

STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2385	Date of Decision: 03/26/04
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland Aviation Administration Contract No. MAA-CO-04-005	
Appellant/Respondent: Century Construction, Inc. Maryland Aviation Administration	

Decision Summary:

Responsibility - Matters of responsibility may be cured after bid opening.

Mistake in Bid - Where a mistake and the intended correction are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid.

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items, six pre-priced allowance items, and five add-alternate items.

4. The Interested Party, System 42, Inc. (System 42) submitted the apparent low bid in response to the solicitation.
5. By letter dated November 26, 2003, Appellant, the apparent second low bidder, protested the award of a contract to System 42. Appellant's protest enumerated the following grounds for its protest: 1) that certain affidavits included with System 42's bid were not properly signed and/or notarized, and therefore, the entire bid was "legally unenforceable, non-binding, and nonresponsive;" 2) that bid item #16782 had a unit price of \$79,000, and an extended price for one unit of \$74,000; 3) that System 42 failed to provide certain prices in both words and numerals; and 4) that the total of prices is inaccurate.
6. In a Procurement Officer's final decision dated December 16, 2003, Appellant's protests were denied and Appellant timely appealed to the Board.

Decision

1. **The Signatures on the Bid Affidavits do not Render System 42's Bid Nonresponsive.**

The forms to be included with a bid proposal were as follows:

Bid Bond

Bid/Proposal Affidavit

MBE Utilization Affidavit

Subcontractor Utilization Affidavit

Bid Proposal

The Bid Proposal and the Bid Bond were both properly signed by Aniema S. Udofa, the president of System 42. Three affidavits, the Bid/Proposal Affidavit, MBE Utilization Affidavit and Subcontractor Utilization Affidavit (collectively the affidavits) were signed by Allan Jarrett, who is identified as an estimator for System 42. In these three affidavits, a notary public subscribed that the affiant

was Aniema Udofa, rather than Allan Jarrett. After bid opening, MAA requested that System 42 assure MAA that Mr. Jarrett was properly authorized to execute the three affidavits. MAA was provided a certification by System 42's corporate secretary that Mr. Jarrett was authorized by a resolution of its board of directors adopted on December 11, 2002. System 42 also submitted corrected affidavits signed by Aniema S. Udofa, President of the corporation.

It is not contended by Appellant that there are any irregularities regarding the signatures on the Bid Proposal and the Bid Bond itself. The Procurement Officer determined that it was the President of System 42, Aniema S. Udofa, who signed those documents. Documentation from the State of Maryland Department of Assessments and Taxation confirms that Aniema S. Udofa is the President of System 42. The only question before the Board is whether the signature of a non-officer on an affidavit who is, in fact, authorized to sign the affidavit renders the bid nonresponsive. We have determined that it does not, and that whatever irregularities which may have existed pertaining to the affidavits herein have been cured.

We have observed that, in contrast to matters of responsiveness, which concerns a bidder's "legal obligation to perform the required services in exact conformity with the IFB specifications," responsibility concerns "a bidder's capability to perform a contract," and information concerning a bidder's responsibility may be submitted after bid opening. National Elevator, MSBCA 1252, 2 MSBCA ¶114 (1985) *citing* Carpet Land, Inc., MSBCA 1093, 1 MSBCA ¶34 (1983). So long as the bid unequivocally demonstrates the bidder's intent to pursue the requirements of the contract, affidavits accompanying a bid that pertain to such requirements will relate to the issue of responsibility, not responsiveness. Where matters of responsibility are concerned, "even where solicitation documents mandate submission of an item '[a] procurement officer may waive as a minor informality the failure to supply requested documents or

information at time of bid opening bearing on responsibility. The bidder may supply such requested information after bid opening but before award of the contract.'" DeBarros Constr. Corp., MSBCA 1467, 3 MSBCA ¶215 (1989) at p.4 *citing* Calvert General Contractors Corp., MSBCA 1314, 2 MSBCA ¶140 (1986).

The applicable test in determining the responsiveness of a bid is "whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof." Polarad Elec., Inc., B-204,025, 81-2 CPD ¶401 (Nov. 12, 1981). In DeBarros, the low bidder failed to include a Debarment Affirmation as well as an MBE Utilization Affidavit, as required by the contract. Approximately two weeks after bid opening, the deficiency was cured. The second low bidder filed a protest on the grounds that the failure to provide these documents with the bid rendered the low bid unresponsive because the solicitation documents (as herein) provided that such documents "must" or "shall be" submitted with the bid. With regard to the MBE Utilization Affidavit, this Board opined that:

Where some additional statement is elsewhere contained in the bid package to demonstrate the bidder's intent to pursue the required level of minority business participation under an awarded contract the failure to submit or execute the utilization affidavit may be waived and the bid accepted.

DeBarros, *supra* at p.4.

Regarding the MBE Utilization Affidavit in this case, the terms of the Contract themselves require compliance with applicable MBE goals. Thus, an improperly signed MBE Utilization Affidavit, or even no affidavit at all, will not diminish the contractor's MBE obligations. MAA's Standard Specifications (as included in the instant IFB) set forth a contractor's MBE obligations at MBE-2.02.B.1 as follows:

An MBE subcontract participation goal has been established for all contracts as indicated in the Technical Provision. The bidder or offeror agrees that this amount of the Contract will be performed by MBE(s).

Here, as was the case in DeBarros, (which concerned identical MBE contract language) "by signing the bid proposal which incorporates such language a bidder agrees to be bound to the required level of MBE participation under an awarded contract." Thus, because System 42 is, by this provision, committed to achieve the specified minority participation goal, System 42's bid is not rendered nonresponsive by any irregularity in its MBE Utilization Affidavit. System 42's Bid Proposal form was executed by the company's President, a corporate officer, and his signature is attested, as the form requires, by the signature of the corporate secretary. System 42 is thus bound to its bid and all the terms of the Contract, including achievement of the specified minority participation goal. Accordingly, the bid is not nonresponsive by virtue of any defect in the submitted MBE Utilization Affidavit.

With regard to the Bid/Proposal Affidavit and the Subcontractor Utilization Affidavit, the matters therein concern the pre-existing status of the bidding corporation and its officers and directors along with an acknowledgment of the corporation's obligations under the law. These matters do not affect the obligations of the contractor to perform the terms of the Contract. Thus, as with the MBE affidavit, these are matters of responsibility and do not involve issues of the responsiveness of System 42's bid. For example, the Bid/Proposal Affidavit contains affirmations regarding prior convictions, debarment, as well as affirmations that the contractor will comply with various relevant statutes. Such affirmations do not directly pertain to the contractor's agreement to perform under the Contract. They may, however, relate to the contractor's reliability and ability to perform. Regardless of the affidavit, the contractor

is still obligated to comply with the relevant law. Similarly, the Subcontractor Utilization Affidavit affirms that the contractor provided the same opportunity to MBE subcontractors as to non-MBE subcontractors. Again, this refers to the status of the contractor, not the contractor's obligations under the contract. System 42's obligation to comply with all provisions of the Contract remain, despite any deficiencies in these affidavits. As such, these affidavits are a matter of responsibility, and may, in the exercise of discretion, be cured after opening. McDonnell Contr. Co., MSBCA 2084, 5 MSBCA ¶450 (1998).

Nothing in either Gladwynne Construction Company, MSBCA 1931, 5 MSBCA ¶390 (1996) or Track Materials, MSBCA 1097, 1 MSBCA ¶30 (1982) changes the result. Gladwynne involved a failure of the bidder to commit to a change by addendum from 14% to 20% MBE participation. Gladwynne's bid was properly found to be nonresponsive because Gladwynne submitted a bid with the pre addendum 14% commitment set forth in the MBE Utilization Affidavit included with the bid. Track Materials involved a failure of the bidder to commit itself to required affirmative action goals in its bid by virtue of the lack of signatures on the affirmative action forms, thus making the bid ambiguous and nonresponsive in the absence of some additional statement elsewhere in the bid package to demonstrate the bidder's intent to pursue the required level of minority business participation under an awarded contract.

Appellant requests this Board to declare System 42's bid nonresponsive because three affidavits were signed by Alan Jarrett, an estimator for System 42, and the bid did not include a board resolution indicating Mr. Jarrett's authority to act on behalf of the corporation. Moreover, Appellant asserts that the Technical Provisions of the Contract were violated because the notary mistakenly subscribed the affiant as Aniema Udofa, rather than Allen Jarrett. While we are concerned that the notary has not fulfilled

her obligations to the State, the three affidavits do not render System 42's bid nonresponsive.

A responsive bid is one which "conforms in all material respects to the invitation for bids." *St. Fin. & Proc. § 11-101(s)(2)(2001)*; COMAR 21.01.02.01(78). In practice, what this means is that "in order for a bid to be responsive it must constitute a definite and unqualified offer to meet the material terms of the IFB." Long Fence Co., MSBCA 1259, 2 MSBCA ¶123 (1986) at p.6. Accordingly, a bid which represents an unqualified commitment to perform the requirements of the contract presents no basis for a determination of non-responsiveness. Seaway Coatings, Inc., MSBCA 2205, 5 MSBCA ¶488 (2000); quoting Carl Belt, Inc., MSBCA 1743, 4 MSBCA ¶339 (1993). We find that none of the issues raised by Appellant regarding the affidavits would afford System 42 the opportunity to refuse to perform any material obligation under the Contract. Accordingly, the matters raised by Appellant regarding the affidavits relate to matters of responsibility, not responsiveness.

Matters of responsibility may be cured after bid opening. The Milton James Co., MSBCA 1959, 5 MSBCA ¶401(1996); National Elevator, MSBCA 1252, 2 MSBCA ¶114 (1985) citing Carpet Land, Inc., MSBCA 1093, 1 MSBCA ¶34 (1983). Thus, assuming *arguendo* that the three affidavits in question as submitted with the bid were defective, System 42's bid otherwise presents a commitment to perform and System 42 would still be obligated to perform all material obligations under the Contract.

The original affidavits were replaced after bid opening. The affidavits as submitted with the bid were signed under penalty of perjury by Allen Jarrett, a person who had authorization to act on behalf of the corporation. Thus, System 42 was bound by the statements set forth therein. Although the notary identified the affiant as Mr. Udofa rather than Mr. Jarrett, this is not fatal because where, as here, a document is signed under penalty of

perjury, no notarial is necessary. This principle is well established with regard to affidavits used in trial courts. For example, Maryland Rule 1-304 states that a sworn statement may be made either before an officer authorized to administer an oath or affirmation or by a signed statement affirming the matter under penalty of perjury. Thus an affidavit is valid if made either upon oath administered by a notary or upon a written statement under penalty of perjury. Having both is not required for the affidavit to be valid. Thus, in this case, even though Mr. Jarrett's signatures were not properly notarized, the affidavits are properly signed under penalty of perjury, and that is all that is required.

Appellant argues that a corporate resolution demonstrating Mr. Jarrett's authorization to execute affidavits was required to be included with the bid under this Contract.

GP-2.06 required for this bid that:

B. The bid form(s) shall be filled out legibly in ink or typed. The bid, if submitted by an individual, shall be signed by the individual; if submitted by a partnership, shall be signed by such member or members of the partnership as have authority to bind the partnership; if submitted by a corporation, the same shall be signed by an officer, and attested by the corporate secretary or an assistant corporate secretary. If not signed by an officer, as aforesaid, there must be attached a copy of that portion of the By-Laws or a copy of a Board resolution, duly certified by the corporate secretary, showing the authority of the person so signing on behalf of the corporation.

While in the first sentence, the provision refers to "the bid form(s)," the second sentence, in contrast to the first, is limited to "the bid." Had the drafters intended the second sentence to refer to the affidavits, the drafters might have also used the term "bid

forms." In this case, however, the drafters chose to limit the requirement for the corporate resolution to "the bid." Here, "the bid" was properly signed by Mr. Udofa, the President, and no corporate resolution is necessary. Nothing in this provision requires the affidavits to include a corporate resolution. However, even if such a resolution were required to accompany affidavits, such a requirement pertains to responsibility, not responsiveness. As such, the corporate resolution may be (and actually was) provided after bid opening.

The affidavits, having been signed by a person with actual authority under penalty of perjury, are valid, and System 42 is bound by the statements therein. The original affidavits being valid, MAA may not reject the bid as nonresponsive.

2. It is Clear From the Face of System 42's Bid that Item No. 16782-1 was Intended to be \$79,000.

In its second protest point, Appellant contends that while bid item #16782 had a unit price of \$79,000, it had an extended price for the one unit of \$74,000. Separately, Appellant's fourth point is that when using an extended price of \$74,000, Systems 42's total price is mathematically incorrect. Appellant is wrong on both points.

Item #16782-1 is for a Closed Circuit Television System. A bidder is required to bid a lump sum for one system. The bid forms provide a space under a column entitled "Unit Price" and a space for an extended price under a column entitled "Total Price." Because only one system is required, the unit and total prices should be identical.

System 42 completed its bid tabulation form by hand. For Item #16782-1, under the Unit Price column, System 42 inserted a hand-written unit price of \$79,000. On the same row, under the Total Price column, System 42 inserted an extended total price for that one

item which Appellant alleges to be \$74,000.

An examination of System 42's handwritten bid reveals that the second numeral in the extended price is intended to be a "9". Although the pen which was used did not deliver all of the ink at the top of the "9" at most this represents a minor irregularity which may be waived so long as the intent and meaning of the entire bid is clear. GP-2.15.

Here it is clear that the bidder intended the second numeral to be a "9" rather than a "4". Even if the extended price were to be read as \$74,000, however, it is undisputed that the unit price is \$79,000. Under such a circumstance, there would be a clear discrepancy between the unit price and the extended price.

We start with the requirement that the intended bid must be evident from the face of the bid documents. COMAR 21.05.02.12.C(1) provides:

(1) If the mistake and the intended correction are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

In determining the bidder's intent, we look to what is the reasonable interpretation of the entry. Only where there is more than one reasonable interpretation is a bid ambiguous. Porter Constr. Mgm't, MSBCA 1994, 5 MSBCA ¶414 (1997). An ambiguous bid must be rejected as nonresponsive unless the ambiguities may be viewed as minor irregularities. AEPCO, Inc., MSBCA 1977, 5 MSBCA ¶415 (1997). In this case, there is only one reasonable interpretation, and the bid is not ambiguous. That the total price was intended to be \$79,000 is evident from the face of System 42's bid. First, an examination of other handwritten 9's and 4's in

System 42's bid reveals that the second digit in the unit price was not a "4" because where that number is written elsewhere, it is completely different. On the other hand, the numeral is entirely consistent with the number "9" appearing elsewhere, except for the top portion of the numeral. Moreover, a total price of \$79,000 for this item is consistent with the subtotal of \$3,727,882 for items 01010-1 through 01210-4 shown on page BF-25. Finally, System 42 has confirmed its total bid price of \$4,405,677, which is also consistent with a price of \$79,000 for the item.¹

On the other hand, an interpretation that sees the figure as \$74,000 is not consistent with other numerals in the bid and is not consistent with either the subtotal or the bid total. Accordingly, such an interpretation is plainly unreasonable. Thus, from the face of System 42's bid, it is obvious that the intended numeral is a 9 and that System 42's intended bid for this item is \$79,000, not \$74,000. Accordingly, the handwriting miscue herein is a minor irregularity where the intent and meaning of the bid is clear. Moreover, even if considered to be a "mistake," where a mistake and correction are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid. COMAR 21.05.02.12.C(1).

Accordingly, the second ground of Appellant's protest regarding the handwritten prices for this item does not provide sufficient basis to reject System 42's bid. Moreover, as the extended price is \$79,000, not the alleged \$74,000, Appellant's fourth appeal point that there was an error in addition when calculating the total is no longer at issue. System 42's subtotal for those items has been correctly added to result in a subtotal of \$3,727,882, and a total of

¹We also note that the Contract provides an order of precedence where there are certain discrepancies. Section GP-2.19.C.1 provides that "[t]he unit price will govern in the event of a discrepancy between the unit price bid and the extended price (product of unit price multiplied by the quantity)." Here, the unit price is \$79,000. When extended by a quantity of one, the extended price is also \$79,000, which is not an unreasonable result, and under the Contract, this is the price that will govern. See Orfanos Contractors, Inc., MSBCA 1391, 2 MSBCA ¶188 (1988) (applying the order of precedence clause to resolve discrepancies between unit prices and extended prices).

all items of \$4,405,677.00.

3. System 42's Failure To Bid In Words Does Not Render its Bid Nonresponsive.

As further grounds for its protest, Appellant has observed that the subtotal of the base bid items 01010-1 through 01210-4 requires that the price be written in words in addition to the numerals. Appellant thus argues that because System 42 did not include the price in written words, "there is no way to confirm the numerical number, an element necessary to assure the offered price."

The bid tabulation form provides spaces for subtotals for Base Bid Items 01010-1 through 01210-4 in words as well as numerals.

Appellant refers to the Contract provision setting forth an order of precedence which states that "[t]he written words will govern in the event of a discrepancy between the prices written in words and the prices written in figures." See, GP-2.19.C.3. Respondent correctly observes, however, that in this case there cannot be a discrepancy owing to the fact that there are no written words. Thus a provision resolving discrepancies between the prices written in words and the prices written in figures cannot apply.

This is not to suggest that the Board favors the failure of bidders to comply with instructions. However, with regard to missing information it has been observed that "[i]f sufficient information is present in the bid documents to determine the missing information, the bid will be responsive." J. Cibinic & R. Nash, *Formation of Government Contracts*, 425 (2d. Ed. 1986). This Board has been in accord. See, e.g., Orfanos Contractors, Inc., MSBCA 1391, 2 MSBCA ¶188 (1988)(failure to enter a bid total viewed as a "mere clerical error" waivable by the agency.) Although having the amount in both words and numerals is a convenience to the State in the event that there is some uncertainty as to the numerical figures or a mistake which might be corrected if both are available, there is no need for

the words where the price which the bidder is willing to commit to is evident without the words. In this case, the words are unnecessary because the figures sufficiently indicate the bid prices. Accordingly, in the face of sufficient figures, the absence of words does not render the bid nonresponsive, and Appellant's protest on this ground fails.

For the foregoing reasons, the appeal is denied.

Wherefore, it is Ordered this day of 2004 that the appeal is denied.

Dated:

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

Michael J. Collins
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 2385, appeal of Century Construction, Inc. under Maryland Aviation Administration Contract No. MAA-CO-04-005.

Dated:

Michael L. Carnahan
Deputy Recorder