

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

Docket No. 2454	Date of Decision: 02/18/05
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under MdTA Contract No. HT-623000-002	
Appellant/Respondent: Blastech Enterprises, Inc. Maryland Transportation Authority	

Decision Summary:

Responsibility - Discretionary Determination - The rejection of an unbalanced bid is tied to the agency's discretionary determination of responsibility.

**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of Blastech)	
Enterprises, Inc.)	
)	
)	Docket No. MSBCA 2454
)	
Under MdTA Contract No.)	
HT-623000-002)	

APPEARANCE FOR APPELLANT: Kimberly A. Manuelides, Esq.
Saul Ewing LLP
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Sandra E. Clifford
Assistant Attorney General
Glen Burnie, Maryland

APPEARANCE FOR INTERESTED PARTY: David L. Cole, Esq.
Ober, Kaler, Grimes & Shriver
(K&K Painting, Inc.) Baltimore, Maryland

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest regarding the above captioned solicitation to clean, paint, and repair the K Truss and Approach Bridges at the Baltimore Harbor Tunnel/Thruway.

Findings of Fact

1. The above captioned solicitation involves cleaning, painting, and miscellaneous repairs of the K Truss and Approach Bridges at the Baltimore Harbor Tunnel/Thruway.
2. The Contract was advertised by the Maryland Transportation Authority (MdTA), the Respondent herein, on August 10, 2004 with a bid opening date of September 10, 2004.
3. Eight (8) bids were received and read aloud. The apparent low bidder was K&K Painting, Inc. (K&K), the Interested Party herein, and the apparent second low bidder was Appellant.
4. The apparent low bid of \$2,789,000.00 submitted by K&K was 2.9% lower than the next lowest bid of \$2,870,038.00 submitted by

Appellant.

5. On September 17, 2004, Respondent received a bid protest dated September 16, 2004 from Appellant requesting that the bid of K&K be rejected because (1) K&K "did not follow the instructions with regard to submission of its bid," and (2) the bid submitted by K&K is unbalanced.
6. Appellant alleges that K&K did not follow the bid submission instructions when K&K failed to write the prices on its proposal in words and numerals and failed to enter the unit costs in the numeral columns. The protest states that the bid of K&K "should be rejected for this reason alone."
7. In asserting that the K&K bid is unbalanced and thus K&K is not a responsible bidder, Appellant's protest takes exception to the amounts submitted by K&K for Items 401 (Environmental Protection) and 402 (Worker Protection), noting that the amounts submitted by K&K and Appellant for these items were as follows:

	<u>K&K</u>	<u>Appellant</u>
Item 401	\$1,000.00	\$800,000.00
Item 402	\$1,000.00	\$50,000.00

8. On December 16, 2004, the Procurement Officer issued the Respondent's final agency decision. In its decision, the Respondent rejected Appellant's protest based on determining that the K&K bid was responsive because the total bid price is shown on K&K's bid sheet and that K&K's bid was not unbalanced.
9. From this decision Appellant filed its appeal with this Board on December 23, 2004. Appellant asserts in its appeal that because K&K failed to comply with the technical requirements of the bid instructions and because the bid was allegedly unrealistic and unreflective of the commitment of a responsible bidder, the bid of K&K was nonresponsive and K&K was not a responsible bidder.
10. Appellant did not file Comment on the Agency Report. Comment on

the Agency Report was filed by the Interested Party, K&K. However, no party requested a hearing, and, therefore, the appeal is decided on the written record.

Decision

Appellant protests that the apparent low bid submitted by K&K failed to comply with the technical requirements of the bid instructions and that, therefore, the bid is nonresponsive. The specific technical requirement which Appellant states K&K did not follow can be found in the Schedule of Prices section of the bid documents. A note to bidders at the top of the Schedule states, in relevant part:

This proposal shall be filled in by the bidder, with the prices written in words and numerals. The extension amounts of unit costs shall also be filled in.

The individual pages of the Schedule also contain direction to fill in each bid item with prices written in words and numerals. A copy of K&K's executed Schedule of Prices is attached as Exhibit A. Appellant's bid protest states, "K&K's bid was not written in words and numerals and the majority of unit costs are not entered in the numerical columns."

According to the Code of Maryland Regulations (COMAR), "responsive" means a bid which conforms in all material aspects to the requirements contained in the invitation for bids. COMAR 21.01.02.01B(78). However, a procurement officer has discretionary authority to waive minor irregularities in bids. COMAR 21.05.02.12A; Calvert General Contractors Corp., MSBCA 1314, 2 MSBCA ¶140 (1986).

"A minor irregularity is one which is merely a matter of form, and not of substance." COMAR 21.06.02.04A. In this case, the Procurement Officer reviewed the bid documents submitted by K&K and found that, although the prices for each item were only written in numerals, the aggregate bid price was written in words and numerals on the bid sheet, albeit on different lines. The Procurement Officer determined that the failure of K&K to strictly adhere to the

technical requirement to write the prices in words and numerals and to fill in the unit cost amounts was a minor irregularity, and he exercised his discretion to waive such failure. The Board will not overturn this discretionary act because the actual bid price was apparent from the face of the bid documents, and the exercise of discretion herein was not so arbitrary as to constitute a breach of trust. While it would be preferable that bidders comply with instructions, this Board has observed in a somewhat similar context involving the absence of words in a bid that if sufficient information is present in the bid documents to determine the missing information, the bid will be deemed responsive.

In the appeal of Century Construction, Inc., MSBCA 2385, 6 MSBCA ¶ _____ (March 26, 2004), the apparent low bidder, System 42, Inc. (System 42), responding to an Invitation for Bids from the Maryland Aviation Administration, failed to provide certain prices in both words and numerals in its Bid Proposal but was, nevertheless, awarded the contract. The apparent second low bidder, Century Construction, Inc., protested the award, asserting, among other grounds, that System 42's bid was nonresponsive. The Procurement Officer denied the protest, and Century appealed.

As this Board explained, "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.'" (cite omitted). *Id.* Although having the amount in words and numerals is a convenience to the State, "there is no need for the words where the price which the bidder is willing to commit to is evident without the words." *Id.* Accordingly, the Board concluded, "in the face of sufficient figures, the absence of words does not render the bid non-responsive." *Id.* The protest thus failed on this ground.

In the instant appeal, Appellant's argument must fail for the same reasons. As pointed out in the Agency Report, K&K's Bid Proposal expresses its total bid price of \$2,789,000.00 in both written numbers and words on page 183 of the Bid Proposal. Unit

prices, however, were only written in numerals, notwithstanding the direction that they also be written in words. The Procurement Officer, as noted, concluded the absence of words in the unit items did not render the bid nonresponsive, and he waived the irregularity.

Appellant also argues that the apparent low bid submitted by K&K should be rejected because it is "plainly unrealistic and unreflective of the commitment of a responsible bidder." Appellant's argument relies on its assertion that K&K's bid is unbalanced. In support of this contention, Appellant cites amounts submitted by K&K for two items which Appellant believes to be "plainly unrealistic." K&K submitted prices of \$1,000.00 for Item 401 (Environmental Protection) and \$1,000.00 for Item 402 (Worker Protection). Appellant submitted prices of \$800,000.00 and \$50,000.00 for these items, respectively.

There is no prohibition in the General Procurement Law or COMAR against accepting an unbalanced bid. Moreover, what constitutes an unbalanced bid is not defined. Pile Foundation Construction Co., Inc., MSBCA 2238, 5 MSBCA ¶503 (2001). An alleged unbalanced bid, therefore, should only be rejected if accepting it would violate the requirement for awarding the contract to the responsible bidder submitting the lowest responsive bid. Thus, if the bid is materially unbalanced such that the bid may not, in fact, be the low bid, or if there appears to be material front end loading which places unreasonably high costs in early payment items potentially leaving insufficient funds if the contractor should default or fail to perform later in the job, then the State may reject the bid on grounds the bidder is not responsible.

A "Responsible" bidder is one that has the capability in all respects to perform fully the contract requirements, and one that has the integrity and reliability that shall assure good faith performance. COMAR 21.01.02.01B(77). The procurement officer has broad discretion in determining bidder responsibility. Covington Machine and Welding Company, MSBCA 2051, 5 MSBCA ¶436 (1998) and cases cited at p.5. The determination of whether a bidder is

responsible is within the sole purview of the agency, and in the absence of a showing of bad faith or lack of a reasonable basis for the agency's determination, this Board will not interfere with such determinations. *Id.*; Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA ¶82 (1984).

Under the Contract, Item 401 is for Environmental Protection, and Item 402 is for Worker Protection. Respondent asserts that these two items are essential and inseparable components of Item 403, the Cleaning and Painting of the Bridge, and thus asserts that any reasonable determination of whether the prices submitted for Items 401 and 402 result in a materially unbalanced bid must also take into account the amount submitted for Item 403. Appellant does not take Item 403 into account in its bid protest.

The Procurement Officer's final decision reflects Respondent's belief that taking Items 401, 402, and 403 into account together provides a more complete picture of the reality of the prices submitted by K&K and Appellant, and that this demonstrates that, as a whole, the K&K bid is not materially unbalanced.

The Procurement Officer noted that the amounts submitted by K&K and Appellant for these items were as follows:

	<u>K&K</u>	<u>Appellant</u>
Item 401	\$1,000.00	\$800,000.00
Item 402	\$1,000.00	\$50,000.00
Item 403	\$2,342,941.00	\$1,270,000.00
Total	\$2,344,941.00	\$2,120,000.00

Based on these prices, in his evaluation of Appellant's bid protest, the Procurement Officer determined that the totals for the three items were reasonably close to one another, and that the bid submitted by K&K was not materially unbalanced. He noted that K&K's total price for Items 401-403 is only \$229,941.00 higher than the

total submitted by Appellant for these same three items.¹

In short, the Procurement Officer determined that the prices set forth for Items 401 and 402 should not be isolated from the price submitted for Item 403 to determine the responsibility of the bidder regarding the cleaning and painting portions of the work. Based on this record, we find that the Procurement Officer's determination that an accurate analysis requires Item 403 to be included has been shown to have a reasonable basis.

Accordingly, the appeal is denied.

Wherefore it is Ordered this day of February, 2005 that the appeal is denied.

Dated:

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

Michael J. Collins
Board Member

¹We note that the record reflects that the third low bidder submitted a bid of \$200,000.00 for Item 401, \$3,000.00 for Item 402, and \$2,078,000.00 for Item 403, for a total bid for the three items of \$2,281,000.00.

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 2454, appeal of Blastech Enterprises, Inc. under MdTA Contract No. HT-623000-002.

Dated:

Michael L. Carnahan
Deputy Recorder