

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

Docket No. 2467	Date of Decision: 04/13/06
Appeal Type: [] Bid Protest	[X] Contract Claim
Procurement Identification: DGS Contract No. BA-000-861-101	
Appellant/Respondent: P.J. Dick, Incorporated Department of General Services	

Decision Summary:

Contract Interpretation - Reliance - A contractor may not reasonably rely on event or project progression dates as set forth in an IFB or RFP that are specifically noted to be anticipated rather than firm.

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

In The Appeal of P.J. Dick,)
 Incorporated)
) Docket No. MSBCA 2467
Under DGS Contract No.)
 BA-000-861-101)

APPEARANCE FOR APPELLANT: Robert K. Cox, Esq.
 J. Brian Cashmere, Esq.
 Watt, Tieder, Hoffar &
 Fitzgerald, L.L.P.
 McLean, VA

APPEARANCE FOR RESPONDENT: Joy K. Sakellaris
 Assistant Attorney General
 Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals from a Department of General Services (DGS) Procurement Officer's final decision denying its claim for an equitable adjustment relating to alleged additional costs resulting from its self performance of certain concrete work after a subcontractor which was to perform such work declined to extend its subcontract bid.

Findings of Fact

1. On or about August 16, 2002, DGS issued a Request for Proposals (RFP) for the above referenced Contract. The RFP contained, in relevant part, the following language that each offeror was required to include in its price proposal:

"It is understood that the bid price will be firm for a time period of ninety (90) calendar days from the bid opening date [the date by

which price proposals were to be submitted to DGS] and that if the undersigned be notified of acceptance of this bid within this time period, the firm shall execute a contract for the above stated compensation...."1

2. After the submission and review of Appellant's technical proposal, DGS invited Appellant to submit a price proposal by way of a December 17, 2002 Request for Price Proposal. Appellant submitted its price proposal (Offer No. 1) in response to the RFP on January 28, 2003 with a base price of \$25,859,000 and a price that included Alternates 1-11 of \$27,567,000. Thereafter, Appellant responded to a request for Best and Final Offer (BAFO No. 1) on February 19, 2003 with a base price of \$24,995,000 and a price that included Alternates 1-11 of \$26,627,000. Both Offer No. 1 and BAFO No. 1 contained the identical language required by the RPP (as cited above) - stating that offers submitted were firm for ninety (90) days from their respective bid opening dates.
3. On February 27, 2003, DGS notified Appellant that, based on its BAFO No. 1, it was recommended for award of the Contract. However, in July 2003, due to unforeseen delays on another DGS project, DGS was forced to rescind its recommendation to award the Contract to Appellant.

1 The above quoted language from the RFP is consistent with *Md. Code Ann., State Fin. & Proc. §13-104(e)(1)(i)(Supp. 2004)* - relating to competitive sealed proposals, which provides in relevant part "...a proposal is irrevocable for the period specified in the request for proposals..."

4. Beginning in February 2004, DGS resumed its solicitation for the award of the Contract and issued several additional addenda to the RFP involving award, Contract performance and responses to contractor questions.
5. Thereafter, on March 10, 2004, DGS issued RFP Addendum No. PP-11 which invited offerors to submit revised Price Proposals (BAFO No. 2) by no later than March 17, 2004 at 2 p.m.
6. On March 16, 2004, Appellant received a subcontract proposal from DGS Construction, Inc. (DCI) for concrete work on the project in the amount of \$4,967,730. The DCI subcontract proposal provided that it could be "withdrawn if not accepted within thirty (30) days."
7. Appellant submitted its BAFO No. 2 on March 17, 2004 with a base price of \$27,385,000 and a price that included Alternates 1-11 of \$28,892,000 and incorporated its concrete subcontractor's (DCI's) proposal. In BAFO No. 2, Appellant agreed, as it had agreed before in Offer No. 1 and BAFO No. 1, that BAFO No. 2 was firm for ninety (90) days from the submission date of March 17, 2004. As of the March 17, 2005 submission of BAFO No. 2, and as material to this appeal, the RFP provided (through RFP Addendum No. PP-9, issued on February 17, 2004) that Board of Public Works approval of the Contract was anticipated by March 24, 2004 and access to the site for on-site activities was anticipated by April 19,

2004.² Such anticipated dates were also reflected in RFP Addendum No. PP-10 and a consistent time line for such dates reflected in PP-11. The RFP and addenda were to be incorporated into the Contract along with CPM construction schedules. These anticipated dates, however, were specifically not warranted to be met, and offerors should reasonably have expected CPM changes if such dates were not met. At all relevant times the project substantial completion date was August 22, 2005.

8. Following a letter of intent to award from DGS dated May 12, 2004, Appellant executed the Contract on or about May 24, 2004 and returned the executed Contract to DGS.
9. The letter of intent to award noted that final award was contingent on approval by the Board of Public Works. Contemporaneous with the signing of the Contract on May 24, 2004, Appellant said nothing to DGS concerning any issues it had with the passing of the March 24, 2004 BPW approval and April 19, 2004 site access dates, nor did it seek to confirm or extend its concrete subcontractor's bid even though it knew that it would not be performing the Contract between April 19, 2004 and August 22, 2005. Appellant also did not raise any concern about "additional costs," such as winter work costs, that it would suffer by commencing performance of Contract work that required site access after April 19, 2004, Appellant

² The April 19, 2004 site access date was necessarily contingent on BPW approval of a Contract.

admitting in its Complaint that, "[d]uring the solicitation period for the Project and after March 16, 2004, it was common knowledge that construction costs, particularly for materials of the type to be used in the Project, were rapidly escalating in price."

10. On June 9, 2004, the Board of Public Works approved award of the Contract to Appellant, and, on June 10, 2004, within 90 days of Appellant's March 17, 2004 BAFO No. 2 price submission, DGS executed the Contract and returned the fully executed Contract to Appellant.
11. Upon receiving the Contract for execution in May, 2004, Appellant had begun various administrative actions required by DGS, and it began conducting scope review meetings with its subcontractors, including DCI, the concrete subcontractor.
12. On or about June 1, 2004, however, DCI notified Appellant of its intent to withdraw its bid on the project. DCI had not extended its subcontract and thus was not bound; said subcontract proposal only being binding for 30 days from its March 16, 2004 submission, unless accepted, which acceptance had not occurred within the 30 day period which expired in mid April, 2004.
13. By June 3 or 4, 2004, following DCI's initial notification, Appellant's representatives had met with DCI in an effort to reverse the withdrawal notice.
14. By letter dated June 9, 2004, DCI, citing a now unacceptable

construction schedule, confirmed its prior notice of bid withdrawal; a bid which Appellant had used in computing its RFP BAFO No. 2 Price Proposal.

15. By letter dated June 8, 2004, Appellant submitted a notice of claim asserting that it had incurred "additional costs" in the amount of \$935,000³ that allegedly resulted from DGS' alleged failure to award the Contract by March 24, 2004 and issue a notice to proceed by April 12, 2004, the dates set forth or necessarily referenced in RFP Addendum Nos. PP-9-11.
16. Thereafter, by letter dated September 3, 2004, Appellant submitted its certified claim for the additional costs allegedly arising out of its self performance of the concrete work that would have been performed at a lower cost under the withdrawn subcontract bid by DCI.
17. In a Procurement Officer's Final Decision dated February 18, 2005, DGS concluded that Appellant had no entitlement to the monies claimed and denied its claim. Specifically, DGS found that: (1) Appellant had submitted an offer that was firm for 90 days; (2) DGS executed and delivered the Contract within that time frame; (3) Appellant never conditioned its proposal on the target dates for award of the Contract; and (4) Contract award and notice to proceed dates set forth by DGS in the RFP Addenda were, by the clear Contract language, only

³ The "additional costs" are the costs allegedly incurred during the Appellant's self performance of concrete work which was to have been performed by DCI.

anticipated dates.

18. On March 8, 2005, Appellant appealed the Final Decision to this Board.

19. The issue of entitlement only was heard on the merits on December 13 and 14, 2005. Pursuant to a briefing schedule the record on entitlement closed on February 22, 2006.⁴

Decision

Appellant alleges that it is entitled to “additional costs”/equitable adjustment under the Contract because DGS did not award the Contract and issue a notice to proceed by the dates/language set forth in RFP Addendum Nos. PP-9 to 11. Appellant claims that it reasonably relied on the Contract award and notice to proceed dates in the RFP and that any DGS deviation from the same constituted a change to the Contract, a breach of DGS’ implied obligation not to hinder Appellant’s performance, and/or a breach of an alleged express warranty to timely award the Contract.

Respondent DGS argues that, as a matter of law, Appellant is not entitled to the “additional costs”/equitable adjustment it seeks in the instant Appeal based on clear contract law and policy, as well as specific Contract language regarding Appellant’s bid being firm for a period of 90 days with Appellant being notified of acceptance of its bid within such period.

Under the clear, unambiguous language of the RFP, and

⁴ Because the Board has determined that the appeal is to be denied on entitlement grounds, the parties need not submit a schedule for a hearing on quantum.

consistent with *Md. Code Ann., State Fin. & Proc. §13-104(e)(1)(i)*, Appellant's appeal fails as a matter of law. Appellant submitted its BAFO No. 2 on March 17, 2004. Therein, consistent with its Offer No. 1 and BAFO No. 1, it agreed to keep such offer firm/irrevocable for a period of 90 days from bid opening, i.e., from March 17, 2004 to June 15, 2004. Appellant subsequently executed the Contract on or about May 24, 2004, within the irrevocable 90-day period, affirming its intent to perform the Contract at its BAFO No. 2 price. On June 10, 2004, one day after approval by the Board of Public Works on June 9, 2004, DGS executed the Contract within the same 90-day period, thus accepting Appellant's viable bid within the 90-day bid acceptance period specified in the solicitation. Accordingly Appellant is obligated to perform the Contract at its BAFO No. 2 price.

This is the result mandated by the explicit terms of the Contract, as well as by the General Procurement Law. A successful bidder is bound to its initial bid, and if during the initial bid acceptance period the bid is accepted or conditionally accepted, the bidder has agreed to perform the contract at the bid price.

In response, Appellant argues that it was not bound to its bid (BAFO No. 2) price because its price was based on certain dates set forth in the RFP and addenda that were not met. Appellant asserts that it was entitled to rely upon dates set forth in RFP addenda that were incorporated into the Contract when it formulated its pricing. Specifically, Appellant contends that RFP Addendum No.

PP-9, issued on February 17, 2004, set forth dates that Appellant reasonably relied on in preparing its bid. Such dates were Board of Public Works approval of the Contract by March 24, 2004 and access to the site for on-site activities by April 19, 2004. The Addendum also provided for 490 days from April 19, 2004 through August 22, 2005 to achieve substantial completion. However, the dates stated therein were only anticipated dates. DGS stated only that it hoped to meet the Board of Public Works approval date, and it specifically advised offerors that:

"The State does not warrant that the dates recited in paragraphs 10 and 11 [March 24 and April 19] of this Section A as well as dates recited in Section B [March 24 and April 19] of this Addendum PP-9 will be met..."

Appellant next asserts that RFP Addendum No. PP-10, issued on March 5, 2004, reiterated a substantial completion date of August 22, 2005 upon which Appellant could reasonably rely in preparing its offer such that its project schedules were based on access to the site by April 19, 2004 with substantial completion by August 22, 2005. However, while RFP Addendum No. PP-10 did state in response to contractor questions posed on the issue of substantial completion that the substantial completion date of the Contract was August 22, 2005, DGS again clarified that offerors could not rely on this date by stating that DGS' answer was based on the anticipated schedule noted in RFP Addendum No. PP-9.

Appellant further asserts that RFP Addendum No. PP-11, issued on March 10, 2004, also made representations that it reasonably

relied on. This Addendum provided a narrative concerning the times during which the Contract work must be conducted consistent with an April 19, 2004 date for access to the site. However, in this provision, DGS stated that "...construction is anticipated to start after the conclusion of the 2004 Legislative Session and continue through the 2005 Legislative Session...." Thus, DGS again reiterated that any schedule was only an anticipated schedule.

Appellant's reliance on anticipated event or project progression dates as set forth in the RFP was misplaced. The Contract provisions Appellant relies on in support of its Appeal are provisions setting forth target dates/time frame for project progression. However, these March 24, 2004 and April 19, 2004 dates relied upon by Appellant were by the clear language of the Contract anticipated dates only that DGS was under no contractual obligation, express or implied, to meet. Furthermore, these anticipated dates set forth in the RFP, notwithstanding their incorporation into the Contract, had passed at the time Appellant executed the Contract. Thus, when it signed the Contract, agreeing once again to its proposal price, it had full knowledge that the dates would not be achieved. Had DGS not clearly qualified the scheduled dates as anticipated⁵ rather than firm, Appellant might reasonably have relied thereon and been entitled to an equitable adjustment for additional costs caused by the delay in schedule.

⁵ While we may have serious doubt about the legality of such a proposition we will assume *arguendo* that a subordinate agency may represent a date that is binding on the BPW for approval of award of a contract and that reliance on such representation is reasonable.

See Martin G. Imbach, Inc., MDOT 1020, 1 MSBCA ¶52 (1983).

Based on the record herein, however, we must find that there is no misrepresentation⁶ of an actual or implied schedule upon which Appellant was entitled to rely.

For the foregoing reasons, the appeal must be denied.

Wherefore, it is Ordered this day of April, 2006, that the above captioned 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.**

6 Any actual misrepresentation of schedule we would find to be a material misrepresentation.

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 2467, appeal of P.J. Dick, Incorporated under DGS Contract No. BA-000-861-101.

Dated:

Michael L. Carnahan
Deputy Recorder