

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

In The Appeal of)
Pessoa Construction Company,)
Inc.)
) Docket No. MSBCA 2652
Under MAA Contract No.)
MAA-CO-09-009)
)

APPEARANCE FOR APPELLANT: Stephen J. Annino, Esq.
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OPINION BY BOARD MEMBER DEMBROW

This appeal raises the question of whether the State is obligated to modify a bid which is alleged by the bidder to have been excessive in price as the result of a calculation error. Because the responsibility of correctly stating bid prices falls primarily upon the bidder and not the State, and in view of the particular circumstances presented here, in which the bidder repeatedly confirmed its mistaken bid and failed to request a modification of its bid to the correct amount, this appeal is dismissed.

Findings of Fact

1. In February 2009 the Maryland Aviation Administration (MAA) of the Maryland Department of Transportation (MddOT) issued a certain Invitation for Bids (IFB) known as AA CO-09-009 for MAA Task No. 2616, which involved construction activity at Baltimore/Washington International (BWI) Thurgood Marshall Airport, including demolition, excavation, grading, pavement construction, installation of drainage structures and related work for which bids were due by 2:00 p.m. on March 19, 2009.
2. In accordance with Part I of the Technical Provisions of the competitive sealed bid that is the subject of this dispute, specifically General Provision § GI-1.03, the contract was to be awarded to the lowest responsive bidder based upon the total base bid price plus or minus whatever combination of additional or deducted alternatives MAA designated from the contract documents, as determined by MAA to be in the best interest of the State.
3. Three (3) alternate constructions were proposed by MAA: Alternate No. 1, International Pier Lighting; Alternate No. 2, Pier Dx/Dy Apron Lighting; and Alternate No. 3, Factory Cast Grates and Frames for Aircraft-Rated Trench Drains.
4. Alternate No. 3 was issued by MAA as Addendum No. 6 to the IFB which was promulgated by facsimile (fax) on the morning of March 19, 2009, the due date for bid submissions, requiring bidders to make certain last minute bid deductions and additions as more fully set forth in Finding of Fact No. 5 below.

5. Addendum No. 6 incorporating Alternate No. 3 of the subject solicitation substituted factory cast grates and frames for 2,040 linear feet of aircraft rated trench drains, such alternative requiring bidders to deduct the cost of constructing Item D-751-5.6 and substituting for it the cost of constructing Item D-751-5.8 instead.
6. Six (6) bidders submitted bids in response to the IFB including the initial apparent low bidder, appellant Pessoa Construction Company, Inc. (Pessoa), with a submitted base bid of \$34,575,787.50 (initially stated by Pessoa as \$33,338,165.00 and later adjusted by MAA to derive a correct base bid of \$34,592,764.32, though Pessoa confirmed MAA's corrections only to the sum of \$34,575,787.50), and interested party P. Flanigan & Sons, Inc. (Flanigan), which initially appeared to be second lowest bidder, with a base bid of \$34,839,199.30, as well as four (4) other bidders submitting somewhat higher base bids ranging from \$36,349,928.10 to \$44,330,793.50.
7. Of the six firms submitting bids on this project, two (2) of them proposed no price differential between the cost of constructing Item D-751-5.6 and the cost of constructing Item D-751-5.8 (Alternate No. 3), two (2) others proposed a lower cost for constructing D-751-5.8, with savings ranging from \$131,580 to \$255,000, and the remaining two (2) priced Alternate No. 3 higher, namely, Pessoa, which priced Alternate No. 3 at an increased cost of \$153,000, and Facchina Construction, which priced Alternate No. 3 at an increased cost of \$23,358, the foregoing price adjustments to the six (6) bidders' offers averaging a

net price decrease of \$105,111 to construct Alternate No. 3, Item D-751-5.8 instead of Item D-751-5.6.

8. Specifically with respect to appellant's bid for Alternate No. 3, Pessoa deducted from its bid the sum of \$1,020,000 for construction of Item D-751-5.6 (calculated on the basis of a unit rate of \$500 per linear foot of construction multiplied by the length in feet of the trench, namely, 2,040) and in its place added the sum of \$1,173,000 for construction of Item D-751-5.8 (calculated on the basis of a unit rate of \$575 multiplied by 2,040), thereby accounting for Pessoa's submitted price increase of \$153,000 for Alternate No. 3, higher than any other bidder for this particular modification even though Pessoa was lower than all other bidders in submission of its initial base bid.
9. In fact, Pessoa had not calculated the cost of construction of Item D-751-5.6 on the basis of a unit cost of \$500 per linear foot, for a total of \$1,020,000, but instead at a unit cost of \$625 per linear foot, for a total of \$1,275,000.
10. As a result of this "carry-over" error, Pessoa's stated cost for constructing Alternate No. 3 was incorrectly stated in an amount greater than it should have listed had Pessoa not made the mistake in its deduction of the true cost of Item D-751-5.6.
11. The Code of Maryland Regulations (COMAR) 21.05.02.12C provides in part: "If the procurement officer knows or has reason to conclude that a mistake has been made, the bidder may be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid

or a bid unreasonably lower than the other bids submitted."

12. Language identical to the above provision from COMAR 21.05.02.12C was also set forth in the General Provisions on Page 11 of the IFB contract documents at Section GP-2.14.
13. In follow-up to bid submissions and prior to award determination, a meeting was conducted on March 24, 2009 at which time MAA informed Pessoa that its bid for trench drains was considerably lower than MAA's engineer's estimate.
14. The record does not reflect that Pessoa's carry-over error for Item D-751-5.6 was identified at this time.
15. On March 25, 2009, MAA's procurement officer referenced a list of questions to be addressed by the evaluation committee in its post-bid pre-award bid confirmation letter to Pessoa entitled "Confirmation Questions from Discussion," of which item No. 15 stated: "Please confirm that Deduct Alternate 3 was actually an additional \$153,000."
16. By letter dated March 27, 2009 Pessoa confirmed that its price for Item No. D-751-5.8, Alternate No. 3, was indeed an additional \$153,000, stating in writing specifically as follows: "15. [Pessoa] confirms that Deduct Alternate 3 is an additional \$153,000."
17. By letter dated March 30, 2009, Pessoa changed its earlier position and attempted to revise its bid by stating in a letter to MAA: "After further review and conversation with our estimating department, the Addition/Deduction Alternate No. 3 has been misrepresented to MAA. Given the fact that the Engineer may opt for a lesser quality trench drain

[Pessoa] does not warrant an increase in cost. If a lesser quality product is instituted into the project then, the increase is actually a decrease."

18. In the same letter to MAA dated March 30, 2009, Pessoa confirmed its total bid price submission of \$34,575,787.50.
19. By letter dated April 7, 2009, MAA notified Pessoa that its initially stated base bid did not correctly calculate the grand total of its line items nor did Pessoa use exactly six percent (6%) of the P-401 and P-501 bid incentive items as required by the IFB, so MAA corrected Pessoa's calculations as to both of these arithmetic errors, as a result of which MAA increased Pessoa's total base bid to \$34,592,764.32, not counting the three (3) construction alternatives.
20. MAA was obligated to make the foregoing calculation corrections by the Code of Maryland Regulations (COMAR) 21.05.02.12C(1), which states: "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."
21. The identical language as quoted above from COMAR 21.05.02.12C(1) also appeared in the General Provisions of the IFB at GP-2.14(B)(1) under the heading, "Mistakes in Bids."
22. Not counting the three (3) construction alternatives, Pessoa submitted the lowest base bid at a price of \$34,592,764.32, compared to Flanigan, which offered the second lowest base bid at a price of \$34,839,199.30.
23. When MAA evaluated the six (6) bids, it included the costs of the three (3) construction alternatives.

24. Including the costs of the three (3) alternatives to the proposed construction job, MAA determined that Pessoa's bid increased to \$36,828,764.32 while Flanigan's bid increased to \$36,778,944.30, rendering Flanigan and not Pessoa the low bidder.
25. Also set forth in the correspondence dated April 7, 2009, Pessoa was notified by MAA that it had determined that Pessoa was not the low bidder for the job, having been underbid by interested party Flanigan, which offered a price differential of less than \$50,000 in savings to the State; a slight sum in the context of the total contract value, representing only about .14% of the contract cost, but nonetheless lower than Pessoa's bid.
26. As may be inferred from the average price reduction of more than \$100,000 offered by the six (6) bidders for construction of Alternate No. 3 as more specifically set forth in Finding of Fact No. 7 above, MAA's last minute decision to include that option by promulgating Addendum No. 6 on the bid due date may have been intended as a means of cost savings on the project by using factory cast grates and frames, but neither MAA's true intent nor anticipation with respect to price impact in promulgating Addendum No. 6 is fairly disclosed by the pleadings or evidence available to the Board except by sheer retrospective speculation.
27. Had MAA not issued Addendum No. 6 and instead calculated bid prices including Alternate Nos. 1 and 2 but without including Alternate No. 3, Pessoa's bid would have been in the amount of \$36,675,764.32 and Flanigan's bid would have been in the amount of \$36,910,524.30, hypothetically rendering Pessoa and not

Flanigan the low bidder, with Pessoa offering savings to the State in the amount of \$234,759.98 as compared to Flanigan's bid without Alternate No. 3, but the record is devoid of information pertaining to the reason that MAA opted to promulgate Addendum No. 6 on the bid submission due date and the basis of that decision is not the subject of review by this Board.

28. By letter dated April 8, 2009 Pessoa complained to MAA about its award denial notification of the previous date, stating: "The numbers stated in the table contained in your April 7th letter for Pessoa's Total Base Bid and Total Alternate 3 are incorrect. As clarified and stated in Pessoa's March 30 and March 31, 2009 correspondence, Pessoa's total base bid is \$34,575,787.50. With regard to Alternate 3, the number contained in the table is incorrect. As clarified in our March 30, 2009 letter, Pessoa's number for Alternate 3 should be a deduction, not an addition."
29. By letter dated April 13, 2009, Pessoa submitted a bid protest challenging MAA's determination that Pessoa was not the low bidder because the cost of Pessoa's construction of Alternate No. 3 should have been a deduction of \$153,000 rather than a price increase of that amount.
30. By letter dated April 17, 2009, MAA issued a final decision denying Pessoa's bid protest.
31. By letter dated April 20, 2009 Pessoa requested that MAA reconsider its denial of Pessoa's April 13, 2009 bid protest, asserting that Pessoa's construction of Alternate No. 3 should actually have been priced at a deduction of \$102,000 rather than an increase of \$153,000 or a decrease of the same amount, as Pessoa

had earlier asserted in various communications to MAA concerning Pessoa's cost for Alternate No. 3.

32. On April 23, 2009 Pessoa timely filed the instant case, its first appeal, which was docketed as MSBCA No. 2652, in which Pessoa challenges MAA's determination that Pessoa was not the lowest bidder and also claims that Amendment No. 6 was confusing, both of the grounds addressed by the procurement officer's letter dated April 17, 2009.
33. By letter dated May 1, 2009, MAA replied to Pessoa's correspondence to MAA dated April 20, 2009, viewing that letter as a second bid protest and again denying Pessoa's complaint, this time on the basis of untimely filing as well as on the merits.
34. In response to MAA's letter dated May 1, 2009, Pessoa filed its second appeal to this Board on May 8, 2009, docketed as MSBCA No. 2656, which also contests MAA's determination that Pessoa was not the low bidder in response to the subject IFB.
35. Only MSBCA No. 2656 and not MSBCA No. 2652 properly corrects the arithmetic carry-over error set forth in Pessoa's bid for construction of Alternate No. 3.
36. No hearing was requested by any party to this appeal.

Decision

Two (2) bases of bid protest are brought before the Board in this appeal, namely, whether Addendum No. 6 was improper because it was "confusing," as claimed by Pessoa its April 13, 2009 bid protest, and second, whether MAA erred in determining that Flanigan and not Pessoa submitted the low bid for the work desired by MAA to be performed at BWI Thurgood Marshall Airport, including the three (3)

construction alternatives that MAA ultimately opted to include in the contract. No issue is raised with respect to the propriety or timing of MAA's determination to include the three (3) construction alternatives in its IFB and ultimately to evaluate bids based on the inclusion of all three (3) alternates. This Board is not empowered to second guess those determinations, which are for MAA and MAA alone to decide. Furthermore, there is no pertinent evidence of record on either point.

Turning to the merits of the instant appeal, the first ground of appeal of this bid protest must be dismissed by the mandate set forth in COMAR 21.10.02.03A, which provides: "A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposal shall be filed before bid opening or the closing date for receipt of initial proposals." While it is unfortunate that MAA did not elect to include Alternate No. 3 until the morning of the bid submission due date, to the extent that anything in Addendum No. 6 was confusing or otherwise improper, it was incumbent upon Pessoa to bring that contention to MAA's attention prior to bid opening. Though Pessoa had a very short time frame within which to raise any allegation of patent ambiguity, it could have raised that issue concomitant with the bid prices that Pessoa submitted on March 19, 2009 and Pessoa should have noted its objection at that time. Its failure to do so constitutes a waiver of the right to raise that issue at any time after bid opening, including in the context of the instant appeal.

The Board notes also that Pessoa apparently does not specifically allege that Addendum No. 6 contained any ambiguity, either patent or latent; only that it was

"confusing" to appellant, which the Board interprets as an allegation of patent ambiguity. Simply put, if Pessoa was confused about the bid documents, it had a duty to inquire so that it would no longer be confused. As set forth above, to the extent that Pessoa's confusion was the result of an unalleged patent ambiguity, it was incumbent upon Pessoa to seek clarification of MAA before bid opening. After bid opening, it is simply too late to raise a claim of patent ambiguity, a principle firmly established in COMAR as well as Board precedent. See Adler Svcs. Group, Inc. v. UMBC, MSBCA 2114, 5 MSBCA ¶482 (2000), Harbor Construction, Inc. v. MTA, MSBCA 2015, 5 MSBCA ¶439 (1998), Centex Construction Co., Inc. v. MTA, MSBCA 1419, 3 MSBCA ¶243 (1990), Helmut Guenschel, Inc. v. UM, MSBCA 1434, 3 MSBCA ¶211 (1989), Cherry Hill Construction Inc. v. SHA, MSBCA 1313, 2 MSBCA ¶172 (1988), Rice Corp. v. DNR, MSBCA 1302, 2 MSBCA ¶167 (1987).

The only remaining issue raised in this appeal, therefore, is whether there was a mistake in bid necessitating MAA's correction as a result of which Pessoa and not Flanigan would become the low bidder. Specifically, Pessoa contends in this appeal that MAA had a duty to correct its bid calculations by deducting \$153,000 as the true cost of constructing Alternate 3, rather than adding \$153,000 to the bid that Pessoa initially submitted and thereafter repeated in assurance to MAA arising from Pessoa's specific response to MAA's inquiries on that particular pricing point. However, the arithmetic error that occurred here was in the actual amount of \$102,000, which should have been deducted from Pessoa's base bid for construction of Alternate No. 3, not \$153,000.

The correct deduction of \$102,000 can indeed be derived

solely on the face of the bid documents, as required before a bidder's mistake may be corrected by the State. See Techlawn International, Inc. v. SHA, MSBCA 1848, 4 MSBCA ¶1374 (1995), Dick Corp. v. MdTA, MSBCA 1321, 2 MSBCA ¶152 (1987), Driggs Corp. v. SHA, MSBCA 1243, 1 MSBCA ¶106 (1985), Flanigan & Sons, Inc. v. SHA, MSBCA 1068, 1 MSBCA ¶54 (1983), Richard F. Kline, Inc. v. MDOT, MSBCA 1116, 1 MSBCA ¶39 (1983). Pessoa's bid tabulation form at Section 7 for Alternate No. 3 at Page BF.61 deducted the total sum of \$1,020,000 for construction Item No. D-751.5.6, calculated on the basis of a unit cost of \$500 per foot for 2,040 linear feet; but it should have deducted \$1,275,000, calculated on the basis of its actual stated unit cost of \$625 per foot, as Pessoa set forth at Page BF.47 of its bid tabulation. Because Pessoa priced the construction of Alternate No. 3 at \$575 per foot, its total price for that option was \$1,173,000, or a decrease of a total of \$102,000 from its true originally submitted price based upon the correct unit cost of \$625, not \$500, as Pessoa incorrectly carried over at Page BF.61 of Section 7 of its bid tabulation form.

MAA might have simply noted and made this arithmetic correction to Pessoa's bid, but instead, MAA requested that Pessoa confirm its price on this particular aspect of a very extensive checklist of work to be done. Pessoa committed its carry-over error not only on March 19, 2009 but also apparently again orally on March 24 and yet a third time by its written correspondence dated March 27, 2009. In this appeal, Pessoa claims that MAA should have reduced Pessoa's price by \$153,000, but for MAA to deduct that amount from Pessoa's bid would be absolutely without sustainable justification. Pessoa's bid should have been reduced by a

different amount, namely, \$102,000, but Pessoa itself in this appeal fails to make that claim for relief. Appellant's own course of communications belie its legal argument that its error was "clearly evident."

Because appellant was unable accurately to calculate its price differential for Alternate No. 3 after focused re-examination directed by the State, as occurred here, Pessoa's claim that MAA should have done so is tenuous at best. The State should be permitted to rely upon a bidder's repeated assurances in response to the State's bid confirmation requests that the bidder has diligently re-checked its figures and stands by its bid. A bid can only be corrected "if the mistake and intended correction are *clearly evident* on the face of the bid document." (Emphasis added.) Upon Board review solely of the bid documents, one might conclude that indeed Pessoa's bid could and should have been reduced by MAA by the sum of \$102,000; but there was no arithmetic error clearly evident on the face of the bid in the amount of \$153,000, as appellant claims in the instant appeal. In fact, there was no arithmetic error in that amount at all. The true error was in the amount of \$102,000, which appellant concedes by virtue of the allegations it raises in MSBCA No. 2656.

As set forth in the Board's foregoing Findings of Fact, the General Provisions of the contract documents at GP-2.14 parroted this language from COMAR 21.05.02.12C(1), both of which state: "If the mistake and 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." Here, not even the bidder could determine its mistake until April 20, 1009, when Pessoa claimed for the first time that its bid should actually have been

reduced not by the sum of \$153,000, but by \$102,000. At that late date, its claim was untimely. Prior to that time, namely, on March 19, 2009, Pessoa asserted that Alternate No. 3 would cost an additional \$153,000. It confirmed that price again in writing on March 27, 2009 in response to MAA specific inquiry. Then on March 30, 2009 Pessoa stated vaguely and conditionally, "If a lesser quality product is instituted in the project then, the increase is actually a decrease." Presumably, this third price quote implied a decrease in Pessoa's price by the precise sum of \$153,000, as Pessoa contended on April 8, 2009, that being the only figure referenced by appellant for an entire month following its initial bid submission on March 19, 2009. Thus, Pessoa affirmatively misstated its bid on at least five (5) separate occasions: March 19, 24, 27, 30 and April 8, 2009.

It is indeed odd as well as instructive that a specific figure is not referenced by Pessoa in its March 30, 2009 attempt to revise its bid. The likelihood of the State's successful enforcement of such a provisional price reduction would surely have been uncertain. This is so not only because the deduction of \$153,000 is not even an accurate correction to Pessoa's bid, but also because Pessoa on March 30, 2009 did not state specifically that its price was reduced by the precise sum of \$153,000. Instead, it stated that there could be "a decrease" conditioned upon some unknown entity determining that "a lesser quality product" had been instituted. Pessoa was obligated to establish its bid firmly and accurately by the offer it submitted to MAA on March 19, 2009. It was not permissible for MAA to allow appellant after bid submission to waffle on its price except by requesting a best and final offer (BAFO) from all bidders, which MAA elected not to do.

To sum, the most powerful evidence against Pessoa's assertion in this appeal that it submitted a mistake in bid of the nature of a mere calculation error clearly evident on the face of the bid document is that Pessoa itself did not assert until April 20, 2009 that its true price decrease was actually not in the amount of \$153,000 at all, but in the sum of \$102,000 instead. When the correct calculation of a bid is elusive even to the bidder, as was the case here, the State should not be held to a higher standard of fixing the bidder's bid in light of the bidder's inability to do so. Under such circumstances, the State has no authority to mandate a reduction of a bid and similarly, cannot be obliged to make deductions in bids that the bidder is unable accurately to calculate despite multiple attempts to do so during the month that transpired between Pessoa's initial bid submission on March 19 and its submission of a correct bid calculation on April 20, 2009. Here, appellant's communications to MAA after bid submission reversed any inference that otherwise may have existed to support Pessoa's appeal ground that it made a mistake in its bid which the State was obliged to correct.

Pessoa did make a mistake in its bid, but it cannot be said that Pessoa's mistake was "clearly evident." Had it been so, surely Pessoa would have pointed out prior to April 20, 2009 the necessity of correcting its mistake by deducting the precise amount of \$102,000. It did not, and instead, assured MAA first that its bid was correct, then that it might reduce its bid by some amount, then that it would reduce its bid by \$153,000, none of which assurances represented an accurate correction to its carry-over error that was evident on the face of its bid. For all of these reasons, this appeal must be dismissed. Simply stated, this

is not a case where Pessoa's "mistake and intended correction are clearly evident on the face of the bid document" as Pessoa's own post-bid utterances establish.

Wherefore, it is Ordered this 9th day of September, 2009, that the above captioned appeal is dismissed with prejudice.

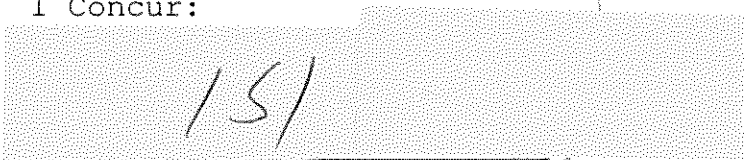
Dated:

9/9/09

 15/

Dana Lee Dembrow
Board Member

I Concur:

 15/

Michael W. Burns
Chairman

 15/

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 2652, appeal of Pessoa Construction Company, Inc. Under MAA Contract No. MAA-CO-09-009.

Dated:

September 9, 2009

151
Michael L. Carnahan
Deputy Clerk