BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of	)	
Concrete General, Inc.	)	
	)	
	)	**Docket No. MSBCA 2918**
Under SHA Contract	)	
No. FR571517R	)	
	)	

APPEARANCE FOR APPELLANT:	**Lewis J. Baker, Esq.** **Watt, Tieder, Hoffar & Fitzgerald, LLP** **McLean, Virginia**
APPEARANCE FOR RESPONDENT:	**Scot Morrell** **Assistant Attorney General** **Baltimore, Maryland**
APPEARANCE FOR INTERESTED PARTY:	**Nick R. Hoogstraten** **Peckar & Abramson, P.C.** **Washington, D.C.**

OPINION BY BOARD MEMBER DEMBROW

By this bid protest appellant seeks the opportunity to correct errors in the bid it initially submitted to the State. Because acceptance of the requested corrections would require reference to extrinsic explanation not included in the initial bid, such corrections are impermissible. As a result, the subject bid was properly deemed to be non-responsive and therefore ineligible to be accepted for contract award.

Findings of Fact

1. The State Highway Administration (SHA) issued a certain Invitation for Bids (IFB) to identify a contractor to perform roadway improvements at the interchange of Catoctin

Mountain Highway (Rt. 15) and Monocacy Boulevard in Frederick County, Maryland. Bid opening occurred on December 18, 2014. With a bid of $31,564,162, appellant Concrete General, Inc. (CGI) submitted the apparent low bid, with interested party Kibler Construction Co., Inc. (KCC) submitting the next lowest bid in the amount of $31,685,747, a difference of $121,585, which is less than one half of one percent of the low bid. Two (2) other bidders also submitted prices in response to the subject IFB, namely, Francis O. Day Co. and Judlau Contracting, Inc.

2. After the initial promulgation of the IFB and prior to bid opening, SHA amended its form Schedule of Prices. (Appellant's Ex. 1, 2.)

3. In submitting its bid, CGI opted not to use the form Schedule of Prices provided by SHA, but instead, used its own Schedule of Prices, as is expressly permitted by Sec. TC 2.02 of the July 2008 edition of the Standard Specifications for Construction and Materials, which was incorporated into the IFB. Sec. TC 2.02 states specifically, "The Contractor may elect to submit the bid on forms generated in the development of the bid. When approved, these forms may be submitted in lieu of the schedule of prices bid form furnished by the Administration in the Invitation for Bids. They shall emulate the forms currently furnished by the Administration and shall contain the following information. (1) State and Federal Contract Nos., (2) Administration Item Nos., (3) Administration Category Code Nos., (4) Administration Proposed Quantities, (5) Description of Items, (6) Unit Price, (7) Total Cost of Each Item, (8) Total Bid Amount." CGI used its own software, known as HCC, to prepare its Schedule of Prices. (App. Ex. 3.)

4. CGI's original bid falsely included the identical "Description of Items" for Item 5026 as for Item 5025, even

though the quantity varies for the two (2) similar but distinct items. In fact, they are not the same. The correct description should have indicated a different color of road striping, one white and one yellow. Another error contained on this page of CGI's bid was the duplicate entry of item number 5026 in place of item number 5027, as a result of which successive items in the 5,000 bid item series carried incorrect item number references as well as errors for the corresponding references to "Description of Items." Strangely, CGI's software left the sequence of quantities in the correct order, but the bid item numbers for the eight (8) bid items following the first Item 5026 were off by one (1) digit and as a result, the stated descriptions of the bid items were also misplaced by one box from the order of items correctly stated in the Schedule of Prices. (App. Ex. 4, 5.)

5. In addition to the need to correct the eight (8) bid item numbers, nine (9) category code numbers (CCN) were also incorrectly stated in the same boxes on the Schedule of Prices in which the item numbers are listed incorrectly. Similarly, nine (9) of the boxes for "Description of Items" also need to be corrected, included nine (9) descriptive statements and five (5) Section references that are also set forth in that column of CGI's Schedule of Pricing. Thus, the 5,000 series of CGI's Schedule of Pricing requires a total of thirty-one (31) separate corrections, though all of them appear to stem from a single initial error in accidentally stating Item No. 5026 twice and thereby moving some but not all of the subsequently stated information into the wrong boxes immediately subsequent to the correct boxes on the Schedule of Pricing. (*Id*.)

6. Claiming that it meant to offer to SHA the same price for Item 5027 as it offered for Items 5025 and 5026, CGI

asserted after bid opening its alleged corrected intention to charge a unit price of $1.60/linear foot for Item 5027, “5 Inch White Permanent Preformed Patterned Reflective Pavement Markings,” for an extended price of $41,950. The other three (3) bidders claimed unit prices ranging from $3.26/lf to $4.00/lf for the same bid item, with extended pricing ranging between $85,493 and $104,900, more than twice CGI’s price for that item. Only CGI claims to have deliberately priced Item 5027 at the same price as Items 5025 and 5026. Item 5025 was for “10 inch *White* Lead Free Reflective Thermoplastic Pavement Markings” and Item 5026 was for “10 inch *Yellow* Lead Free Reflective Thermoplastic Pavement Markings.” (Italics supplied.) Because the only difference between Items 5025 and 5026 is the color of the pavement marking, all bidders, including CGI, priced Item 5026 at the same unit price as they priced Item 5025, but no bidder other than CGI priced Item 5027 the same. The reflective thermoplastic application of markings referenced in Items 5025 and 5026 requires the melting of pellets into a liquid which is then spray-painted onto the road surface, while Item 5027 exacts a much different application process, requiring the placement of a thick preformed pattern reflective stripe with an adhesive back affixing the material to the road. Installation of the preformed pattern reflexive striping is more expensive than the spray painted application of thermoplastic pavement marking. No explanation is offered why a contractor would charge the same amount for the more costly preformed reflective striping as it would charge for mere thermoplastic pavement marking, though, in fairness to appellant, no explanation is required. (Interested Party Ex. 1.)

7. CGI’s bid contained no line item at all for the last item in the 5,000 bid series, namely, Item 5034, “Removal of

Existing Pavement Marking Lines Tape, Any Width," nor does that item description appear anywhere in CGI's Schedule of Prices, though CGI asserts correctly that the description for that bid item is fully identified in other elements of the IFB documents, including Addendum No. 2, for which CGI acknowledged receipt and attached the cover sheet to its bid. KCC bid $59,850 for Item 5034. CGI claims that it meant to bid $37,050 for that bid item, as mistakenly shown in its extended pricing set forth in the box it labeled for Item 5033 as the final bid item in that series.

8. On a separate page of the bid, the aggregate tally is reflected by CGI at the end of a row in which CGI indicates pricing in the 5,000 series only through 5033, not 5034. Correction of that final error as repeated from the itemization sheets yields a total of thirty-two (32) separate individual corrections needed to revise CGI's bid as the result of its mistaken duplicate listing of Item 5026. (Agency Report, Ex. 5.)

9. On December 29, 2014, eleven (11) days after bid opening, KCC filed a bid protest objecting to the award of the contract to CGI and alleging that CGI's bid was unbalanced and non-responsive. Although that bid protest was untimely, SHA reviewed the CGI bid as it is obliged to do pursuant to the Code of Maryland Regulations (COMAR) 21.05.02.13D. In the course of that review, SHA determined that the CGI bid was not materially unbalanced, but also determined that the CGI bid was not responsive because it failed to submit a complete and accurate Schedule of Prices, rendering appellant's bid fatally flawed. That determination was appealed to the Maryland State Board of Contract Appeals (Board) on February 5, 2015. SHA filed its Agency Report February 30, 2015 and Comments thereon were filed March 13 and 17, 2015, with Rebuttal Comments filed March 23, 2015.

Hearing was conducted March 27, 2015.

Decision

KCC's allegation that CGI's bid was materially unbalanced was briefed by the parties but is an issue that is not properly before the Board within the scope of the instant appeal because that allegation was not raised by KCC in timely fashion within seven (7) days after the basis for protest was known or should have been known, and also because SHA determined that CGI's bid was not materially unbalanced and KCC did not file an appeal of that determination to the Board. See COMAR 21.10.02.03B. Therefore the only issue pending in this appeal is whether SHA properly deemed the CGI bid to be non-responsive by virtue of mistakes admittedly set forth therein. SHA's review is governed by COMAR 21.05.02.12C, which states as follows:

> C. Confirmation of Bid. 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. If the bidder alleges mistake, the bid may be corrected or withdrawn upon the written approval of the Office of the Attorney General if any of the following conditions are met:
>
> (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.

Thus, a bidder is permitted to revise its initially submitted bid only when "the mistake and the intended correction are clearly evident on the face of the bid document."

It is a well-established principle of government contract law that bids are ordinarily not permitted to be modified following bid submission based upon any information outside of the "four corners" of the documents submitted as the bid. See Appeal of Inner Harbor Paper supply Co., 1 MSBCA ¶24, MSBCA No. 1064, (1982); Appeal of Excelsior Truck Leasing Co., Inc., 1 MSBCA ¶50, MSBCA No. 1102 (1983); Appeal of National Elevator Co., 2 MSBCA ¶115, MSBCA No. 1251 (1985); Appeal of National Elevator Co., 2 MSBCA ¶114, MSBCA No. 1252 (1985); Appeal of Long Fence Co., Inc., 2 MSBCA ¶123, MSBCA No. 1259 (1986); Appeal of Calvert General Contractors Corp., 2 MSBCA ¶140, MSBCA No. 1314 (1986); Appeal of National Elevator Co., 2 MSBCA ¶160, MSBCA No. 1329 (1987); Appeal of Cam Construction Co. of MD, Inc., 2 MSBCA ¶195, MSBCA No. 1393 (1988)Appeal of Long Fence Co., Inc., 3 MSBCA ¶286, MSBCA No. 1607 (1991); Appeal of Weis Markets, Inc., 4 MSBCA ¶305, MSBCA No. 1652 (1992); Appeal of McGregor Printing Corp., 4 MSBCA ¶318, MSBCA No. 1697 (1992); Appeal of Aepco, Inc., 5 MSBCA ¶415 (1997); Appeal of Substation Test Co., 5 MSBCA ¶429, MSBCA Nos. 2016 & 2023 (1997); Appeal of Covington Machine & Welding Co., 5 MSBCA ¶436, MSBCA No. 2051 (1998); Appeal of Cop Shop, Inc., *et al.*, 5 MSBCA ¶447, MSBCA Nos. 2081 & 2082, (1998); Appeal of Fortran Telephone Communications Systems, Inc., 5 MSBCA ¶460 (1999). The simple reason for the "four corners" Rule is that, if a bidder were to be permitted to clarify or correct a bid after it is formally submitted to the State, that would enable that bidder unilaterally to decide whether to continue to offer its bid, by making a satisfactory modification or explanation, or to withdraw its bid, by declining to offer an acceptable correction, at the bidder's sole election. That has been characterized as the proverbial "second bite at the apple" which is impermissible because competing bidders are not afforded the same opportunity.

With respect to the apparent typographical error committed by CGI when it listed Item 5026 twice, thereby rendering bid item number references to the next successive eight (8) bid items off by one digit, the Board notes that while the cause of the series of errors is immaterial, it appears that a software glitch in CGI's HCC computer program may have created the cascade of corrections which mixed up and confused the subsequent information appellant intended to set forth in its initial bid. Had the duplicate listing of Item 5026 been the only error, the Board may well have agreed with appellant that such an error is clearly evident on the face of the bid document, finding that the procurement officer could easily decipher that the sequential numbering of bid items repeats one number, rendering the immediately subsequent bid numbers off by one numerical digit. This might constitute a typographical error for which correction may fall under the directive of COMAR 21.05.02.12C(1). However, some of the other errors that flowed from the duplicate listing of Item 5026 cannot be corrected without reference to information not contained in the initial bid, and that is prohibited.

The dilemma faced by the procurement officer in attempting to award this contract to the lowest bidder is illustrated by a close examination of the third box from the top of the page of CGI's Schedule of Pricing which starts with Item 5025. As bid, appellant claimed that row to have been for Item 5026, CCS No. 585410, which is 26,225 linear feet of 10" yellow lead free reflective thermoplastic pavement markings, section 553, bid at $1.60/lf, for an extended price of $41,960. By contrast, as appellant seeks to have its bid corrected, CGI now claims that the procurement officer should have been able to tell that the correct bid set forth in that row should have been Item *5027*, CCS No. *585600*, which is 26,225 lf of *5" white permanent preformed patterned reflective pavement markings*, section *559*, bid at the same pricing of $1.60/lf, for an extended price of $41,960.

(Four requested changes highlighted in italics.) The correction itself is odd because by examination of the rest of the bid, one might have anticipated that CGI would charge $1.60/lf for reflective thermoplastic pavement markings, but $3.10/lf for preformed patterned reflective pavement markings, not $1.60/lf.

Did appellant knowingly intend to price Item 5027 at $1.60/lf, the same price as its charge for much different Items 5025 and 5026; or was CGI forced into that position by virtue of its related mistaken entries for those three (3) bid items? Incorrectly listed as Item 5029, CGI now claims that it meant to price Item 5030 at a unit price of $3.10/lf. Correctly listed, Item 5030 is five-inch "Yellow Permanent Preformed Patterned Reflective Pavement Markings" while Item 5027 is for the identical material in white. Item 5027 is five-inch "White Permanent Preformed Patterned Reflective Pavement Marking," which appears in the Schedule of Pricing right after the first of CGI's errors. It is said to be priced at $1.60/lf; while the same product in yellow is priced at $3.10/lf.

While unusual, it is possible that CGI actually intended to offer this price differential, and it is certainly permissible for them to have done so, but under the circumstances of the other related errors pertaining to this series of bid items, it surely appears odd for one color of preformed pavement marking to cost almost twice as much as the same material in another standard color in the same size, and it is stranger still to note that the unusually low price for the preformed white marking happens to carry the exact same price as totally separate, much different items that happen to be listed immediately prior to the price for the preformed white striping tape. One might reasonably suspect that CGI's listing was in error when it repeated a price of $1.60/lf for the third item in that list of three items costing $1.60/lf, the first two of which were nearly the same but the third of which was entirely different; however,

that would be based more upon speculation than proof. Under the "four corners" Rule, SHA is not allowed to make inquiry as to CGI's true intent after bid submission, so it is indeed unfortunate that CGI's initially submitted Schedule of Prices admittedly did not set forth the correct bid item numbers along with the correct descriptions for those items.

CGI's failure to include Item 5034 is also problematic. CGI's bid makes no reference to "Removal of Existing Pavement Markings Lines Tape" even though the State estimated the need to do this work for a distance of 57,000 feet. That's over 10 miles. It is a stretch for appellant to assert that the State should have deciphered its charge of $37,050 for that work from the row in which CGI indicated not removal of pavement markings, but instead, installation of "Preformed Thermoplastic Pavement Marking Legends and Symbols." CGI's true price for Item 5034 is something that SHA cannot reliably determine based solely upon the information set forth in CGI's offer provided to the State prior to bid opening. CGI's Schedule of Pricing does not even include any bid Item number 5034, nor any bid description at all for "Removal of Existing Pavement Markings." Because the procurement officer is barred from examining matters outside of the "four corners" of the written bid in order to discover CGI's true and correct offer, the omission of Item 5034 alone renders the bid materially flawed and defective.

All bidders were free to use SHA's form Schedule of Pricing in submitting their bids. They were also free to submit their own Schedule of Pricing, but such independently developed Schedules were required to emulate SHA's Schedule of Pricing and specifically enumerate unit pricing, extended unit pricing, and total bid price based upon the foregoing. That information was required to be disclosed for each and every item for which SHA requested a bid price. CGI failed to include Item 5034 in its Schedule of Pricing. Its bid, therefore, is non-responsive.

CGI bears sole responsibility for the natural consequence of its decision not to use SHA's form Schedule of Pricing and the subsequent errors and omissions appearing in the defective Schedule of Pricing that appellant developed on its own and used to respond to this IFB. The Board cannot conclude that all of the corrections now requested by appellant are clearly evident on the face of its bid. As a result, the Board is without authority to contravene the lawful and correct determination of the procurement officer to reject CGI's low bid as non-responsive. Therefore this appeal must be denied.

WHEREFORE, it is by the Appeals Board this _____ day of March, 2015,

ORDERED that the instant appeal be and hereby is DENIED.

Dated:

_____
Dana Lee Dembrow
Board Member

I Concur:

_____
Michael J. Collins
Chairman

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 2918, appeal of Concrete General, Inc. Under SHA Contract No. FR571517R.

Dated:

_____
Michael L. Carnahan
Deputy Clerk