

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
H.D. Myles, Inc.)
)
) Docket Nos. MSBCA 2883 & 2888
Under SHA Project No.)
410D31415)

APPEARANCE FOR APPELLANT: Christopher R. Ryon
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Lance M. Young
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Jason R. Potter
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

These appeals must be granted because appellant's low bid was responsive even though it failed to comply with the stated requirement of removing a page from the original IFB and replacing it with a page from an Addendum.

Findings of Fact

1. This bid protest arises from a certain Invitation for Bids (IFB) issued by the State Highway Administration (SHA) known as SHA Project No. 410D31415 for the purpose of identifying a vendor to provide street sweeping and related services in Montgomery and Prince George's Counties for which six (6) bids were opened on December 19, 2013 and appellant H.D. Myles, Inc. (Myles) was soon afterwards identified as the low bid prospective contract awardee, with an estimated bid price of \$1,197,894, and interested party Kalika Construction Group USA, LLC (Kalika) submitted the second lowest bid, with an estimated bid price of \$1,498,250. (Appellant's Ex. 7.)

2. Bid estimates were determined by using SHA's estimated assumptions of projected service needs as set forth on the pricing schedule which was a part of the IFB, and multiplying those quantities by the unit prices submitted by each bidder for each category of unit pricing, the four (4) principal categories of which were street sweeping services of various scheduled roadways ranging in length between 238 and 435 lane miles for which SHA estimated the need for eight (8) cycles of street sweeps during the duration of the contract. (Appellant's Ex. 10; Tr. 60.)
3. SHA will seek contract approval by the Board of Public Works (BPW) to authorize expenditure of state funds up to the calculated bid total based upon SHA's estimate of service needs and the successful bidders' offer of unit pricing for each category of service. (Tr. 30, 83.)
4. The contract awardee is to be paid by SHA as service is completed for the various categories of street-sweeping work performed by the contractor in accordance with SHA's direction to the contractor to perform the work it seeks to have done at the times to be determined by SHA during the duration of contract performance. (Tr. 75-76.)
5. Based upon environmental protection concerns and the need for emergency clean-up of road spills, in accordance with federal laws and state policy to reduce run-off harmful to water quality, SHA seeks to maximize the amount of debris that can be removed from Maryland roadways by scheduling street-sweeping services at periodic intervals determined in part by total maximum daily load (TMDL) considerations rather than a predetermined schedule. (Tr. 36.)
6. Before this contract could be awarded, Kalika filed a bid protest by letter dated December 26, 2013 alleging that Myles' bid was non-responsive and should therefore be disqualified. (State's Ex. 3.)

7. By correspondence dated February 3, 2014, SHA granted the Kalika bid protest. (Appellant's Ex. 3; State's Ex. 5.)
8. Myles filed an appeal of that decision with the Maryland State Board of Contract Appeals (Board) on February 12, 2014, which appeal was docketed as MSBCA No. 2883. (State's Ex. 6.)
9. Also on February 12, 2014, Myles filed its own protest contesting the propriety of SHA's granting of Kalika's bid protest, which was denied by SHA on February 25, 2014, and that determination was then also appealed to the Board on March 4, 2014 and docketed as MSBCA No. 2888. (Appellant's Ex. 8, 9.)
10. The principal basis of Kalika's bid protest is the allegation that Myles did not offer to agree to extend its bid prices beyond the end of calendar year 2015, as required by the IFB, placing Myles on an uneven and unfair advantage in comparison to competing offerors who did agree to the contract duration extension. (State's Ex. 3.)
11. The particular grounds of Kalika's bid protest is that Myles' bid was unresponsive because Myles failed to comply with the requirements of Addendum No. 3 to the IFB, which was issued November 12, 2013, extending the contract completion date from "December 31, 2015" to "730 calendar days," or two (2) years following contract award, instead of a date certain as originally stated, that date being the end of the second calendar year following anticipated contract award. (Appellant's Ex. 4; State's Ex. 5 & 6.)
12. Addendum No. 3 consisted of two pages: the first page advising bidders of the revised contract duration period and instructing bidders to substitute the second page into the bid package, and the second page being the actual revised page 114 of the IFB reflecting the extended contract duration. (Appellant's Ex. 4.)

13. Specifically, the first page of Addendum No. 3 directed bidders to "**REMOVE** and **INSERT** the entire page of "Contract Provisions - EXTRA WORK, CONTRACT TIME, BONDING, LIQUIDATED DAMAGES, AND PROPOSAL GUARANTY" - Contract time: "Completion Date: to "730" Calendar Days" and provided further: "Before submitting your bid, please remove any existing Invitation for Bids pages and contract drawings (as applicable) that have been replaced by this Addendum, and insert the revised Invitation for Bids pages and contract drawings (as applicable) in their proper sequence." (Emphasis in original.) (Appellant's Ex. 4.)
14. Counsel stipulate that Addendum No. 3 made a material change to the contract proposal. (Tr. 12.)
15. No evidence was introduced to suggest that Addendum No. 3 affected the unit bid pricing submitted by any bidder, and uncontested evidence was introduced that Addendum No. 3 did not affect the bid price submitted by Myles. (Appellant's Ex. 9; Tr. 92.)
16. Counsel stipulate that appellant received Addendum No. 3 and acknowledged such receipt in writing to SHA. (Tr. 90.)
17. Michael A. Lesniowski (Lesniowski), President of Myles, testified that upon receipt of Addendum No. 3, concerned to make certain he understood all requirements included in that Addendum, he telephoned the SHA representative named in the Addendum as the appropriate contact for SHA, discussed the requirements of the amendment, and as a result, felt assured that the only substantive change contained in Addendum No. 3 was the modification to the contract completion date from "December 31, 2015" to "730 days" after contract award. (Tr. 72.)
18. SHA does not dispute that Lesniowski made the aforementioned telephone call.
19. When Myles submitted its bid for this project, it attached a copy of the first page of Addendum No. 3 to the front of its

- bid, intending that action to evidence Myles' understanding of and agreement with the revised contract duration period. (Tr. 42.)
20. When it submitted its bid, Myles knew the revised contract duration period to be 730 calendar days following contract award. (Tr. 76.)
 21. When it received the Myles bid, SHA knew that Myles knew the revised contract duration period to be 730 calendar days following contract award. (State's Ex. 1; Finding of Fact Nos. 16-19; Tr. 72, *cf.* Tr. 79.)
 22. Myles committed to the contract duration specification of 730 days following contract award.
 23. Myles did not remove from the bid package the original version of page 114, which established the initial contract completion date as December 31, 2015, and replace that page with revised page 114 reflecting the amended contract duration of 730 calendar days, as bidders were instructed to do by Addendum No. 3. (Appellant's Ex. 3; Tr. 77.)
 24. The reason that Myles attached the first page of Addendum No. 3 to its bid but did not substitute revised page 114 for original page 114 is that Lesniowski printed Addendum No. 3 from SHA's website, which did not include that second page of the Addendum, only the first page explaining the change in contract duration that was repeated on the second page. (Tr. 42, 77-78.)
 25. The Special Provisions section of the IFB included the following provision under the heading, "TERM OF CONTRACT": "If monies remain in this Contract and if work remains to be performed beyond the aforesaid completion date, the Administration may extend, at their discretion, the completion date to allow the unfinished work to be completed." (Appellant's Ex. 6.)
 26. Steven J. Marciszewski (Marciszewski), SHA's Director of its Office of Construction and Procurement Officer for this

procurement, testified that, notwithstanding the unilateral discretion afforded by the aforementioned Special Provision as stated, by SHA policy, SHA would not extend this contract beyond the stated period of contract duration without the approval and agreement of the contract awardee. (Tr. 31.)

Decision

Counsel for appellant argues that the fact pattern presented by the instant appeals is remarkably similar to the circumstances that existed in the Board's prior ruling in the Appeal of David A. Bramble, Inc., MSBCA 2550, ___ MSBCA ¶ ____ (Sept. 2006), based upon the precedent set forth in the Appeals of Corcon, Inc., MSBCA 1804, 4 MSBCA ¶ 358 (May 1994) and also the Appeal of Carl Belt, Inc., MSBCA 1743, 4 MSBCA ¶ 339 (Nov. 1993). The Board agrees.

In Bramble, *op cit.*, a bidder neglected to attach to its bid the entire copy of an IFB and its Addendum, as required. Noting that such a minor irregularity was not uncommon, the Board reasoned that because the bidder extended an unambiguous offer to comply with all of the terms of the contract, it was proper for SHA to determine the bid to be responsive even though it was admittedly defective in that the bid was not submitted with the IFB and Addendum attached. Here, Myles attached the first page of the Addendum to its bid as an indication of its knowledge and acceptance of modified contract duration, but failed to remove from the IFB the original version of page 114 and substitute the revised page. This bid defect was a minor irregularity as defined in the Code of Maryland Regulations (COMAR) 21.06.02.04. The Board is unable to conclude that any ambiguity existed with respect to Myles' offer. It is simply improper for SHA to deem Myles' bid nonresponsive for a substantially similar irregularity as SHA previously waived in Bramble, *Id.*, based upon another very comparable case, namely, the Appeal of Carl Belt, Inc., *op cit.*, in which the successful bidder also failed to attach a copy of

the entire IFB with its bid, even though instructed to do so by the State. To do so was arbitrary.

The technical defect determined by SHA in the instant appeal to be sufficient to render the Myles bid fatally flawed is indeed quite similar to the defect presented in Bramble, *op cit.*, as well as the Appeal of Carl Belt, Inc., *op cit.*, which defect SHA ignored at that time because the contested bid there, like here, otherwise conformed in all material respects to the invitation for bids. Examination of the facts presented here in light of the Board's prior rulings makes it clear that Myles' acknowledgement of the correct contract duration, but failure to substitute the second page of the Addendum making that change, should have been deemed by SHA to be a minor irregularity, as SHA has done in the past.

Even more like the facts in the instant case, the principal precedent relied upon in Bramble, *op cit.* is the Appeals of Corcon, Inc., *op cit.*, in which the contested bid was claimed to be defective because it did not attach material addenda to the IFB, though receipt of the addenda was acknowledged by the bidder, as is the case in the contest at bar. In Corcon, *Id.*, the Board stated, "a pre-bid acknowledgement of a material amendment may be sufficient even in the absence of any reference to the amendment in the bid." (pg. 6.) There, the Board found that the challenged bid created no doubt as to the bidder's intention and agreement to perform all requirements of the contract. The Board renders the same conclusion with respect to Myles' bid. Quoting from the Comptroller General of the United States in Fisher Berkeley Corporation, B-196432, 80-1 CPD ¶ 26 (1980), in Corcon, *Id.*, the Board stated specifically, "all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirements." (pg. 8.)

It appears to the Board that Myles did commit itself to all material elements of the IFB here in dispute, including the obligation to continue street sweeping services at the prices

stated for 730 days following contract award. In addition, it appears, at least from the express writing of the "Term of Contract" paragraph set forth in the Special Provisions Section of the IFB, that bidders could be unilaterally obligated by SHA to extend their pricing to a longer period of time than either of the alternative periods specified for contract duration during the course of this procurement, though SHA asserts that it would not seek to enforce that provision by obliging a contractor to perform work at its offered pricing after the contract termination date without the contractor's agreement.

Surely contract duration is an important element of just about any contract, but the fact that the contract duration here was expressly made so fluid by the very terms of the IFB makes the contract termination date even less significant than it would have been for the ordinary case of a contract calling for service performance during an inalterable, rigidly specified time frame. Here, the vendor appears to be expected by SHA simply to continue for a couple of years of street-sweeping services as directed by SHA until the amount of money authorized by BPW runs out.

As set forth above, the Board concludes that Myles made an unambiguous offer to commit to contract performance through the two-year duration of the contract. Myles may be rightfully criticized for not switching out the original page 114 of the IFB for the revised page provided by Addendum No. 3, but that page was not even important enough to be included in SHA's website information for this procurement, adding further anecdotal evidence that the bid defect here alleged was a minor irregularity.

This case concerns a distinction of form and not substance because Myles knew about, acknowledged receipt of, and agreed to the extension of the contract duration established by Addendum No. 3. As appellant's counsel cleverly couches the controversy over Myles' bid, Myles did include the Addendum on its submission, just not in its submission. This is simply not

enough to render a bid nonresponsive, as SHA and the Board have previously determined in other unrelated but comparable cases. Because the Board finds no doubt over Myles' agreement to be bound by all of the terms of the contract, including its duration, these appeals must be granted.

Wherefore it is Ordered this _____ day of May, 2014 that the instant Appeals be and hereby are GRANTED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Ann Marie Doory
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 2883 and 2888, appeals of H.D. Myles, Inc. Under SHA Project No. 410D31415.

Dated:

Michael L. Carnahan
Deputy Clerk