



various locations in Anne Arundel, Calvert, Charles & St. Mary's Counties."

3. The IFB's Special Provisions, at page 37, included "Special Bidding Instructions" which set forth:

THE CONTRACTOR IS ALERTED THAT A MINIMUM COST HAS BEEN ESTABLISHED FOR MOST BID ITEMS IN THIS CONTRACT. THE CONTRACTOR'S BIDS SHALL BE GREATER THAN OR EQUAL TO THIS MINIMUM COST. IF A BID PRICE IS BELOW THE MINIMUM COST ESTABLISHED FOR ANY ITEM, THE BID WILL BE CONSIDERED NON-RESPONSIVE AND THE CONTRACTOR'S BID WILL BE REJECTED. THE MINIMUM COST APPEARS BELOW APPLICABLE BID ITEMS IN THE SCHEDULE OF PRICES.

4. Among the minimum unit prices established in the IFB's Schedule of Prices was the following:

c. Item No. 4036, "Hours of Work Barge 8 Foot x 16 Foot," set forth a minimum unit price of \$10.80 per hour times 80 hours.

5. On October 26, 2010, SHA issued Questions and Answers that were posed at the pre-bid meeting for the IFB. (Joint Exhibit J2). Among these Questions and Answers was the following:

[Q.] The Minimums established for Items #4007 and #4008 appear to be switched.  
[A.] The items will remain as is for this Contract.

6. Mr. Steven Kight of PDI-Sheetz testified that he and his mother, owner of PDI-Sheetz, were the only bidders to attend the pre-bid meeting with Mark Sansone of SHA District 5. (Tr. p.121)
7. Mr. Kight was asked if Mr. Sansone addressed the special bidding instructions at all, and Mr. Kight responded, "He pointed them out specifically as we were going through the book and reiterated that if we submitted a bid below the

minimums set forth in the contract, then our bid would be rejected." (Tr. p. 121-122)

8. Mr. Kight testified that when he prepares his bids to comply with the special provisions, he uses a computer program that is designed to prevent him from making mistakes so that he can comply with the minimum bid requirements. (Tr. p. 121-122)
9. Bid opening for the IFB was held on October 28, 2010. As shown on the Bid Tabulation, at bid opening the results were: Allied Contractors, Inc. ("Allied") was the low bidder at \$2,334,634.00, Mercier's, Inc. ("Mercier's") was second-low bidder at \$2,342,497.60, and PDI-Sheetz was third-low bidder at \$2,346,878.67. (Joint Exhibit J3). PDI-Sheetz' bid was \$12,244.67 higher than Allied's low bid.
10. Allied's bid for the IFB included a unit price that did not meet the minimum unit price established for Item No. 4036. (Joint Exhibit J4). Allied bid \$10.00 per hour on Item No. 4036 but the minimum cost was \$10.80, meaning Allied's bid was \$0.80 per hour lower than the established minimum unit price.
11. Mercier's' bid for the IFB included a unit price that did not meet the minimum unit price established for Item Nos. 4002 and 4008. Mercier's bid \$75.00 per hour on Item No. 4002, which was \$10.00 per hour lower than the established minimum unit price. Mercier's bid \$12.00 per hour on Item No. 4008, which was \$0.50 per hour lower than the established minimum unit price.
12. All unit prices included in PDI-Sheetz's bid for the IFB equaled or exceeded the minimum unit prices established in the IFB.

13. By letters dated November 1, 2010, SHA rejected both Allied's and Mercier's' bids for the IFB because they were determined to be disqualified for failure to comply with the minimum bid requirements. (Joint Exhibit J6).
14. By letter dated November 1, 2010 SHA notified PDI- Sheetz of its notice of intent to award the contract to PDI- Sheetz. (Joint Exhibit J5).
15. By way of letter dated November 3, 2010, Allied protested SHA's rejection of its bid for the IFB. (Joint Exhibit J7).
16. By letter dated December 13, 2010, SHA rescinded its rejection of Allied's bid and indicated an intent to award the contract to Allied. (Joint Exhibit J8).
17. By letter also dated December 13, 2010, SHA notified PDI- Sheetz that SHA rescinded its determination to reject Allied's bid, and that SHA intended to award the contract to Allied. (Joint Exhibit J9).
18. By letter dated December 20, 2010, PDI-Sheetz protested SHA's decision to award the contract to Allied. (Joint Exhibit J10).
19. By letter dated January 14, 2011, PDI-Sheetz supplemented its protest to address the arguments set forth in Allied's November 3, 2010 protest. (Joint Exhibit J11).
20. On January 31, 2011, SHA issued a Procurement Officer's Final Decision denying PDI-Sheetz's protest. (Joint Exhibit J12).
21. By letter dated February 2, 2011, Allied withdrew its November 3, 2010 bid protest and extended its bid price based on the Procurement Officer's Final Decision. (Joint Exhibit J13).

22. By letter dated February 10, 2011, PDI-Sheetz filed a Notice of Appeal to the Maryland State Board of Contract Appeals. (Joint Exhibit J14).
23. In July 2006, SHA issued a separate IFB No. AT9957314 (the "Dist. 3 IFB") for "Miscellaneous Roadway Structure Repairs at Various Locations" throughout SHA's District 3, consisting of Montgomery and Prince George's counties. The Scope of Work in the Dist. 3 IFB was substantially similar to the IFB at issue in this appeal. (Appellant's Exhibit A1).
24. The Dist. 3 IFB's Special Provisions, at page 31, also included "Special Bidding Instructions" similar to the requirements included in the IFB at issue, stating:

THE CONTRACTOR IS ALERTED THAT A MINIMUM COST RANGE HAS BEEN ESTABLISHED FOR EACH BID ITEM IN THIS CONTRACT. THE CONTRACTORS BID SHALL BE AT OR ABOVE THIS COST RANGE. IF A BID PRICE IS BELOW THE COST RANGE THE BID WILL BE CONSIDERED NON-RESPONSIVE AND REJECTED. THE MINIMUM COST RANGE APPEARS BELOW EACH BID ITEM IN THE SCHEDULE OF PRICES.
25. Bid opening for the Dist. 3 IFB was held on August 31, 2006. As shown on the Bid Tabulation, at bid opening, Southern Improvement Co. ("Southern") was the low bidder at \$2,589,960.02, and PDI-Sheetz was second-low bidder at \$2,700,720.00. (Appellant's Exhibit A2). PDI-Sheetz' bid was \$115,559.98 higher than Southern's low bid.
26. Southern's bid for the Dist. 3 IFB included a unit price that did not meet the minimum unit price established for Item No. 4032. Apparently due to an incorrect placement of a decimal point, Southern bid \$0.60 per hour on Item No. 4032, which was \$5.40 per hour lower than the established minimum unit price of \$6.00. The difference between

Southern's total bid for this Item and the minimum conforming to the Special Bidding Instructions was \$21,600.00.

27. All unit prices included in PDI-Sheetz's bid for the Dist. 3 IFB equaled or exceeded the minimum unit prices established in the Dist. 3 IFB.
28. By letter dated August 31, 2006, SHA notified Southern that it was the low bidder in response to the Dist. 3 IFB. (Appellant's Exhibit A3). This letter also requested that Southern submit an Affirmative Action Plan and Experience and Equipment Certification.
29. On September 6, 2006, Southern submitted an Experience and Equipment Certification. (Appellant's Exhibit A4). By letter dated September 6, 2006, PDI-Sheetz protested award to Southern on the grounds that Southern failed to meet the requirements of the Special Bidding Instructions. (Appellant's Exhibit A5).
30. By letter dated September 12, 2006, in response to PDI-Sheetz' protest, Southern withdrew its bid. (Appellant's Exhibit A7a). In this letter, Southern, admitting that it violated the minimum bid requirement, noted that "a transposition error occurred for which there is no excuse."
31. With respect to the Dist. 3 IFB, following Southern's withdrawal, SHA awarded Contract No. AT9957314 to PDI-Sheetz, pursuant to SHA Standard Specifications GP-2.19, as the responsible and responsive bidder whose bid met the requirements set forth in the Dist. 3 IFB and was the lowest conforming bid price.
32. In September 2010, SHA advertised Invitation for Bids No. AX9737714, "Miscellaneous Roadway Structure Repairs at Various Locations in Carroll, Frederick and Howard Counties" (the "Dist. 7 IFB").

33. The scope of work described in the IFB included, generally, maintenance of roadway structures in Carroll, Frederick and Howard Counties.
34. Bid opening for the Dist. 7 IFB occurred on November 4, 2010. As shown on the Bid Summary and Bid Tabulation, at bid opening, Concrete General, Inc.'s ("CGI's") bid was identified as "irregular" because it "did not meet minimum unit cost." (Appellant's Exhibits A8 and A9, respectively).
35. Mr. Mike Miller, Vice President of Concrete General, Incorporated, testified that he has been in the construction and maintenance field for over 30 years and has bid on many contracts with special instructions. He made a mistake in a bid, and his bid was found non-responsive. (Tr. p. 159) He stated that it is well known by bidders on these SHA contracts that the special instructions have been used for many years and the instructions are part of the industry custom. Mr. Miller was asked if "he has ever seen a SHA policy about using a minor irregularity provision to allow a bidder's bid that is below the minimum to be corrected?" He testified, "I've never seen it happen." (TR. p.178-179) He was asked, "how would it affect the industry if the Board approves what SHA did?" His response was, "Well you're establishing a rule, a bright line of in this case for this item \$10.80. Well it's a slippery slope if you allow \$10. Then maybe we can allow \$9. So when does that end? The special bidding instructions tell me an absolute. So if we're allowed to go below the minimum, I don't know how far you can go without it being declared a minor - not minor irregularity." (TR. P. 178- 179)

36. Mr. Steve Marciszewski, Acting Director with the Office of Construction for SHA, testified that he has been involved in SHA maintenance contracts with Special Bidding Instructions. Chairman Collins asked "Do you know, Mr. Marciszewski if in your years of working at SHA has there ever been a time where that language appeared and we invoked the minor irregularity or do-as to in your knowledge has there ever been an example of that until this case?" Mr. Marciszewski answered "No, I'm not aware of that." (Tr. p. 240-241)

#### Decision

At the outset of the hearing the parties stipulated to the accuracy of the above-referenced findings of fact. Respondent objected to the relevancy of some of Appellant's exhibits (A1 - 9) arguing that the two (2) other contracts not pertaining to Dist. 5 were not relevant to the bid protest before the Board. The Board finds that the objection is no longer relevant. Respondent opened the door to these contracts by distinguishing how the contracts failed to meet minimum bid prices, arguing in its Reply to Appellant's Post Hearing Brief that bids were rejected for other reasons.

SHA IFB for Contract No. AX97514, bridge and roadway maintenance in Anne Arundel, Calvert, Charles and St. Mary's Counties, included special instructions, with all of the words in the instructions capitalized, unlike the words in the rest of the IFB. The special provisions state:

#### SPECIAL BIDDING INSTRUCTIONS

THE CONTRACTOR IS ALERTED THAT A MINIMUM COST HAS BEEN ESTABLISHED FOR MOST BID ITEMS IN THIS CONTRACT.  
THE CONTRACTOR'S BID SHALL BE GREATER THAN OR EQUAL TO THIS MINIMUM COST. IF A BID



PRICE IS BELOW THE MINIMUM COST ESTABLISHED FOR ANY ITEM, THE BID WILL BE CONSIDERED NON-RESPONSIVE AND THE CONTRACTOR'S BID WILL BE REJECTED. THE MINIMUM COST APPEARS BELOW APPLICABLE BID ITEMS IN THE SCHEDULE OF PRICES.

SHA started using such Special Bidding Instructions in IFBs in 1996 to protect against unbalanced bidding (TR. p 90-91). The adherence to the language and terms of the IFB, and most specifically the Special Bidding Instructions, were to be followed, and according to the testimony of Mr. Mike Miller it was understood in the industry that these instructions were to be followed absolutely. The language is very clear, and the Special Bidding Instructions tell all bidders what is expected when bidding and what will happen to their bid if there is a deviation. When asked at the hearing if they had ever heard of a bid being found responsive that had failed to comply with a special bidding instruction, all four (4) witnesses said they had never seen that occur. Further, an employee of SHA in the pre-bid meeting specifically represented to bidders that failure to comply with these instructions would render the bid non-responsive and the bid would be rejected.

SHA's initial action upon the bid opening was to render Allied and Mercier's bids non-responsive, and because of going below the minimum price required by the IFB, the defect was deemed to be material. SHA sent a notice of apparent low bid to Appellant and then rescinded it when the procurement officer decided to ignore the language of its own IFB, even its own Special Bidding Instructions. Allied, Inc. did not comply with the Special Bidding Instructions because Allied bid under the minimum cost in the schedule of prices. Allied's bid was initially properly found to be non-responsive. Allied then filed a bid protest asking that its noncompliance be considered

a minor irregularity controlled by the provisions set forth in Code of Maryland Regulations (COMAR) 21.06.02.04. Weeks later, on December 13, 2010, the procurement office changed his mind and decided to deviate from the IFB Special Bidding Instructions by determining the failure to comply to be a minor irregularity.

Appellant relied on SHA's contract administration practices over the years and pre-bid statements made by the SHA's Mr. Sansone. The language of the IFB is clear. The Instructions state, "IF A BID PRICE IS BELOW THE MINIMUM COST ESTABLISHED FOR ANY ITEM, THE BID WILL BE CONSIDERED NON-RESPONSIVE AND THE CONTRACTOR'S BID WILL BE REJECTED." That plain language tells all potential bidders what is expected when bidding and what will happen if there is a deviation. In this case Allied and Mercier deviated from line items by submitting less than the minimum price, which is a material deviation from the requirements of the IFB.

SHA cannot just ignore the language of its own Special Bidding Instructions. "It is well settled, that responsiveness must be determined from the face of the bidding documents." Inner Harbor Paper Supply Company, MSBCA 1064, 1 MSBCA ¶24 (1982). The Board holds that, in light of the Special Bidding Instructions set for in the IFB, to decide after the bids were opened that a deviation was a minor irregularity is arbitrary to all the bidders of this IFB. "It is fundamental that an agency may not solicit quotations on one basis and then make award on another." See Honeywell, Inc., MSBCA 1317, 2 MSBCA ¶148, p.10 (1987), Park.Net, Inc., MSBCA 2123, 5 MSBCA ¶473 (1999).

The Board stated in Group Health Association, MSBCA 1679, 4 MSBCA ¶310, p. 21 (1992) "Cases involving claims of minor irregularity typically include situations where bidders or offerors failed to sign bids, Apollo Paving Co., MSBCA 1092, 1 MICPEL, paragraph 29 (1982), failed to initial a bid correction,

Wolfe Brothers, Inc., MSBCA 1147, 1 MICPEL, paragraph 53 (1983); or failed to place a total bid amount in a blank provided on the last page of the bid sheets, Calvert General Contractors Corp., MSBCA 1314, 2 MICPEL, paragraph 140 (1986)." The Appellant, in Group Health, argued that the contract requirements were a "requisite formality", however, the Board rejected that argument stating, "Appellant did not fail to adhere to requisite formalities, but explicitly said it could not comply with the mandatory contract requirements."

Further, this Board sustained a protest in Grady & Grady, Inc., MSBCA 1721, 44 MSBCA ¶324, p. 3 (1993), where the procurement officer attempted to waive as a minor irregularity the low bidder's failure to acknowledge an IFB addendum. The Board held, "The addendum was a material change and its acknowledgement mandatory to make Fick's bid responsive. Fick's failure under these facts to acknowledge Addendum No. 1 could not be waived by the procurement officer." See Oaklawn Development Corporation, MSBCA 1306, 2 MSBCA ¶138 (1986) p. 5, in which the Board opined, "Appellant failed to acknowledge a material amendment which cannot be waived in the guise of a minor irregularity."

The requirements of the Special Bidding Instructions are material to the IFB to prevent unbalanced bidding as referenced in SHA's Standard Specifications at GP - 2.17(b)(3)(b). Strict compliance is vital to that goal. While a procurement officer has wide discretion, a procurement officer cannot waive a material requirement of the IFB. In Taylor-Forge Engineered Systems, Inc., 89-2 CPD 421 (1989), it was held "... that to the extent that a bidder offers a different f.o.b. term than is required by the IFB, the differing term is not a minor deviation, but in fact is a material deviation going to the substance of the bid. We find the MSFC properly refused to

waive this material deviation since such a waiver would be contrary to the competitive system by offering Taylor-Forge what would be, in effect a different contract than other bidders." Further, it was stated, "It is well-established, however, that a bid that is nonresponsive may not be corrected after bid opening to be made responsive, since the bidder would have the competitive advantage of choosing to accept or reject the contract by choosing to make its bid responsive or nonresponsive." As Ms. Kight testified to during the hearing in the instant appeal, "bidders need to be on equal footing." (Tr. p. 224)

In this case, Allied was asking SHA to let it explain why it did not comply with the Special Bidding Instructions and requesting that its bid be allowed to be found responsive. All this was after the bids were opened. SHA changing its decision is arbitrary and unreasonable, especially in light of the testimony of four (4) sworn witnesses who stated that they had never seen this kind of action taken on a contract that had Special Bidding Instructions establishing minimum prices. One of the witnesses was an employee of SHA.

"It has been the consistent position of this Office that the responsiveness of a bid, that is, the bidder's intention to comply with all IFB specification, must be determined from the face of the bid itself at the time of the bid opening." Transport Engineering Company, Inc., B- 185609, 1976, 76-2 CPD 10. Further, a bidder may not explain the meaning of its bid after opening as such action would serve to undermine the integrity of the bidding system and cause overall harm to the system of competitive bidding despite the immediate advantage gained by a lower price in the particular procurement." United McGill Corporation and Lieb - Jackson, Inc., B- 190418, 1978, 78-1 CPD 119.

Language needs to be enforced if SHA is going to include it in their IFB's. SHA is not required to use the language of the Special Bidding Instructions in its solicitations. SHA can draft IFBs any way it wants. The language of the provisions, if used, must mean something uniform for all bidders. SHA's action to deem Allied's non-conformance with the Special Bidding Instructions by failing to meet minimum unit prices as a minor irregularity is arbitrary, capricious and unreasonable. The Appellant's appeal is therefore sustained.

WHEREFORE, it is, by the Board, this \_\_\_\_\_ day of July, 2011, ORDERED that this appeal is SUSTAINED.

Dated:

\_\_\_\_\_  
Ann Marie Doory  
Board Member

I Concur:

\_\_\_\_\_  
Michael J. Collins  
Chairman

\_\_\_\_\_  
Dana Lee Dembrow  
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 2757, appeal of PDI-Sheetz Construction, Inc. under SHA IFB No. AX9737514.

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Clerk