

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

Appeal of)
Southern Improvement Company,)
Inc.)
) Docket No. MSBCA 2778
)
Under)
MAA IFB No. MAA-CO-18-008)

APPEARANCE FOR APPELLANT: None

**APPEARANCE FOR RESPONDENT: Puja K. DeWire
Stanley Turk
Assistant Attorneys General
Baltimore, Maryland**

OPINION BY BOARD MEMBER DOORY

This appeal must be denied because the three (3) lowest bidders in the IFB were responsive. The Appellant also raised an issue not in the original timely protest which denies the Board jurisdiction. Appellant is a corporation which requires representation by a Maryland attorney to come before the Board, but no attorney entered an appearance on behalf of Appellant.

Findings of Fact

1. June 16, 2011 the Maryland Aviation Administration (MAA) issued an Invitation for Bids ("IFB") for a task order construction Contract Number MAA-CO-18-008 ("Contract") for Comprehensive Interior/Exterior Modifications for various construction and/or repairs at the airport.

2. The work under the Contract may include electrical, mechanical, architectural, demolition, roofing, asbestos removal, painting and finishes, all to be completed in accordance with these specifications, all applicable codes, plans, sketches and all other pertinent contract documents at locations designated by the Engineer. (Exhibit 1 G1-1.04).
3. The total task order contract amount is \$10,000,000.00. (Exhibit 2 Question 9, p5 of 12).
4. The Contract includes five (5) sample tasks for which bidders must provide prices and which will form the basis of the award. (Exhibit 3).
5. MAA intends to make awards to "up to four contractors" based on the total base bid. Separate task orders for specific projects will be initiated for each task required under the Contract. (Exhibit 1 G1-1.03).
6. On July 12, 2011, nine (9) bidders responded to the IFB. MAA recommended award to three (3) responsible bidders with the lowest responsive bids based on the aggregate total of five (5) tasks. The three (3) lowest bidders were Mid-Atlantic General Contractors, Inc. (Mid-Atlantic) with \$631,390.00, Baltimore Contractors, Inc. (BCI) with \$711,052.00 and M. Stancliff Construction (Stancliff) with \$783,250.00. (Exhibit 3).
7. On August 10, 2011 the Contract was on the Board of Public Works (BPW) agenda. BPW approved the award of the Contract to Mid-Atlantic, BCI, and Stancliff, despite the previously filed protest by Southern Improvement Company, Inc. (Southern). (Exhibit 4 and 5).
8. On July 19, 2011 Southern filed a timely protest alleging the other eight (8) bids were non-responsive. (Exhibit 6) Southern was the highest bidder of all nine (9) bids submitted. (Exhibit 3).

9. Southern's grounds in the protest for the three (3) lowest bidders states:

Mid-Atlantic: Did not write in the dollar amount in words for Task #4. No signed receipts were attached to the bid documents for the addenda. MBE participation was not based on the total of all task orders as instructed by procurement and as clearly stated in #4 on page 2 of 12 in Addendum #3. NAICS codes are questionable. BCI: MBE participation was not based on the total of all task orders as instructed by Procurement and clearly stated in #4 on page 2 of 12 in Addendum #3. MDOT MBE Certification number was incorrect for Acorn Supply. Stancliff: The bid form did not have a corporate seal as required by Procurement. No signed receipts were attached to the bid documents for the addenda.

10. On July 28, 2011 the MAA issued a final decision and denied Southern's protest stating "Southern did not provide sufficient grounds to find the bids of Mid-Atlantic, BCI, and Stancliff non-responsive." MAA's final decision only addressed the alleged deficiencies in the three (3) bids awarded and considered the bids four (4) through eight (8) moot so they were not addressed. (Exhibit 7).
11. On August 5, 2011 Southern appealed MAA's final decision to the Maryland State Board of Contract Appeals (Board).

Decision

The first ground for protest is that Mid-Atlantic did not write the dollar amount in words, only numbers for Task #4 on the total Contract tabulation form. (Exhibit 9). The Contract required five (5) sample tasks to be priced individually on the bid tabulation form. Out of the five (5) sample tasks and a bottom line for total of those sample task bids only Task #4 did not include the numbers written as words. The number however is clearly marked on the form for that sample task. There is no

ambiguity. The simple omission of the written words can be considered a minor irregularity. In the Code of Maryland Regulations (COMAR), at 21.06.02.04A it states:

A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to the other bidders or offerors.

In Mid-Atlantic's bid, it's unnecessary to have both the numbers and the words because the meaning is clear if only one or the other is used. Further, the Board has held that:

Although having the amount in both words and numbers is a convenience to the State in the event that there is some uncertainty as to the numerical figures or a mistake which might be corrected if both are available, there is no need for the words where the price which the bidder is willing to commit to is evident without the words. In this case, the words are unnecessary because the figures sufficiently indicate the bid prices. Accordingly, in the face of sufficient figures, the absence of words does not render the bid nonresponsive, and Appellant's protest on this ground fails. Century Construction, MSBCA 2385, 6 MSBCA ¶547, (March 26, 2004).

Thus, the first ground is denied.

The second ground of protest against Mid-Atlantic is that Mid-Atlantic failed to provide signed receipts for addenda with the bid. Mid-Atlantic did in fact submit the signed Addendum acknowledgments for Addenda 1, 2 and 3 in its bid. (Exhibit 9).

In David A Bramble, Inc., MSBCA 2550, _____MSBCA _____ (September 2006), an agency requested confirmation of receipts of addenda to the IFB and those addenda were to be attached to the IFB bid submission. The Board in Bramble held that a low bidder who fully understands and commits to the contract obligations

binds itself to an offer and the bid is responsive even if there was a bid defect because such a defect constitutes a minor irregularity.

Even if there was a failure to submit the forms by Mid-Atlantic, which there was not, a Procurement Officer could consider such an omission a minor irregularity. The second ground is denied.

The third ground of the protest is that Mid-Atlantic's bid MBE requirement was not based on the total of all task orders. However Mid-Atlantic's bid submission for the MBE requirement was based upon the contract award amount of \$10 million and was in compliance with the MBE requirement of the contract. (Exhibit 1 at GI-4, Paragraph 3). Exhibit 2 reflects minutes of a Pre-Bid meeting where there were questions of Contractors. On page 5 of 12 in Exhibit 2 there is a question #8, "Must each sample task comply with the MBE goals in addition to the aggregate total?" The "Answer: The MBE goal is based on the total contract award." Thus, Mid-Atlantic did comply with the MBE provision.

Southern's fourth protest states that the NAICS codes provided by Mid-Atlantic are "questionable". No reason was given so no defects with the codes are ascertainable.

Southern's four (4) grounds of protest against Mid-Atlantic are denied because there is insufficient basis to find the Mid-Atlantic bid non-responsive.

The first ground of protest for the bid submitted by BCI alleged by Southern is that BCI's submission used the wrong MBE certification number for Acorn Supply. BCI wrote "Acorn Supply" in the appropriate section of its MBE submission, but used the wrong certification number (89-078). (Exhibit 12). The Board has held that "if sufficient information is present in the bid documents to determine the missing information, the bid will be deemed responsive." Blastech Enterprises, MSBCA 2454, _____MSBCA_____ (February, 2005). There was sufficient

information for the MAA to ascertain the correct certification number because the agency was able to get the correct number from the MBE website. (<http://mbe.md.state.md.us>) (Exhibits 12 and 13). The certification number was incorrect for Acorn Supply, however, the agency considered this to be a minor irregularity because the full name of the entity was listed on Part 2 - MBE Participation Schedule and the certification number was thus ascertainable.

The second ground of protest by Southern is that BCI's submission on BCI's MBE participation was not based on the total of all task orders. BCI's MBE submission was based on the amount of the "total contract award" of \$10 million. As was discussed previously, at the Pre-Bid meeting Contractors were allowed to ask questions about the contract. In Exhibit 2 on page 5 of 12 question 8 states, "8. Must each sample task comply with the MBE goals in addition to the aggregate total? Answer: The MBE goal is based on the total contract award." Further, in question 10 it states, "10. When we submit our MBE forms that are required with the bid, should they reflect the total contract amount of \$10M or should they only reflect the total for the 5 tasks? Answer: See Question #8". Thus, BCI complied with MBE provisions as required. Southern's two grounds of protests against BCI's bid submission are denied.

Southern filed two (2) grounds of protests against Stancliff's bid submission. The first protest ground is that Stancliff, a Maryland corporation, did not affix a corporate seal to its bid. When a document requires a corporate seal, it is sufficient to place the word "seal" "adjacent to the signature of the person authorized to sign the document on behalf of the corporation." *Maryland Annotated Code, Corporations & Associations, Section 1-304.* The contract was signed by the President, an officer of the corporation, with the "seal"

adjacent to the corporate signature, and the bid forms contained Stancliff's corporate seal. (Exhibit 14).

In the second protest, Southern alleges that Stancliff did not submit signed receipts for the bid addenda. In Exhibit 14, Stancliff acknowledged the addenda in the bid proposal form, Section 4 and sent an acknowledgment of receipt to the procurement officer. Notwithstanding, Stancliff's compliance with acknowledging receipt of the addenda, even if the forms were not properly submitted, the procurement officer could have considered the non-compliance to be a minor irregularity as the Board held in the Bramble decision. The two (2) protests by Southern against Stancliff are denied.

The additional protests by Southern of additional bidders' submissions are moot.

The bids of Mid-Atlantic, BCI, and Stancliff are all responsive submissions. Southern's protests are denied.

Southern appealed by letter of August 5, 2011. However, in the appeal, Southern alleges that Stancliff changed its MBE participation plan. (Exhibit 8). This is a new issue not addressed in the Procurement Officer's final decision of July 19, 2011(Exhibit7) and as such there is no agency decision on this issue from which an appeal can be taken. Concrete General, Inc., MSBCA 2587, _____MSBCA _____ (February 7, 2008). Further, the Board lacks jurisdiction on this issue because no action has been taken by the agency as is required by COMAR 21.10.07.03(C). Southern's appeal on this ground is therefore dismissed.

The appeal also questions MAA's decision to award just three (3) contracts. The provisions of the Solicitation provided that MAA may make awards to "up to four contractors." (Exhibit 1). The agency had an option to select four (4) or fewer bidders. A question or protest about the terms or provisions of a solicitation must come before the bid opening. See COMAR 21.10.02.03(A).

In another matter, the Board is governed by the Code of Maryland Regulations (COMAR), and as such, all Appellants who file an appeal to the Board are notified by letter advising that COMAR 21.10.05.03 applies. The provision states:

An individual may appear before the Appeals Board in person, or may be represented by an attorney at law in Maryland. Corporation, partnerships and joint ventures shall be represented by an attorney at law licensed in Maryland.

The Board notes that Southern failed to retain counsel as required by the stated provision, despite the notice given by the Board in its initial acknowledgement. Several recent Board decisions have sought to remind prospective appellants of this obligation by dismissing corporate appeals without benefit of professional legal counsel. Pipes & Wires Service, Inc., MSBCA 2709, ____ MSBCA ____ (2010); Mumsey's Residential Care, Inc., MSBCA 2702, ____ MSBCA ____ (2010); Okojie Group, Inc., MSBCA 2700, ____ MSBCA ____ (2010).

For all of the reasons set forth above, the appeal by Southern is hereby denied.

Wherefore it is Ordered this _____ day of December, 2011 that the above-captioned appeal is DENIED.

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 2778, appeal of Southern Improvement Company, Inc. under MAA IFB No. MAA-CO-18-00.

Dated:

Michael L. Carnahan
Deputy Clerk