

Docket No. 2134	Date of Decision: 8/5/99
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under MAA Contract No. MAA-CO-99-018	
Appellant/Respondent: V & S Contractors, Inc. Maryland Aviation Administration	

Decision Summary:

Responsiveness - Omission of a 90 day extension provision (authorizing extension of the time for acceptance of bids for up to 90 days without seeking approval of the surety) in a bid bond required by the invitation for bid is a material defect rendering the bid non-responsive.

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of :
: V&S CONTRACTORS, INC. :
: MSBCA Docket No. 2134 :
: Under MAA Contract No. :
MAA-CO-99-018 :
APPEARANCE FOR APPELLANT Robert Fulton Dashiell, Esq.
Baltimore, MD
APPEARANCE FOR RESPONDENT Joy R. Sakamoto-Wengel
BWI Airport, MD
APPEARANCE FOR INTERESTED
PARTY P. FLANIGAN & SONS, INC. Thomas N. Biddison, Esq.
Gallagher, Evelius & Jones
Baltimore, MD

OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on Appellant V&S Contractor, Inc.'s (V&S) appeal of the denial of its bid protest of the Maryland Aviation Administration's (MAA) rejection of its bid on the grounds that V&S submitted a non-responsive bid because its bid bond failed to contain required material terms. Following a hearing on August 3, 1999, while still on the record, the Board informed the parties that the appeal was denied, this opinion to follow. Later on the day of hearing, this Board received a faxed¹ Motion for Reconsideration from the Appellant. The Board has considered the arguments made at the hearing on August 3, Appellant's Motion for Reconsideration and the record herein, and finds as follows.

¹Appellant has been informed that the Board does not accept for filing pleadings sent by facsimile. Since the Board was informed that a signed original of the motion is in the mail, the faxed copy was reviewed for purposes of this decision.

Findings of Fact

1. On March 9, 1999, the MAA issued an invitation for bids ("IFB") for the above-captioned contract. The IFB sought supervision, labor, materials, equipment, tools, and all associated work necessary to construct the Midfield Cargo Communications Duct Bank at Baltimore Washington International Airport ("BWI"). The IFB contains MAA's Standard Provisions for Construction Contracts (Vol. 1, Dec. 1993).
2. A pre-bid conference was held on April 7, 1999 at which the MAA contract administrator advised that contractors submitting bids were required to use the MAA's bid documents, including MAA's bid bond form. Minutes of the meeting, and this instruction, were sent as part of an Addendum No. 1 to V&S and all other known prospective bidders.
3. The bid opening was held on May 3, 1999. Based on bid tabulation only, V&S was the apparent low bidder, with P. Flanigan & Sons ("Flanigan") the apparent second low bidder.
4. A review of the bid submitted by V&S revealed that V&S failed to use either the MAA bid bond form or a bid bond form that was similar in all material respects, and the procurement officer, by letter dated May 6, 1999, rejected V&S's bid. As grounds for the rejection, the procurement officer (quoting from the Addendum No. 1 requiring that the MAA bid bond forms be used) stated that the substituted bid bond form did not include the following language, which is included in the MAA Bid Bond and required to be completed:

The Surety executing this instrument hereby agrees that its obligation shall not be impaired by any extension(s) of the time for acceptance of the bid that the Principal may grant to the State, notice of which extension(s) to the Surety being hereby waived;

provided that such waiver of notice shall apply only with respect to extensions aggregating not more than ninety (90) calendar

days in addition to the period originally allowed for acceptance of the Bid.²

As a result of the failure of the bid bond to contain this language, the procurement officer found pursuant to COMAR 21.01.02.01 (78) and 21.06.02.03B that there was a material deviation from the requirements of the IFB and that therefore the bid must be rejected as non-responsive.

5. This appeal timely followed.

Decision

Under Maryland law, if the price of a bid is more than \$100,000, the bidder must include a bid bond with its bid. Md. Code Ann., State Fin. & Proc. §13-207. The MAA requires all bidders to submit a bid bond that conforms in all material respects to the MAA bid bond form. The Procurement Officer determined that V & S' bid was non-responsive because the bid bond submitted did not conform in all

²The preceding sentence in the Bid bond states:

NOW, THEREFORE, if the Principal, upon acceptance by the State of its bid identified above, within the period specified herein for acceptance (ninety(90) days, if no period is specified), shall execute such further contractual documents, if any, and give such bond(s) as may be required by the terms of the bid as accepted within the time specified (ten (10) days if no period is specified) after receipt of the forms, or in the event of failure to so execute such further contractual documents and give such bonds, if the Principal shall pay the State for any cost of procuring the work which exceeds the amount of its bid, then the above obligation shall be void and of no effect.

material respects to the bid bond required by the MAA, in that the V & S bid bond failed to include the provision authorizing extension of the time for

acceptance of bids for up to 90 days without seeking approval of the surety.³

Md. Ann. Code, State Fin. & Proc., §11-101(s) defines a responsive bid as being one that conforms in all material respects to the invitation for bids. To be awarded a procurement contract, the bidder must be responsible and its bid must be responsive. COMAR 21.01.02.01 (78) defines "responsive" as "a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements of the invitation for bids."⁴ Md. Code Ann., State Fin. & Proc., § 13-206 states that "[a] procurement officer *shall* reject a bid., if the procurement officer determines that., the bid is non responsive..." (emphasis added).

General Provision -2.01 of the Invitation for Bids states,

³Counsel for the Interested Party suggested at the hearing that Appellant also failed in its bid documents to express willingness to be bound by the standard provisions. This issue is not before us, no protest having been filed by the Interested Party on the question, and the procurement officer not having raised this issue *sua sponte*.

⁴Responsiveness is determined from the face of the bid documents submitted. Pinnacle Electric Systems, Inc., MSBCA 1967, 5 MSBCA ¶404 (1996). It does not matter what could or may have occurred, but only that there is the potential for the surety to refuse to extend the bond.

"[u]nless otherwise provided in the invitation for bids, bid prices are irrevocable for 90 days following bid opening." Therefore, by the very terms of the invitation for bids, the surety on the bid bond is only bound for 90 days unless expressly provided otherwise. If the MAA cannot make an award within 90 days, the MAA bid bond form acts to bind the surety for up to 90 days over and above the initial 90 day period for acceptance of the bid. Absent the provision, the MAA would be required to have bidders submit new bid bonds if the bids could not be accepted within 90 days. The Appellant argues strenuously that the bid specification (see fn. 2), through use of the word "may", makes any price extension at the election of the contractor. Without commenting on the substance of this argument, the Board's decision is predicated on the failure of the substitute bond submitted by Appellant to bind the surety in cases of extension.

The 90-day extension provision is a material term and must be expressly stated in the bid form. This Board's decision in the Appeal of Keller Brothers, Inc./Acubid Excavation, Inc. Joint Venture, MSBCA 1946, 5 MSBCA ¶ 395 (1996) supports MAA's rejection of V & S' bid as non-responsive. The Board determined in the Keller decision that the use of the same AIA bid bond form submitted by V & S was materially non-responsive because it did not include the required language relating to the extension of the bid. Thus, in Keller, the Maryland Department of General Services was required to reject the appellant's bid as non-responsive. The Keller case is on all fours with the instant case and it is controlling.

Here, because the AIA bond does not include the above-referenced language, and such language is a material term of the bond, the AIA bond submitted by V & S does not bind the surety to all material terms contained in the MAA's bond. As we found in Keller, the 90-day extension provision of the State's bid bond

form is a substantive requirement, the omission of which cannot be waived by the Procurement Officer.

Were the procurement officer to accept the AIA bond without the 90-day extension provision from the State's bid bond form, V&S would be allowed the proverbial "two bites at the apple." H.A. Harris, Inc., 1 MSBCA 1109, 1 MSBCA ¶38 (1983) at 4-5; Madigan Construction Company, Inc., MSBCA 1350, 2 MSBCA ¶162 (1987) at p. 5.

V & S acknowledges that the AIA bid bond it submitted did not contain the language requiring the surety to extend without notice and approval the time period to accept the bid. However, V & S contends that the fact that the form identifies the contract number and the name of the contract explicitly binds "the Principal and the Surety to all the terms of the contract documents, including those relating to the duration or extension of the bid bond itself. Silence is acceptance." Therefore, V & S' argument continues, the surety is bound by that provision.

The Board has rejected the same contention in Corun & Gatch, Inc., MSBCA 1490, 3 MSBCA ¶240 (1990), relying on its decision in H.A. Harris, Inc., MSBCA 1109, 1 MICPEL ¶38 (1983). In Harris, like Corun & Gatch, the surety had signed a blank bid bond which did not contain a penal sum amount, although the specification documents required a bond in the amount of 5% of the bid. The Board found in both cases that the surety's intention to be bound must be evidenced on the face of the bid document. See also, Aepco, Inc., MSBCA 1977, 5 MSBCA ¶415 (1997).

A material provision such as that allowing the MAA to extend the bid time without the surety's consent cannot be implied in the contract. The mere referencing of the contract name and number does not provide clear and convincing evidence that the surety is bound to keep the bid bond in effect during a 90-day extension of the

acceptance period. See, e.g., Maryland Port Administration v. Brawner Contracting Company, Inc., 303 Md. 44, 56 (1985) (court will not imply terms into a contract that were not included in the contract "unless there is clear.., and convincing.., proof of a mutual understanding and bargain that has not been accurately expressed.")

Accordingly, because the 90-day provision in the MAA bid bond form is a material provision and V & S failed to include that provision in the bid bond it submitted with its bid, the MAA was required to and correctly rejected V & S' bid as non-responsive.

For the foregoing reasons, it is this ___ day of August, 1999, hereby ordered that the appeal of V&S Contractors Inc. and Appellant's Motion for Reconsideration are denied.

Dated:

Candida Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

Randolph B. Rosencrantz
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 2134, appeal of
V&S Contractors, Inc., under Maryland Aviation Administration,
Contract No. MAA-CO-99-018.

Dated:

Mary F. Priscilla
Recorder