

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Collinson,)
 Inc.)
)
) Docket Nos. MSBCA 2591
Under State Highway)
 Administration)
 Contract No. XX3365185)

APPEARANCE FOR APPELLANT: Michael H. Davis, Esq.
 Venable, LLP
 Towson, Maryland

APPEARANCE FOR RESPONDENT: Scot D. Morrell
 Assistant Attorney General
 Baltimore, Maryland

OPINION BY CHAIRMAN BURNS

Appellant appeals from a final decision of the Maryland State Highway Administration which denied its bid protest regarding an Invitation for Bids for the modification and/or removal of existing highway signs, and the installation of new highway signs.

For the reasons that follow this matter is to be returned to the Procurement Officer.

Findings of Fact

1. On or about May 7, 2007 Respondent, the Maryland State Highway Administration (SHA) issued Invitation for Bids (IFB) under SHA Contract No. XX3365185.

2. The SHA is a part of the Maryland Department of Transportation and publicly states that its mission is to "[e]fficiently provide mobility for our customers through a safe, well-maintained and attractive highway system that enhances Maryland's communities, economy and environment."
3. The purpose of the IFB was to procure a contractor to engage in the modification and/or removal of existing highway signs, and the installation of new highway signs, within a particular geographic area of Maryland (including Anne Arundel, Baltimore, Calvert, Caroline, Cecil, Charles, Dorchester, Harford, Kent, St. Mary's, Somerset, Talbot, Queen Anne's, Wicomico and Worcester Counties).
4. The IFB required bidders to submit their bids on a proposal form which included a Schedule of Prices.
5. The first 17 pages of the 18 page-long Schedule of Prices form provided five columns under specific headings.
6. The first three headings on each of the first 17 pages from the Schedule of Prices were entitled: "ITEM NO. CCS NO."; "APPROXIMATE QUANTITIES"; and "DESCRIPTION OF ITEM" and "SECTION", respectively.
7. These first three headings were filled in by the SHA for purposes of providing bidders with necessary information for bidding under each "ITEM NO. CCS NO".
8. The final two headings on each of the first 17 pages from the Schedule of Prices were entitled: "UNIT PRICE" "DOLLARS" "CENTS"; and, "AMOUNTS" "DOLLARS" "CENTS".
9. These final two headings were to be filled in by the bidder in order to complete their bid.
10. As noted, the first three columns were supplied with relevant bid information and the final two columns were to be completed by the bidder with unit prices and amounts (both columns to be completed in dollars and cents).

11. Page 17 of the Schedule of Prices listed four separate items to be bid upon: 1) "LINEAR FEET OF GALVANIZED STEEL BEAMS (W6X12)"; 2) "LINEAR FEET OF GALVANIZED STEEL BEAMS (W8X21)"; 3) "LINEAR FEET OF GALVANIZED STEEL BEAMS (W10X26)"; and, 4) "LINEAR FEET OF GALVANIZED STEEL BEAMS (W14X30)".
12. On page 18 of the Schedule of Prices, bidders were to provide the "AGGREGATE AMOUNT AT UNIT PRICES" for Bid Items 1001-1003, 5001, 6001-6012, and 8001-8076.
13. The Item No.'s included on page 17 of the Schedule of Prices - 8073, 8074, 8075 and 8076 - were included on page 18 of the Schedule of Prices and the amount for each Item No. was, therefore, required to be included as part of the "aggregate amount" on page 18 of the Schedule of Bid Prices.
14. A public bid opening was held on or about August 9, 2007.
15. At the time of bid opening, Appellant Collinson, Inc. (Collinson) was announced as the apparent low bidder with a bid in the amount of \$2,982,764.50. Midasco, LLC submitted the second lowest bid in the amount of \$3,088,430.00 and Griffen Sign Company, Inc. submitted the third lowest bid in the amount of \$3,596,400.
16. It was eventually determined by SHA that the bid provided by Collinson at bid opening omitted page 17 of the 18 page Schedule of Prices.
17. Without page 17 of the Schedule of Prices, SHA was unable to determine either the individual unit prices or the aggregate amount Collinson was to have bid on for Bid Items 8073, 8074, 8075 and 8076.
18. The total bid price written by Collinson on page 18 of the Schedule of Prices was \$2,982,764.50.
19. The total price of the prices provided in Collinson's bid (the total of prices for the items provided by Collinson for

pages 1-16 of the Schedule of Prices) was \$2,907,264.50, a difference of \$75,500.00.

20. It was and is arithmetically impossible to determine the intended pricing for the "Unit Price" and the "Amount" for Collinson's bid for Item Numbers 8073, 8074, 8075 and 8076 based on the bid documents submitted by Collinson at bid opening.
21. On or about August 16, 2007, Alan Krimm of SHA's Contract Awards Team informed a representative of Collinson that Collinson's bid had been found to be not responsive because of the failure to furnish page 17 of the Schedule of Prices with its bid.
22. Mr. Krimm is not the Procurement Officer in this matter.
23. Mark J. Flack was the Procurement Officer for this contract.
24. On or about August 16, 2007, discussions were held between Mr. Krimm and Collinson concerning the possibility of dealing with the situation of the missing page and resulting missing bid items.
25. Mr. Krimm was not the Procurement Officer in this matter and did not have the authority to negotiate or make any valid change in the procurement process or determination of the responsiveness or non-responsiveness of Collinson's bid herein.
26. Collinson was informed on or about August 16, 2007, that its bid had been found by SHA to be non-responsive and that Collinson would not, therefore, be awarded this contract.
27. On or about August 16, 2007, Collinson filed a protest of the rejection of its bid as non-responsive, the letter serving "as notice of Collinson's protest of the rejection of its bid."
28. In the protest letter, Collinson claimed that:

Under the Code of Maryland Regulations,
the State has the authority to waive

technical defects or minor irregularities in bids if such waiver would be in the State's best interest. The State may also permit a bidder to cure any deficiencies in the bid.

29. Collinson further noted in its protest letter that:

The page that was mistakenly omitted due to a copying error cannot be construed to be more than a minor irregularity or deficiency in Collinson's bid since that page contained only the cost breakdown of four items. The bid as submitted to the State included the page containing Collinson's total bid amount upon which the State based its low bid determination. The omission of page 17 of the bid did not in any way affect the total amount of Collinson's bid or the State's lowest competitive bid determination. It is very clear that waiving this bid would be in the State's best interest because Collinson remains the low bidder on the project. Therefore, Collinson, Inc. respectfully requests that the State reconsider its decision to reject Collinson's bid.

30. As part of its protest, Collinson included a copy of page 17 of the Schedule of Bids which contained amounts for the four bid Items which totaled \$75,500.00.
31. Collinson filed a "follow-up" letter with SHA on or about August 27, 2007, in which Collinson sought to "provide you with a better understanding of why Collinson has filed this bid protest".
32. In the August 27, 2007, letter, Collinson claimed that its proposal as submitted at bid opening did indeed contain page 17 of the Schedule of Prices, submitting an Affidavit to that effect dated August 24, 2007 from Gailynne Ferguson, an administrative assistant employed by Collinson to support its position.
33. According to the Affidavit supplied by Ms. Ferguson, she prepared the actual bid for delivery by Collinson and

reviewed it to insure "that all pages of the bid were included in the binder, in order".

34. According to Collinson, Ms. Ferguson gave the bid to Tom Collinson, Jr., the son of the company's owner, who hand delivered it to the SHA on August 9, 2007 for bid opening.
35. Collinson, Inc. is listed in documents in this case as having an address in Glenmoore, Pennsylvania.
36. In the August 27, 2007 letter, Collinson offered to perform the contract for \$2,907,264.50, \$75,500 less than the amount of \$2,982,764.50 contained on page 18 of the Schedule of Prices by Collinson.
37. This amount of \$75,500.00 reflects the totals from the four bid items included on page 17 of Collinson's Schedule of Prices page 17.
38. On or about September 24, 2007, the Procurement Officer issued a final decision regarding Collinson's protest(s).
39. The Procurement Officer denied part of Collinson's protest based on timeliness grounds:

On August 27, 2007 (eighteen days after bid opening), Collinson provided a "follow up letter" to its original protest. In this second letter, Collinson for the first time provides an additional basis for its protest. In its first protest, Collinson admits that page 17 was "mistakenly omitted due to a copying error"; in its second protest, Collinson now claims that the bid proposal provided to SHA actually contained Page 17 of the Schedule of Prices. Collinson provided an affidavit of its administrative assistant that prepared the bid indicating that the proposal was complete.

SHA denies this additional grounds [sic] for protest set forth in the August 27th letter on timeliness grounds. The procurement law requires that a bid protest must be filed no later than seven days after "the basis of the protest is known or should have been known." COAMR 21.10.02.03. Further, a protest

received by the procurement officer after the seven day time limit may not be considered. COMAR 21.10.02.03C. Collinson was informed that Page 17 was missing on August 16, 2007. Collinson filed a protest on the same day, provided a completed page 17 and requested the omission of Page 17 be waived as a minor irregularity. Eleven days following notification of the missing page, Collinson set forth a new basis of protest, namely that Collinson did not omit the page and that the page was provided at the bid opening.

At the very latest, Collinson could have or should have known of the basis of its protest that it did not provide Page 17 on August 16, 2007, the date Collinson was notified about the missing page. Thus, in order for a protest based on the allegation that Collinson actually did provide Page 17 to be timely, such a protest had to be filed no later than 7 days after the notification, August 25, 2006[sic]. Collinson waited until August 28th to provide this basis for its protest, some three days late for a timely protest. In light of the fact that the basis for such a bid protest by Collinson was late, SHA hereby denies this additional ground for the bid protest.

40. The procurement officer also noted that:

In its second bid protest, Collinson again requests that the omission of Page 17 (to the extent [sic] it was omitted) be treated as a technical or minor irregularity that should be waived under COMAR 21.05.02.012. For the reasons set forth above, that request is denied.

41. The Procurement Officer denied "both the bid protests by Collinson."

42. Collinson noted a timely appeal from the Procurement Officer's final decision with an Appeal filed with the Maryland State Board of Contract Appeals (Board) on October 4, 2007.

43. Respondent SHA filed an Agency Report of November 1, 2007.
44. Appellant filed Comments to the Agency Report of November 20, 2007.
45. Respondent filed Rebuttal to Appellant's Comments to the Agency Report on December 6, 2007.
46. A hearing was held before the Board on January 24, 2008.

Decision

The Procurement Officer found that a portion of Appellant Collinson's August 27, 2007 letter contained an additional basis for protest. This basis, according to the Procurement Officer, was Collinson's claim that the bid proposal as submitted to Respondent SHA at bid opening actually contained all required pages, including Page 17 of the Schedule of Prices. The Procurement Officer found that this claim was an additional ground for protest which Collinson knew or should have known existed on the date that Collinson was notified as to the missing Page 17 and the finding of bid non-responsiveness - August 16, 2007. Since a protest must be filed within seven days of the date the basis for protest is known or should have been known¹, COMAR 21.10.02.03B, the Procurement Officer ruled that this protest ground was untimely and could not be considered.²

Were the issues contained in the second letter of Collinson new protest grounds, the Procurement Officer would be correct in rejecting at least part of the letter on timeliness grounds. The Board finds, however, that the second letter sent by Collinson dated August 27, 2007 did not add any new protest

¹ These are calendar days, not business days. See COMAR 21.01.02.01(32).

² Actually, the Procurement Officer's letter states the date by which the protest ground should have been filed was "August 25, 2006." This date is clearly incorrect. The year should have been 2007. Additionally, seven days from the date of the notification to Collinson - August 16, 2007 - would be Thursday, August 23, 2007, not Saturday August 25, 2007. Collinson filed its second letter on August 27, 2007, eleven days after the August 16, 2007 notification by SHA. The correct date noted by the Procurement Officer in his letter, therefore, should have been August 23, 2007.

grounds to the protest filed no August 16, 2007, but, rather, merely provided additional information and argument to supplement the August 16, 2007 protest letter of Collinson.

The Procurement Officer should not, therefore, have denied any of the August 27, 2007 letter on timeliness grounds. Since the Procurement Officer did so, this matter should be returned to the Procurement Officer for further consideration of Collinson's protest.

Under COMAR 21.10.02.03.B, a protest must be filed "not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." The term "filed" means receipt by the Procurement Officer. COMAR 21.10.02.03.C. A protest received by a procurement officer after the time limits described in COMAR may not be considered. *Id.*

In this case, Collinson filed a bid protest the day it was told that its bid had been rejected as non-responsive - August 16, 2007. In that letter, Collinson noted that the letter served "as notice of Collinson's protest of the rejection of its bid."

In that protest, Collinson noted that:

"Under the Code of Maryland Regulations, the State has the authority to waive technical defects or minor irregularities in bids if such waiver would be in the State's best interest. The State may also permit a bidder to cure any deficiencies in the bid. See COMAR 21.05.02.12.

Collinson noted in the August 16, 2007 protest letter that "[t]he omission of page 17 of the bid did not in any way affect the total amount of Collinson's bid or the State's lowest competitive bid determination."

The August 16, 2007 letter notes that Collinson had been informed on August 16, 2007 "that page 17 of its original bid had been omitted."

In summary, the August 16, 2007 letter from Collinson

was protesting the rejection of its bid by the SHA, particularly the finding by SHA that the absence of Page 17 of the Schedule of Prices from Collinson's bid submission rendered Collinson's bid non-responsive.

Collinson's August 16, 2007 protest concerns the absence of Page 17 from its bid. Whether that absence was occasioned by Collinson's failure to provide the page with its bid or SHA misplacing the page, the protest issue raised by Collinson on August 16, 2007 involves the rejection of its bid by SHA and Collinson's requests regarding curing or waiving the missing page and SHA's response to the missing page. Collinson very specifically requested "that the State reconsider its decision to reject Collinson's bid."

In the August 27, 2007 letter, Collinson reiterated this protest ground and added additional legal and factual information in support of the August 16, 2007 letter of protest. Collinson did not, however, initiate any new protest grounds in that August 27, 2007 letter and the Procurement Officer erred in viewing the August 27, 2007 letter as containing any new grounds for protest and in rejecting any part of the August 27, 2007 letter on timeliness grounds.³

Frankly, it is not clear that the Procurement Officer's error in rejecting part of the August 27, 2007 letter on timeliness grounds will actually impact the Procurement Officer's initial rejection of Collinson's protest. It is, however, clear that since the second letter did not raise any new grounds of protest, no part of that letter should have been rejected on timeliness grounds and the Procurement Officer should have considered the entire letter on the merits before rendering a decision on Collinson's protest, rather than rejecting a part of

³ Since the Board finds no new grounds for protest, only legal and factual argument, in the August 27, 2007 letter, there is no issue as to timeliness pursuant to COMAR 21.10.02.3B.

that August 27, 2007 letter for reasons of timeliness.

Section 15-218 of the State Finance and Procurement Article provides that upon receipt of a protest, a procurement officer shall review the substance of the protest, *Id. at §15-218(b)* and shall resolve the protest - either by coming to an agreement among the parties, by wholly or partly denying the protest, or by wholly or partly granting the relief sought by the protestor, *Id. at §15-218(c)*.

In order for this statutory process to take place correctly and fairly, this matter should be returned to the Procurement Officer to review Appellant's protest in light of the decision contained herein.

The Board does not reach a decision on any of the other matters and issues raised herein, because such decision(s) would, in light of this opinion, be premature.

This matter is, therefore, remanded to the SHA Procurement Officer consistent with this decision.

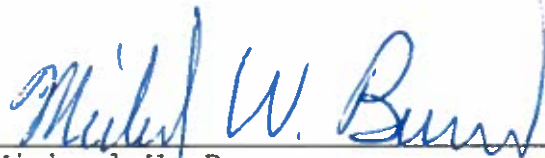
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Under SHA Contract No. XX3365185)

Docket No. MSBCA 2591


ORDER


Wherefore, it is Ordered this 7th day of March, 2008 that the above-captioned matter is remanded to SHA consistent with this decision.

Dated: 7 March 2008


Michael W. Burns
Chairman

I Concur:


Michael J. Collins
Board Member


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 2591, appeal of Collinson, Inc. under SHA Contract No. XX3365185.

Dated: *March 7, 2008*



Michael L. Carnahan
Deputy Clerk