

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

**In the Appeal of Rustler Construction, Inc.** \*

**Under** \*

**Maryland State Highway Administration**  
**Contract No. CA4135370**

**Docket No. MSBCA 3075**

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**OPINION AND ORDER BY BOARD MEMBER DOORY**

Based upon the undisputed material facts, the Board concludes that the Procurement Officer's ("PO") decision to deny Appellant's bid protest based on its allegation that the responsive bidder who submitted the lowest price bid with the shortest schedule was not a responsible bidder who was capable of performing the scope of work set forth in the solicitation was correct. The PO's determination of responsibility of the bidder it recommended for award was within its lawful discretion, Appellant made no allegation of bad faith, and the determination was not arbitrary, capricious or unreasonable.

**UNDISPUTED MATERIAL FACTS**

On October 24, 2017, the State Highway Administration ("SHA") issued Invitation For Bids ("IFB") No. CA4135370 - MD 2/4 From Fox Run Boulevard to MD 231 (Phase II) in Calvert County. The Project Description ("the Project") as set forth in the **SPECIAL PROVISIONS** of the IFB is to reconstruct MD 2/4 from Fox Run Boulevard to MD 231 by widening to provide three through lanes, a continuous auxiliary lane, and a bike lane in each direction with a raised median. A 5-foot sidewalk is also to be provided on both sides of MD 2/4 and signal upgrades are slated to be made at major intersections. To expedite work on the Project, the IFB uses a two-part pricing method: the evaluated bid price consists of an A (Cost) + B (Time) scheme with a daily incentive/disincentive amount of \$16,200. The pricing scheme is fully set forth in the **SPECIAL PROVISIONS** of the IFB:

### **A + B ADJUSTED BID WITH INCENTIVE – DISINCENTIVE**

The Administration desires to expedite construction on this Contract to minimize the inconvenience to and improve safety for the traveling public and to reduce the time of construction. To achieve this, the Administration will award this Contract to the responsible and responsive bidder whose bid is the most favorable evaluated bid price. The evaluated bid price will be an A + B (or Cost + Time) adjusted bid. The A value will be the aggregate amount of the Proposal Form Packet. The B value will be determined by multiplying the calendar days provided by the Contractor in the Proposal Form Packet by \$16,200 per calendar day, which is the daily loss of public benefit. .... For the purposes of determining the calendar days for this Contract, the Contractor shall consider that the Administration will issue Notice to Proceed on or before **April 3, 2018**. The calendar days provided by the Contractor will be added to the Notice to Proceed Date to determine the Contract Time. The Contractor with the lowest total value of A + B will be considered the most favorable evaluated bid. The Contract award amount will be the aggregate amount in the Proposal Form Packet. All payments will be based on actual quantities and bid unit prices.

To further expedite construction on this Contract to minimize the inconvenience to and improve safety for the traveling public and to reduce the time of construction, an Incentive – Disincentive provision is established for the Contract. The total Incentive payment shall not exceed **\$486,000**. There shall be no limitation on the Disincentive deduction. (emphasis in original).

Eight bids were submitted and opened as scheduled per Addendum No. 7 to the IBF on January 18, 2018. When the bids were tabulated, Milani Construction, LLC (“Milani”) was the apparent low bidder with a total bid price of \$27,711,900, and a schedule of 256 days to complete. Total Civil Construction & Engineering, LLC (“TCCE”) was the next lowest bidder at \$29,614,481.36, with a schedule of 463 days to complete; and Rustler Construction, Inc. was next in line at \$34,516,805.30, with a schedule of 730 days to complete.

Rustler filed a bid protest on January 23, 2018. Therein, Rustler asserts that the apparent low bidder, Milani’s completion timeframe of 256 calendar days cannot possibly be met as evidenced by the bid documents and standard industry production rates. Rustler contended that the IFB called for Notice to Proceed on April 24, 2018, which would equate to a completion by Milani by January 6, 2019. Rustler contends that the completion date cannot be met given the

phasing of construction with significant paving work in the final phase, and the assumption provided by Addendum No. 7 that utility relocation work will be done by October 2018. Rustler's protest goes on to address the bid of TCCE and its proposed completion date of 463 calendar days or by July 31, 2019. Rustler contends that although TCCE's bid does correct for Phase 3 seasonal paving, that it does not provide for actual and responsible production rates. Rustler also suggests that the lack of TCCE's history of performing contracts for SHA is also a responsiveness issue. Rustler concludes that its proposed schedule of 730 calendar days is realistic based on production rates it has recently achieved on other projects and that it is working in the area of the Project, which lends credence to its schedule as being based on area conditions and utility scheduling.

On February 15, 2018, the PO issued his final decision denying Rustler's bid protest. Therein, the PO deemed Rustler's protest of Milani as being a responsible bidder as moot since the PO rejected Milani's bid as being non-responsive. As to Rustler's contentions regarding TCCE, the PO responded:

Total Civil is committing extra manpower and resources to complete the project by July 31, 2019, i.e., within its 463-day completion schedule. Total Civil has assured SHA that projects of this scope and magnitude are well within its capabilities and has referenced large-scale projects that it has completed. SHA has confirmed through its discussions that Total Civil is capable of completing the project within its 463-day completion schedule. After discussion with Total Civil, SHA has therefore determined Total Civil has the capability in all respects to fully perform the contract requirements, and the integrity and reliability that shall assure good faith performance.

On February 26, 2018, Rustler filed its Notice of Appeal with this Board which was docketed as No. 3075. On March 5, 2018, TCCE filed a Motion for Summary Decision and Motion to Shorten Time for Responses thereto. The Board issued an Order, dated March 5, 2018, which required all Responses to TCCE's Motion to Shorten Time be filed by March 8, 2018. No opposition being filed thereto, the Board granted TCCE's Motion to Shorten Time and ordered that Rustler

and SHA respond to its Motion for Summary Decision by March 19, 2018, that TCCE's and SHA's Replies to Milani's Response were due by March 21, 2018, and that TCCE's and Rustler's Replies to SHA's Response to TCCE's Motion to Dismiss by March 22, 2018.

On March 19, 2018, Rustler filed its Opposition to TCCE's Motion for Summary Decision. The cover letter accompanying it states that the Affidavit of Siamak Salehi that was enclosed with the Motion is unsigned, but that a signed affidavit would be filed soon.<sup>1</sup> On March 22, 2018, TCCE filed its Reply to Rustler's Opposition to its Motion to Dismiss. On March 22, 2018, the Board issued a Scheduling Order that a hearing be held on TCCE's Motion for Summary Decision and SHA's Motion for Summary Decision on April 26, 2018. On April 17, the Board received a letter from the SHA notifying it that the SHA Administrator had determined that execution of the contract without delay was necessary to protect substantial State interests in accordance with COMAR 21.10.0.11, and that execution of the contract would occur on April 20, 2018 in order to meet the scheduled April 24, 2018, Notice to Proceed. A hearing on the Motions for Summary Decision was held on April 26, 2018, as scheduled.

#### **SUMMARY DECISION STANDARD**

In deciding whether to grant a Motion for Summary Decision the Board must follow COMAR 21.10.05.06D(2):

The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor or the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See, Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726

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<sup>1</sup> The signed Affidavit of Mr. Salehi was not filed with the Board until May 2, 2018.

(1993). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Id.* at 737-738. While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Clea v. City of Baltimore*, 312 Md. 662, 678 (1988).

## DECISION

Appellant presented no evidence or material facts to support its bald allegations regarding TCCE's responsibility based on production rates and TCCE's not having performed contracts for SHA in the past. The IFB does not set out definitive criteria requirements. COMAR 21.01.02.01B(77) defines "Responsible" as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance." The PO's final decision cites discussions SHA had with TCCE regarding its capability to perform the work per the schedule it proposed and regarding TCCE's past performance of large-scale projects similar to the work called for in the IFB that resulted in the determination that, "Total Civil has the capability in all respects to fully perform the contract requirements, and the integrity and reliability that shall assure good faith performance."

As this Board recently stated in *American Powerzone, Inc.*, MSBCA No. 3017 at 4 (2017):

A procurement officer has discretion and latitude in determining whether or not the bidder has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance. COMAR 21.01.02.01(77). When a procurement officer has reached a determination regarding responsibility based on facts and specified criteria, the Maryland State Board of Contract Appeals ("Board") upholds that decision. *Custom Management Corporation*, MSBCA 1086, 1090, 1 MSBCA ¶28 (1982).

Further, the Board has held that the determination of whether a bidder is responsible is within the sole purview of the agency, and in the absence of a showing of bad faith, this Board will not

interfere with such determinations. *Id.* at 4-5 (citing *Covington Machine and Welding Co.*, MSBCA 2051, 5 MSBCA ¶436 (1998)).

Appellant also presented no evidence of bad faith on the part of the PO in determining TCCE to be a responsible bidder. Appellant, for the first time on appeal, makes a new allegation that the solicitation contained a defect that requires rejection of all bids and that another solicitation must be issued. Since Appellant did not raise this issue in its protest filed with the PO, and the PO did not consider it in issuing the final decision that is the subject this Appeal, the issue of whether rejection of all bids was proper or improper cannot be considered by the Board. *See, Mercier's, Inc.*, MSBCA No. 2629 (2008).

**ORDER**

Based on the foregoing, it is this 8<sup>th</sup> day of May, 2018, hereby:

ORDERED that Respondent's and the Interested Party's Motions for Summary Decision are GRANTED.

\_\_\_\_\_/s/\_\_\_\_\_  
Ann Marie Doory, Esq., Member

I concur:

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\_\_\_\_\_/s/\_\_\_\_\_  
Bethamy N. Beam, Esq., Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
Michael J. Stewart Jr., Esq., 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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3075, Appeal of Rustler Construction, Inc., under Maryland State Highway Administration Contract No. CA4135370.

Dated: 5/8/18

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/s/  
Ruth W. Foy  
Deputy Clerk