

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of A.H. SMITH ASSOCIATED,)
LIMITED PARTNERSHIP)
) MSBCA Docket No. 1516
Under SHA Contract No.)
SM 714-501-571)

September 11, 1990

Responsiveness - Where a bidder omits price information for estimated quantities in an IFB, the Appeals Board will not dispute the procurement officer's discretionary judgment to reject the bid as nonresponsive.

APPEARANCE FOR APPELLANT:

Walter S.B. Childs, Esq.
Blumenthal, Wayson, Downs
and Offutt, P.A.
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APPEARANCE FOR RESPONDENT:

Dana A. Reed
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OPINION BY MR. MALONE

Appellant timely appeals the State Highway Administration's (SHA) procurement officer's final decision denying its bid protest to waive omissions in its bid as a minor irregularity.

Findings of Facts

1. This appeal arises out of an Invitation for Bids (IFB) under SHA Contract No. SM 714-501-571 for road construction in St. Mary's County, MD.

2. The IFB required bidders to submit their bids on a Proposal Form which included a Schedule of Prices. Each page of the form had two block columns and located on the right hand edge of each item was a number line for "Unit Price" and "Amounts", to be filled in using "Dollars . Cts". (Agency Report Exhibit A page 345). The form further required a total price which was the sum of the extended prices.

The IFB also incorporated by reference the SHA's Standard Specifications for Construction and Materials, and the 1988 Supplement to the Standard Specifications. These documents contain paragraphs preceded by "GP" which arise out of regulatory language in COMAR.

3. Appellant in completing the Proposal Form left the price columns blank for item numbers 2007, 2008 and 2009 which were all estimated quantity items.
4. The total price was arithmetically \$3,421,440.50 for Appellant's extended prices for the remaining price columns. However Appellant gave a total price of \$3,687,732.75 on its bid form in the blank for the sum of the extended prices.
5. It is arithmetically impossible to determine the intended amount for the Appellant's bid for item numbers 2007, 2008 and 2009 since both the "Unit Price" and "Amounts" blanks are not completed.
6. Bids were opened on April 17, 1990. Appellant became aware of its failure to complete the blanks for item numbers 2007, 2008 and 2009 on May 11, 1990 and by letter dated May 14, 1990 attempted to have the failure waived as the "irregularities do not change our total bid price." (Relevant text given more fully in Finding of Fact No. #9 below).
7. The total bid prices announced at bid opening were as follows:

A.H. Smith	\$ 3,687,732.75
Corman Const., Inc. (Corman)	\$ 4,247,351.05
The Digges Corp.	\$ 4,490,000.00
Genstar Stone	\$ 4,702,204.80
Danes Ind. Corp.	\$ 4,846,000.00
Williams Const.	\$ 4,990,323.65

8. From the decision by SHA to award the contract to Corman (the next low bidder) Appellant filed a timely protest providing in relevant part as follows:

We received the Bid Tabulations on the referenced project today and discovered that our bid is irregular. Items numbered 2007, 2008, and 2009 did not have unit prices shown, nor extensions. The total price on our bid was correct, had these items been filled in properly.

The prices that were omitted should have read:

Item #2007 - Borrow Excavation Type III at \$7.75 per C.Y.

Item #2008 - Contingent Borrow Excavation Type I at \$5.00/Per C.Y.

Item #2009 - Contingent Borrow Excavation Type III at \$7.75 Per C.Y.

Since these irregularities do not change our total bid price as read on April 17, 1990, we would like to have the opportunity to make the necessary correction and accept award of this contract.

Please find enclosed a reproduction of our bid, from our computer showing all unit prices and extensions.

9. Appellants protest was denied by the procurement officer. The relevant text of the final decision is provided:

Bids were opened on the subject contract on April 17, 1990 with your firm announced as the apparent low bidder.

By letter of May 14, 1990, your firm informed this office that your bid was irregular. This was due to your failure to include a unit price and extensions for items 2007, 2008 and 2009. By the same letter you also requested the opportunity to correct the mistake.

All statutes, regulations and pertinent contract provisions regarding correction of bids, require that bid mistakes may be corrected only if the mistake and the intended correct bid are evident on the face of the bid document. Your firm's failure to include both unit prices and extension for bid items 2007, 2008 and 2009 make it impossible for this Administration to determine, from the face of the bid, the price your firm intended to bid for these items.

Since the intended correct unit prices or extensions are not evident on the face of the bid document, the office of the Attorney General has advised this office that your bid cannot be accepted.

Accordingly, pursuant to GP-2.14(4) "Mistakes in Bids" your bid is hereby rejected.

10. Appellant explained the mistake at the hearing as a clerical omission.

Decision

The procurement officer denied this protest based upon the Mistake in Bid section of the Standard Specifications which states:

GP-2.14 Mistakes in Bids

* * *

B. Confirmation of Bid. When the procurement officer knows or has reason to conclude that a mistake may have been made, the bidder may be required to confirm the bid. Situations in which confirmation may be requested include obvious apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if any of the following conditions are met:

(1) If the mistake and intended correction are clearly evident on the face of the bid document, the bid shall be corrected to the extended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

(2) A bidder may be permitted to withdraw a low bid if:

(a) A mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or

(b) The bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made. (Emphasis added).

The authority for GP 2.14 arises out of COMAR 21.05.02.12 which states in full:

.12 Mistakes in Bids.

A. General. Technicalities or minor irregularities in bids, as defined in COMAR 21.06.02.04, may be waived if the procurement officer determines that it shall be in the State's best interest. The procurement officer may either give a bidder an opportunity to cure any deficiency resulting from a technicality or minor irregularity in its bid, or waive the deficiency if it is to the State's advantage to do so.

B. Mistakes Discovered Before Opening. A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in Regulation .09.

C. Confirmation of Bid. If the procurement officer knows or has reason to conclude that a mistake has been made, the bidder may be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn upon the written approval of the Office of the Attorney General if any of the following conditions are met:

(1) If the mistake and the intended correction are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

(2) A bidder may be permitted to withdraw a low bid if:

(a) A mistake is clearly evident on the face of the bid document but the intended corrected bid is not similarly evident; or

(b) The bidder submits proof of evidential value which clearly and convincingly demonstrates that a mistake was made.

D. Mistakes Discovered After Award. Mistakes may not be corrected after award of the contract except when the procurement officer and the head of a procurement agency make a determination that it would be unconscionable not to allow the mistake to be corrected. Changes in price are not permitted. Corrections shall be submitted to and approved in writing by the Office of the Attorney General.

E. Determinations Required. When a bid is corrected or withdrawn, or correction or withdrawal is denied, the procurement officer shall prepare a determination showing that the relief was granted or denied in accordance with these regulations.

The procurement officer was not willing to "correct" the bid since he could not tell from Appellant's bid document what the unit prices were for the three blank item numbers since nowhere on the bid of Appellant is it indicated what the unit price was for items 2007, 2008 and 2009.

The Appellant, however, argues that its the bid should be corrected (pursuant to GP 2.14) by assuming that it intended a unit price for items 2007, 2008 and 2009 that was the same as shown on four of the five other bidder's forms.

SIIA argues that the procurement officer after discovery of the omission of the prices in Appellant's bid correctly proceeded under GP 2.14 to confirm the bid at the arithmetically correct sum of the extended prices of \$3,421,440.50. When advised by Appellant that the total bid of \$3,687,732.75 was the correct price, the procurement officer decided to reject the bid because the correction could not be made from the face of the bid documents. In so doing the procurement officer apparently relied on GP 2.14. However, GP 2.14 by its terms does not provide for rejection of the bid but only to correct or withdraw a bid.

The record is clear the Appellant never intended to withdraw its bid or have a correction made. The Appellant wanted to complete the omissions on the bid form by reference to other bidders' prices for the omitted items and have the omissions waived as a minor irregularity. Thus the Appeals Board finds the parties reliance on GP-2.14 is unfounded. At no time did Appellant attempt or request to withdraw or correct its low bid. Appellant wanted the procurement officer to waive the omissions in its bid as a minor irregularity pursuant to GP-2.15 and COMAR 21.06.02.04.

As a practical matter (although reliance on GP 2.14 was misplaced) the procurement officer found the Appellant's bid not responsive. The regulation controlling rejection of an individual bid for nonresponsiveness is found at COMAR 21.06.02.03 which states:

Rejection of Individual Bids or Proposals.

A. Notice in Solicitation. Each solicitation issued by a State agency shall provide that any bid or proposal may be rejected in whole or in part when it is in the best interest of the State to do so.

B. Reasons for Rejection. Reasons for rejection of a bid or proposal include but are not limited to:

(1) The vendor that submitted the bid or proposal is not responsible as determined under COMAR 21.06.01.01;

(2) The bid is not responsive or the proposal is not reasonably susceptible of being selected for award;

(3) The price is unreasonable;

(4) The bidder or offeror is debarred or otherwise is ineligible for award and the period of debarment or ineligibility has not expired.

On the other hand COMAR 21.05.02.12 dealing with mistakes in bids and from which GP-2.14 (which the procurement officer actually relied on to reject Appellant's bid) is drawn provides regulatory guidance for certain anticipated factual mistakes, and must be applied as warranted. Section C thereof "Confirmation of Bid" anticipates a bidder who mistakenly offers a bid with an apparent error or a bid unreasonably low so that at the option of the State it can be corrected or withdrawn. This section refers to the commission of an error, not as in the appeal at hand the omission of prices from the bid document. Where a bid omits price information, the bid does not respond to the invitation for bid and such an omission is usually fatal to the bid unless it can be waived as a minor irregularity.

Price is a suspect area in an IFB. The Appeals Board has previously noted the importance of correctly and completely fulfilling the requirements of an IFB as to price information.

A minor irregularity is defined in COMAR 21.06.02.04 as follows:

A. 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 the bid or proposal from the exact requirements of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors.

B. The defect or variation in the bidder proposal is immaterial and inconsequential when its significance as to price, quantity, quality or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement.

C. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State.

However, the items for which Appellant submitted no price could vary as estimated quantities and create a substantial variation in the cost of the work. This potential arises out of the very nature of estimate quantities and is the predicate for requiring specific bid price for units of estimated quantities.

The procurement officer in a case of irregularity has the option to cure or waive the irregularity in the event the irregularity is determined to be minor. Here the procurement officer rejected the bid since he could not tell what prices were intended from the bid document.

There was no arithmetical method for the procurement officer to correct the error from the face of the bid documents and resort to extrinsic evidence is not appropriate in this context.

Drawing the line on what is a waivable irregularity in an IFB has been the topic of several Appeals Board decisions. See for example Orfanos Contractors, Inc., MSBCA 1391, 2 MICPEL ¶188 (1988); Calvert General Contractors Corp., MSBCA 1314, 2 MICPEL ¶140 (1986).

The underlying rationale of waiver of an irregularity as minor to be gleaned from this Board's decisions is that other bidders are not prejudiced by the waiver and the State benefits from accepting the bid which contains the irregularity.

In the instant case Appellant argues that the State could save monetarily by waiving the omission. However, the error cannot be corrected from the bid documents without extrinsic evidence, thus creating potential prejudice to other bidders.

The Appellant left three unit prices blank for estimated quantities of work. State contracts are structured for remedies in the event there is an estimated quantities overrun (or underun). Without a definite unit price the structural remedy would be impossible to calculate since a unit price for a starting point is unknown.

There are many examples of overrun of estimated quantities which substantially change the scope of the respective procurements. A change in estimated quantity could substantially increase the cost of a project.

In the instant case the numerical difference from the total of \$3,687,732.75 and the arithmetic total of the extended prices of \$3,421,440.50 is \$266,292.25. To correct the bid the procurement officer would have to divide up the \$266,292.25 among the three blank items. Changes and adjustments to price and unit price to this extent which would necessarily require resort to extrinsic evidence are clearly beyond the concept of "minor irregularity".

Appellant also argues that its bid does not displace an otherwise low bid and that the procurement officer abused his discretion in not waiving its failure to complete price information. However, in the context of the facts of this appeal allowing price information to be changed after bid opening could give Appellant an unfair advantage and create an auctionlike atmosphere. Where a discretionary determination is involved this Board will not disturb the procurement officer's discretionary determination unless it finds that it was fraudulent or so arbitrary as to constitute a breach of trust. See Calvert General Contractors Corp., MSBCA 1314, supra. We do not find the procurement officer's determination to violate this standard. Compare Melka Marine, Inc., MSBCA 1499 (1990).

Appellant finally contends that the procurement officer could have split the award by deleting items 2007, 2008 and 2009 and awarding them to other bidders reserving the award of the remaining items to Appellant.

While the general provisions give the procurement officer the option to split an award, the record supports the procurement officer's decision not to split this award. Testimony showed that a split award could lead to scheduling problems, delays and increased cost and that split awards in road construction cases is seldom, if ever, done.

Therefore, the appeal is denied.

Dated: 9/11/90


Neal E. Malone
Board Member

I concur:


Robert B. Harrison III
Chairman


Sheldon H. Press
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1516, appeal of A.H. SMITH ASSOCIATED, LIMITED PARTNERSHIP, under SHA Contract No. SM 714-501-571.

Dated: 9/11/90

Mary F. Priscilla mc

Mary F. Priscilla

Recorder

