

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF )  
APEX ENVIRONMENTAL, INC. ) MSBCA Docket No. 2009  
Under Department of General )  
Services Contract No. )  
SR-000-950-103 )

July 10, 1997

Interested Party - A party does not become an interested party, and thus a party which may file a protest, until it knows sufficient facts to protest any and all bids which are between the lowest bid and that of the protestor. The protests must be based on grounds, which arguably would defeat any intervening bid so as to put the protestor in line for award. Only when the protestor knows sufficient grounds to become an interested party does the COMAR 21.10.02.03 seven-day requirement start running for purposes of timeliness of protest.

Responsiveness – Addenda - A bid may be considered responsive despite a bidder's failure to follow direction to enter the date of receipt of addendum where the IFB seeks only acknowledgment of receipt, receipt of the addendum has been acknowledged by certified mail receipt, and the Procurement Officer determines that the addendum was not a material change to the IFB.

APPEARANCES FOR APPELLANT

Paralee White, Esq.  
Victor Klingelhofer, Esq.  
Joseph A. Zillo, Esq.  
COHEN & WHITE  
Washington, DC

APPEARANCE FOR THIRD PARTY  
AMERICAN COMBUSTION, INC.

Krista L. Pages, Esq.  
Anthony N. Palladino, Esq.  
SMITH, PACHTER, McWHORTER &  
D'AMBROSIO, P.L.C.  
Vienna, Virginia

APPEARANCE FOR RESPONDENT

John H. Thornton  
Assistant Attorney General  
Baltimore, MD

## OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on the timely appeal of the denial of the bid protest of Apex Environmental, Inc. (APEX) that the second lowest bidder, American Combustion, Inc., (ACI), had submitted a non-responsive bid. The Department of General Services (DGS) filed a motion to dismiss this appeal on grounds that Appellant's protest was untimely. This Board must therefore determine 1) whether Appellant's initial protest was timely and 2) whether DGS erred in viewing the failure of ACI to indicate receipt of Addendum 1 on the face of its bid as a minor and waivable irregularity.

### Findings of Fact

1. On October 24, 1996, DGS issued an Invitation for Bid (IFB) for Project No. SR-000-950-103, for the Upgrade of Fuel Storage and Delivery Systems for the State Highway Administration Central Region and the Mass Transit Administration. The IFB required a contractor to remove and replace existing fuel tanks, piping, pumps and other components of the state fuel storage and delivery system (for State-owned vehicles) at 21 sites in Central Maryland. Essentially, the IFB required the contractor to upgrade State gas stations. Similar IFBs have been issued for other regions of the State.
2. A prebid conference was held on November 15, 1996. Appellant did not attend the prebid conference, but ACI did.
3. Following the prebid conference, the State's consultant Mueller Associates II, Inc. (Mueller) compiled an Addendum No. 1 to the IFB to summarize discussion at the prebid conference with the intent of clarifying some of the requirements of the IFB. The addendum also removed from the list of sites the Gaithersburg shop, leaving 20 sites. It was sent by Certified Mail, Return Receipt Requested, to those who had requested the original IFB from DGS.
4. The Instructions to Bidders incorporated in the IFB includes the following:
  7. Discrepancies
  - B. . . . Any addenda . . . will be mailed to all listed holders of the Bid Documents within a reasonable time prior to the bid opening. The bidder must acknowledge the receipt of all addenda in the space provided on the Construction Bid Form.
5. A return receipt from ACI was received which included the following
  3. Article Addressed to:  
American Combustion Industries  
3520 Bladensburg Rd.  
Brentwood, MD 20622  
SROO950103  
ADD.#1 Cert on 11/21/96
  5. Received By: Tom Keller
6. Bids were opened on December 11, 1996. The three lowest bids were from Omega Environmental, Inc. (OMEGA) (\$1,507,455), American Combustion, Inc. (ACI) (\$1,536,708) and Appellant APEX (\$1,574,850). At the bid-opening, it was announced that

- ACI had failed to acknowledge receipt of Addendum No. 1 on the face of the bid. No comment was made, however, with regard to the bid of the lowest bidder, OMEGA.
7. On several occasions over the next couple of months, including February 5, 1997, Appellant had conversations with procurement officials, arising from its discovery that OMEGA apparently was experiencing financial trouble. The Vice President of Appellant APEX, Ms. Winston, was informed that OMEGA would not be found to be “not responsible” solely on the basis of financial difficulties.
  8. By letter of February 13, 1997, DGS informed OMEGA that it was rejecting its bid on the grounds that it was not a responsible bidder, i.e., a bidder “who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance”, because OMEGA misrepresented prior work, and failed after several reminders to provide required information/documentation of its qualifications to perform the work. The other bidders were not simultaneously informed of this decision.
  9. On March 5, 1997, Mr. Langton of DGS called Ms. Winston at APEX and asked that APEX agree to extending its bid.<sup>1</sup> By letter of March 6, 1997, APEX agreed to extend the bid price validity period and bid bond for an additional (90) calendar days.
  10. In the same letter, APEX also suggested that its firm was the lowest responsible and responsive bidder for the project, since “Omega Environmental, Inc. has serious financial difficulties and American Combustion, number two bidder, failed to acknowledge addendum 1 . . . “ which addendum, APEX argued, was material.
  11. On March 7, Mr. Langton requested that Mueller provide the “Total Impact Cost or Additional Cost if any this Addendum has on this project,” forwarding the APEX letter. By fax, Mueller responded that “it is the opinion of Mueller Associates II Inc., that Addendum No. 1 does not significantly change the scope or the cost of the project. The items contained therein were included to further clarify items of work which were discussed at the pre-bid meeting.”
  12. By letter dated March 10, 1997, APEX learned that OMEGA, the first low bidder, was disqualified and that the second low bidder, ACI, was now the apparent low bidder. The Department indicated awareness that ACI had inadvertently omitted the acknowledgment of Addendum #1 on their bid form, but noted that after consulting with Mueller, they concluded that the defect noted was immaterial and negligible when contrasted with the total cost or scope of the procurement.
  13. On March 17, 1997, APEX timely protested the award of the contract to ACI on the grounds of materiality of the omission of acknowledgment of Addendum #1 on the bid document.
  14. APEX's protest was forwarded to Mueller, and based on Mueller's written comments dated March 21, 1997, on April 4, the Procurement Officer denied the protest. This appeal timely followed.

### Decision

We first address the argument of DGS in its response to the Appeal of APEX that the protest

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<sup>1</sup>This Board finds that Mr. Langton was mistaken in his testimony that he had told APEX on March 5, 1997 that OMEGA's bid had been rejected. In support of this finding, we note that 1) Ms. Winston wrote a letter on March 6 which in no way suggests that she was aware of that fact; 2) DGS had not received a report from Mueller regarding the import of Addendum No. 1 until March 7; and 3) the Procurement Officer's denial of APEX' protest does not suggest that the protest was untimely.

was untimely. Although timeliness was not addressed by the procurement officer, Counsel for DGS argued in the Agency Report and elicited testimony from Mr. Langton that APEX's Corporate Officer Ms. Winston was told by telephone on March 5, 1997 that OMEGA's bid had been rejected. Ms. Winston denied this, and as shown in finding of fact No. 9 and footnote 1, this Board finds as a fact for the purpose of this appeal that Mr. Langton was mistaken that he had told Ms. Winston in this telephone call that OMEGA's bid had been rejected (for reasons unknown to APEX) and that APEX did not learn that it had become the second low bidder until March 10, 1997.

We agree with APEX that it had no grounds to disqualify OMEGA, and that thus it could not protest the second low bidder, ACI, until March 10, 1997, when DGS notified it that OMEGA was disqualified. This Board has dismissed protests when the protester is not an interested party pursuant to COMAR 21.10.02.01A<sup>2</sup>, because it cannot prove that, even if its protest were sustained, it would be next in line for award. Chesapeake Bus and Equipment Company, MSBCA 1347, 2 MSBCA ¶163 (1987), citing Erik K. Straub, Inc., MSBCA 1193, 1 MSBCA ¶83 (1984) and Honeywell, Inc., MSBCA 1317, 2 MSBCA ¶148( 1987). A party not in line for contract award normally is not affected competitively since it will receive no direct benefit if the protest is upheld. Straub, supra. APEX was told that protest on the grounds of financial instability of OMEGA would fail; thus a simultaneous protest of ACI, Inc., even if successful, would still not have placed APEX in line for award. APEX did not know that it had become an interested party eligible to protest ACI's failure to acknowledge receipt of the addenda until it received the letter dated March 10, 1997 from DGS indicating that OMEGA's low bid had been rejected (on grounds that it had not provided required qualification information following notice that it was low bidder.) The Board therefore denies the DGS motion to dismiss the appeal.

The Board must now determine whether the Procurement Officer was correct in finding that ACI's failure to acknowledge Addendum #1 on the face of its bid was not material, and thus, whether that failure could be waived. APEX argues that Addendum No. 1 was a material change to the IFB and that thus failure to acknowledge the Addendum could not be waived. Set forth below is Addendum No. 1, with cites from the original IFB specifications in italics following related sections:

**This Addendum is hereby made part of the Contract Documents.**

Clarification of issues from pre-bid meeting held November 15, 1966 is as follows:

I. **Supplementary Information to Bidders:**

1. Prior to the start of work by the Contractor, precision tank tightness testing for existing USTs [underground storage tank] to remain (to be upgraded) will be performed by the State Highway Administration under a separate contract. Contractor shall assume that all existing USTs to remain are tight at

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<sup>2</sup>COMAR 21.10.02.01B (1) states: "Interested party" means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract . . ."

the commencement of their work on each site.

Contractor shall provide precision tightness testing for each upgraded tank (and new tank) at completion of each site, per the specifications.

2. All existing USTs to remain (to be upgraded) are believed to be fiberglass. Contractor shall hand excavate to expose the tops of all such USTs. Contractor shall exercise all such care as is required to prevent damage to the fiberglass USTs.
3. Bidders are alerted to the fact that the Gaithersburg shop has been deleted from the scope of this project. Ignore all references to the Gaithersburg shop.
4. The only site in the Central Region to receive a new canopy is Brooklandville. The specification book does not contain any information on the canopy. All canopy designs and specifications are indicated at the rear of the Drawing set (Drawing numbers 70 through 76).
5. Bidders are reminded that sheeting/shoring/bracing systems are required by the specifications (Specification Section 02200, par. 1.02.C).

II. Changes to the Specifications:

SECTION 01000 - REQUIREMENTS OF THE WORK

Paragraph 1.04 ABBREVIATED SUMMARY SCOPE OF WORK

Delete subparagraph C., and replace with the following:

- C. The project shall include the pump-out, recovery, removal, legal disposal, and clean-up of all fuel residues remaining in the existing tanks and distribution piping. Refer to Bid Form, and specification Sections 02400 and 02950.

*[Section 02400: Par. 3.02.F states, "The Contractor shall pump dry the tank and piping system to remove all flammable or combustible liquids and/or sludge remaining in the system after the product is removed for storage."]*

Paragraph 1.24 "TEMPORARY FUEL FACILITY"

Delete subparagraph A., and replace with the following:

- A. During construction, at all sites, the Contractor shall provide temporary fuel tanks and pumps for the purpose of fueling the Owner's vehicles (gasoline and diesel fuel). For each site where gasoline tank(s) are being replaced, provide a diked 1000 gallon temporary tank with nominal 12-14 gpm electric driven fuel pump. For each site where diesel tank(s) are being replaced, provide a diked 2000 gallon temporary tank with 2 nominal 12-14 gpm electric driven fuel pumps. All temporary tanks shall be U.L. 142 shop fabricated steel, and shall be installed in accordance with NFPA 30 and 30A, including provisions for normal and emergency venting. Dike shall be factory provided, 110% capacity of tank. Fuel pumps shall be complete with nozzles and hoses, ready for operation. Extend electrical service to the pumps as required. Before performing any work or conducting any operations on the site which might contaminate the usable fuel in an existing tank, determine the amount of clean, usable fuel in each tank, notify the Owner, and upon Owner's approval, transfer to the temporary tanks. Under the base bid, Contractor shall transfer up to 900 gallons of gasoline per site, and up to 1800 gallons of diesel fuel per site from the existing underground tanks to the aboveground temporary tanks. The State will provide any additional fuel for the temporary tanks if the remaining fuel in the existing USTs is less than these amounts (i.e. Contractor is not responsible for providing any new fuel). At the completion of the project, all fuel remaining in the temporary tanks shall be transferred to the permanent fuel tank(s) by the contractor, and the temporary fuel facility shall be removed.

*[Section 01000, Paragraph 1.24 A states, “. . . at the completion of the project, all remaining fuel shall be transferred to the permanent fuel tank(s) and the temporary fuel facility shall be removed by the contractor.”]*

SECTION 02400 - REMOVAL AND DISPOSAL OF PETROLEUM STORAGE TANK, PIPING, AND DISPENSING SYSTEMS

Paragraph 1.02 “DESCRIPTION”

Delete subparagraph B., and replace with the following:

- B. Under the base bid, Contractor shall transfer usable fuel to temporary aboveground tanks as specified in Section 01000 paragraph “TEMPORARY FUEL FACILITY”, and in accordance with this Section. Contractor shall then remove remaining tanks contents including non-usable waste fuel, residues, sludge, and any other solids or liquids whether flammable or inflammable, and

whether existing or generated by Contractor's cleaning activities. Contractor shall perform pump-out, recovery, removal, legal disposal, and clean-up of all fuel residues remaining in the existing tanks and distribution piping. Refer to Bid Form for volume or liquid/sludge removal and disposal to be assumed, and for unit pricing requirements. Note: transfer of usable fuel, and removal of liquids and other materials generated by Contractor's cleaning activities is not chargeable on a unit price basis as residue and sludge removal. These items shall be included under the base bid.

*[Section 02400: Par. 1.02B states: "Contractor shall remove tank contents including waste fuel, residues, sludges, and any other solids or liquids whether flammable or inflammable, and whether existing or generated by Contractor's cleaning activities. Contractor shall perform pump-out, recovery, removal, legal disposal, and clean-up of all fuel residues remaining in the existing tanks and distribution piping."]*

#### SECTION 02950 - CONTINGENCIES

##### Paragraph 3.01F "RESIDUE AND SLUDGE REMOVAL UNIT PRICE"

Delete subparagraph 1., and replace with the following:

1. The Contractor shall include, along with his bid, a unit price for the removal, transportation, and disposal of waste residue and sludge from tanks, which are designed to be removed or abandoned under the contract. Price shall include all necessary labor, equipment, transportation, and all other incidentals necessary to complete the work.

Note: Transfer of usable fuel from existing USTs to temporary aboveground tanks shall be included under the base bid, and is specified in Section 01000 under paragraph "TEMPORARY FUEL FACILITY".

Transfer of usable fuel, and removal of liquids and other materials generated by Contractor's cleaning activities is not chargeable on a unit price basis as residue and sludge removal. These items shall be included under the base bid.

Of primary concern to the Appellant is the language "at all sites" used in paragraph 1.24A which refers to use of temporary storage tanks. Appellant believes that this required bidders to utilize temporary storage tanks at all 20 sites rather than the five sites it believes the original specifications require. The program manager, Mr. Bedell, who was in charge of preparing APEX's bid, testified that this shift requiring temporary fuel tanks at 20 rather than 5 sites increased the cost of the bid by approximately \$80,000 to \$90,000.

The State's Consultant, Mueller, and the apparent low bidder, ACI, disagree. Both argued

(Mueller by letter to the Procurement Officer, and ACI by testimony at the hearing), that the contract (before and after the Addendum) required that fuel be temporarily stored at approximately 15 sites.

After receipt of the APEX bid protest, the Procurement Officer forwarded the protest to its Consultant, Mueller, for comment on whether or not the changes in the addendum constituted a material change. Mr. Paul Czajkowski, P.E., by letter of March 21, 1997 replied:

A. It has always been the intention of our specification to provide for temporary fueling facilities at all sites. This requirement in the addendum is not new to the project; it is merely a clarification of the original specification. Replacement of underground piping and other UST system components at fueling sites precludes the use of existing fuel delivery systems during construction, and it is necessary to provide temporary fuel storage and pumping at these sites.

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B. The contractor will probably only need one or two sets of temporary tanks. The same temporary tanks can be used on multiple sites as the work crews move from site to site in a sequence which would be set in the contractor's work plan. (coordinated with SHA). The equipment costs associated with the temporary tanks is the same regardless of the number of sites, because they will be the same tanks. Generally, the sites will be completed in sequence, not simultaneously.

C. There are only 15 sites (not 20) at which fueling operations will need to be interrupted during construction. 5 of these sites involve tank/piping replacements, and 10 involve upgrades of tank with replacement of piping. Note that replacement of piping will necessitate a fuel system interruption just as will the replacement of a tank. No existing fueling system interruption will be necessary at 5 of the 20 sites in the contract. The reasons for this are . . . the fueling operation at the Southern Avenue Shop is closing down entirely. . . . the new fuel systems at Metro Yard and at Brooklandville may be installed before the existing systems are interrupted. . . . The work at the two MTA sites (Northwest and Bush Avenue) involve only fuel management system modifications. No fueling system interruption will be necessary.

\* \* \*

Our point is this: it is clear from the context in which the requirements for temporary fueling are set forth, that temporary tanks are required only where there will be an interruption of existing fueling operations. It is not the intention of the original specification or the addendum to require temporary fueling where the supply of a particular fuel (gasoline or diesel) will not be interrupted. The actual number of individual placements of temporary tanks required for the project is somewhat dependent upon the individual contractor's means and methods, and his ability to minimize existing system interruptions.

\* \* \*

APEX contends that the determination of fuel quantity is a change in legal obligation. The determination of fuel quantity in a tank is necessary before transfer can be made to another vessel. . . .The contractor would not be able to fulfill the obligations of the original contract (fuel transfer and storage) without determining fuel quantity in each tank. The original specifications contain the requirement to comply with COMAR 26.10, [which states] that before the filling of an oil storage system, "the liquid level shall be gauged and the measurement recorded in writing." . . . The addendum did not place any additional legal obligation upon the contractor.

\* \* \*



APEX contends that the transfer of up to 900 gallons of gasoline per site, and up to 1800 gallons of diesel per site is a change in legal obligation.

\* \* \*

There are places in the original re-bid specification (i.e. prior to Addendum No. 1) which require the contractor to transfer existing fuel from the existing tanks and to put it into storage. Addendum No. 1 gives the bidders maximum quantities for bidding the amount of fuel transfer at each site where it is required. The actual cost to transfer 900 gallons of gasoline and 1800 gallons of diesel fuel per site may very well be at no additional cost or at less cost than that which a reasonable bidder would have assumed in the absence of the addendum. A typical SHA site may have 1-10,000 gallon gasoline UST and 2-10,000 gallon diesel fuel USTs which would be replaced. The amount of usable fuel transfer which Addendum No. 1 specifies is only 9% of the volume of each of the existing tanks. The contractor was already required by the original re-bid specification to transfer the usable fuel out of the existing USTs to storage vessels. If APEX contends that Addendum No. 1 fuel transfer requirements present a cost increase, then what would have been the basis for their bid in the absence of MAII's quantity specification (900 and 1800 gallons)? It seems to me that a reasonable estimate of fuel to be transferred (again, this was a requirement prior to the addendum) would have been at least this much.

\* \* \*

APEX contends that Addendum removed the State's legal obligation to pay unit prices to the contractor for the transfer of useable fuel, and removal of liquids and other materials generated by the contractor's cleaning activities. APEX claims that Addendum No. 1 made these work items part of the base bid. . . At no time on this project was the State obligated to pay the contractor on a unit price basis for the transfer of usable fuel, and the removal of liquids and other materials generated by the contractor's cleaning activities. This work has always been under the base bid for this project. . . . The addendum clarified that items such as usable fuel and contractor's cleaning fluid are part of the basebid (and have been so for the entire project).

ACI's witness, project manager Ms. Natale, confirmed that ACI viewed the addendum in the manner described in Mueller's letter. She testified that as she reviewed the bid documents, she understood that 15 sites would require temporary fuel storage handling because five sites required replacement of the underground tanks, and 10 sites required the upgrading of the system or piping such that service at the site would be interrupted, and temporary fuel storage/dispensing systems would be required. Ms. Natale testified that she read the addendum to state that

during construction at any of the sites wherein fueling operations may be interrupted, [ACI] would be required to provide temporary services. Now that could include the temporary fuel tanks and pumps that are referenced here, but in multiple sites there were only upgrades to the fuel management system. Therefore, temporary fuel tanks that the contractor would provide at those particular locations may not necessarily be required, but may be required. So it becomes then a part of the contractor's method of operation and how they plan to perform the project.

As was Ms. Natale's experience on other similar projects with SHA, what the amendment required was that fueling service must be maintained. Ms. Natale interpreted paragraph 1.11 at page 1000-5 of the specifications to require that to the extent that ACI's work interferes with SHA operations,

they must provide other means of temporary service for vehicle fueling, which in some cases might require temporary tanks.

Contrary to the view of APEX, ACI's Ms. Natale found that the amendment was clarifying, and in fact, reduced the potential cost of the bid. For example, the amendment made it clear that the total usable fuel which must be transferred from old tanks was 900 gal. of gasoline and 1800 gal. of diesel fuel, rather than all fuel which might be contained in the underground 10,000 gallon tanks. This change by amendment meant that ACI's price was lowered because they were able to quantify how much fuel they would be expected to handle.

Prior to the Addendum's issuance the Procurement Officer determined that it contained no significant cost or time factors. In light of that determination, he decided to waive the failure of ACI to note receipt of Addendum No. 1 on the bid. Finally, after reviewing the protest of APEX and the comments provided by the Consultant, the Procurement Officer on April 4, 1997 confirmed that the addendum did not materially or significantly alter the scope of the project, and rejected the APEX protest.

The Board finds that the Procurement Officer did not abuse his discretion in finding that "the defect noted in American Combustion's bid is immaterial and negligible when contrasted with the total cost or scope of this procurement" and awarding the contract to ACI following its confirmation that it acknowledged receipt of the addendum. COMAR 21.06.02.04 states as follows:

#### **.04 Minor Irregularities in Bids or Proposals**

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 a bid or proposal from the exact requirement 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 bid or 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.

The Board finds that the Addendum clarified the provisions already contained in the original specifications. The evidence of record does not support that this materially changed the scope of the work. The changes which were made were minor. The amendment clarified existing language (which the Board acknowledges to be confusing). Based on the evidence of record, we decline to find that the Procurement Officer was arbitrary in his reliance on Mueller's evaluation and in his determination that the changes were minor or immaterial. Since Addendum No. 1 did not materially alter the requirements of the contract, ACI's failure to acknowledge receipt was a minor irregularity and properly waived.

Assuming arguendo, however, that the amendment was **material** and therefore could not be waived pursuant to COMAR 21.06.02.04, the Board examines the sufficiency of the receipt that was provided to DGS. We look at the requirements of the IFB with regard to acknowledgment. The Instruction to Bidders in this IFB simply states that receipt of the Addendum must be acknowledged on the face of the bid. The Addendum was sent to bidders by SHA, and the record reflects actual receipt. This acknowledgment of receipt was accomplished prior to bid opening by the returned Certified Mail green card. See finding of fact Nos.4 and 5. Appellant's argument notwithstanding, it is not clear that any additional acknowledgment of responsibility for performance of the changed work is required. The Board, applying the holding of Corcon, Inc., MSBCA 1804, 4 MICPEL ¶358 (1994), must find that there was sufficient acknowledgment of receipt of the Addendum to satisfy COMAR's responsiveness requirements.

The Board in Corcon framed the question as follows: "Are there circumstances where a bid may be deemed to be responsive when the bidder, as required, acknowledges receipt of addenda prior to bid opening, but does not attach the addenda to the bid as instructed in the IFB?" The question was answered in the affirmative:

COMAR 21.05.02.08 states, in pertinent part:

Each amendment to an invitation for bids shall be identified as such and shall require that the bidder acknowledge its receipt. The amendment shall reference the portion of the invitation for bids it amends. The procurement officer shall authorize the issuance of an amendment.

There is no requirement in COMAR that, after acknowledging receipt, the bidder must attach the addenda sheets to its bid or otherwise acknowledge an amendment in the bid itself. In any event SHA suggests that the failure to attach the addenda sheets may be waived because the addenda did not make any material amendments to the IFB since no line items or elements of work for which a separate bid price was required were added.

A bidder's failure to acknowledge receipt of a material amendment renders its bid nonresponsive. Oaklawn Development Corporation, MSBCA 1306, 2 MSBCA ¶138 (1986). An amendment is material where such amendment's effect as to price, quantity, quality or delivery is not trivial or negligible when contrasted with the total cost or scope of the procurement. Id. See also COMAR 21.06.02.04. Pursuant to such guidelines we find the amendments herein to be material.

Corcon at pp. 3-4.

As the Board stated in the Corcon case, the question then becomes whether or not ACI has been responsive, notwithstanding the failure to acknowledge the addendum in the space provided on the bid form. "We believe that a pre-bid acknowledgment of a material amendment may be sufficient even in the absence of any reference to the amendment in the bid. The Comptroller

General has indicated that a bidder may bind itself to the contents of certain amendments merely by acknowledging receipt thereof. See 38 Comp. Gen. 614 (1959) (B-138356); 33 Comp. Gen. 508 (1954) (B-119732). An amendment changing the specifications is one such example. Ventura Manufacturing Company, B-193258, 79-1 CPD ¶194 (1979). Corcon, supra at p. 6.

The Board noted that in Corcon, the bidder who failed to attach addenda as required would not be released from its obligation under the bid by claiming that its offer and pricing did not include the addenda requirements when it had previously acknowledged receiving the addenda and provided a price for each element of work referenced in the addenda. See, Carl Belt, Inc., MSBCA 1743, 4 MSBCA ¶339 (1993). We find that here, ACI's bid, on its face, does not create doubt as to whether ACI intended to perform the amended solicitation requirements.

In conclusion, the Board finds that the APEX protest was timely. It further finds that Addendum No. 1 was a clarification of specification requirements and not a material change to the contract. Finally, the Board finds that the failure to acknowledge the Addendum in the space provided on the bid form was a minor irregularity, that the Addendum had in fact been acknowledged by returned mail receipt, and the State correctly exercised its discretion pursuant to COMAR 21.06.02 in accepting ACI's bid.

For the foregoing reasons, the appeal of APEX is denied.

It is therefore Ordered this 10th day of July, 1997 that the appeal is denied.

Dated: July 10, 1997

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Candida S. Steel  
Board Member

I concur:

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Robert B. Harrison III  
Chairman

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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 2009, the Appeal of APEX Environmental, Inc., under the Department of General Services Contract No. SR-000-950-103.

Dated: July 11, 1997

\_\_\_\_\_  
Mary F. Priscilla  
Recorder

