

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of CENTURY )  
ELEVATOR, INCORPORATED )  
)  
) Docket No. MSBCA 2125  
Under Maryland Aviation Administration )  
Contract No. MAA-MC-99-004 )  
)

July 1, 1999

Bid Protest - Timelines - Pursuant to COMAR 21.10.02.03, a bidder must file a protest within seven days of when he knew or should have known of the grounds of the protest.

APPEARANCE FOR APPELLANT: Brian D. Yoklavich, Esq.  
Taylor & Yoklavich, P.C.  
Silver Spring, Maryland

APPEARANCE FOR RESPONDENT: Stanley Turk  
Assistant Attorney General  
Baltimore, Maryland

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals from the decision of the Maryland Aviation Administration's (MAA) Procurement Officer which denied its bid protest that it was the low bidder and on other grounds regarding the above-captioned solicitation for the repair and maintenance of elevators, escalators, and moving walkways at the Baltimore Washington International Airport (BWI).

Findings of Fact

1. In September 1998, the MAA issued an invitation for bids (IFB) for a three-year contract for the repair and maintenance of elevators, escalators, and moving walkways at BWI.
2. The technical provisions of the IFB include routine, regularly-scheduled maintenance for elevators, escalators and moving walkways. In addition to the regularly-scheduled work, the IFB includes a provision for parts and extra work. Because there is no way to tell in advance how many parts and how much extra work would be required, the contract funding for parts and extra work was fashioned as a fixed allowance item. For appropriation purposes, this allowance item was set at \$50,00.00 per year, or \$150,000.00 over the three-year term of the contract.<sup>1</sup>
3. Section P of the bid documents is a five-part worksheet where bidders set forth the monthly

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<sup>1</sup> The contract provides for two additional one year periods at the option of MAA.

and yearly costs for each elevator, escalator and moving walkway. Section P, Part I is the worksheet for year one of the contract; Part II is for year two; Part III is for year three. Part IV is the fixed allowance for extra work and parts worksheet where bidders set forth their hourly labor rates (including parts) for extra work over the three-year term of the contract.

While the Part IV worksheet requires bidders to set forth hourly rates for extra work, the amount of money available for all extra work for the three years of the contract was the same (\$150,000.00) for all bidders and such total amount is preprinted on Part IV of the worksheet.

The last page of Section P (Part V) provides lines for total contract cost for three years to be expressed in words and figures. Part V instructs bidders to tally Parts I through IV and set forth the total contract costs. Parts I through V are constructed in such a manner that a bidder would reasonably understand that the low bid would be determined based on the amount that the bidder set forth on the lines provided on Part V for the total contract cost for three years, i.e., the total of Parts I, II, and III plus the fixed \$150,000.00 as set forth in Part IV.

4. Bids were due on December 16, 1998. A pre-bid/site inspection meeting was held on November 10, 1998 at BWI for interested bidders.
5. Prior to bid opening, neither Appellant nor any other person challenged the manner in which the bid would be calculated and made no protest of any alleged improprieties in the solicitation.
6. Bid opening occurred as scheduled on December 16, 1998. Appellant was in attendance. Seven bids were received, including the bids from Appellant and Millar.
7. During bid opening, bids as they appeared on the line provided on Part V were recorded on a Bid Opening Checklist under a column labeled "Total Bid Price" and numerically ranked according to the price that appeared on Part V. The bid amounts were publicly announced at the bid opening and Millar was identified as the apparent low bidder. Appellant was the next lowest bidder.
8. As is set forth in Part V of Millar's bid, Millar's total contract cost for the three-year term was \$539,988.00. As is set forth in Part V of Appellant's bid, Appellant's total contract cost for the three-year term was \$541,680.00.
9. Appellant's total contract cost of \$541,680.00 as set forth in Part V of its bid is derived from the sum of its bid for each of the three years of the contract as set forth in Parts I - III plus the \$150,000.00 fixed allowance for parts and extra work allowance over the three-year term of the contract as set forth in Part IV. Millar's total contract cost of \$539,988.00 as set forth on Part V of its bid is also derived from the sum of its bid for each of the three years of the contract plus the \$150,000.00 parts and extra work allowance over the three-year term of the contract.
10. At the conclusion of the bid opening, a representative of Appellant examined the bids. In oral conversations between Appellant and MAA at the conclusion of the bid opening and the next day (December 17, 1998), MAA conveyed to Appellant that, notwithstanding the identification of Millar as the apparent low bidder, MAA would conduct a review of the bids to determine which bidder had in fact submitted the low responsive and responsible bid.
11. Appellant was notified by letter from MAA dated December 17, 1998 and received by Appellant on December 23, 1998 that Millar was the successful low bidder.
12. Appellant sent a protest by FAX which was received by the MAA on the afternoon of December 30, 1998. Several grounds of protest were raised, including an allegation that Appellant's bid should have been determined to be the low bid and an assertion that the Millar bid was nonresponsive for failure to include a Certificate of Good Standing from the

- Department of Assessments and Taxation with its bid as required by SP-1.22.
13. By final decision letter of April 21, 1999, Appellant was advised that the protest was denied.
  14. On April 30, 1999, Appellant appealed the denial of the protest to this Board.
  15. During the hearing several grounds of protest were voluntarily dismissed by the Appellant. Remaining for decision is Appellant's protest on the grounds that the MAA failed to properly evaluate the bids to determine the low bidder and that Millar's bid is non-responsive for failure to file a Certificate of Good Standing from the Department of Assessments and Taxation as required by SP-1.22 of the bid specifications. As discussed below, neither protest on such issues presents grounds for sustaining this appeal.

### Decision

Appellant does not and cannot dispute that, when comparing bid totals in Part V, Millar's bid was, on its face, the lowest bid.

The low bid was to be determined according to the provisions of Section P of the bid documents. Consistent with Section P, the MAA evaluated the bids according to the bid totals set forth by each bidder in Part V of the bid forms. Using this method, Millar's bid was the lowest.

Appellant, however, contends that the method of calculating the lowest bid should also involve calculating the number of hours of extra work that MAA estimated<sup>2</sup> would be required for each year of the contract and multiplying such number of hours by the rate bid for such for extra work in Part IV and assuming that the \$1,692.00 difference between Appellant's bid and the Millar bid (as set forth on Part V) would be overcome by Appellant's lower rates for extra work after a certain number of hours of extra work was performed. Using Appellant's proposed method of calculation, depending upon how many hours are used, under certain circumstances Appellant would be the lowest bidder and under other circumstances Millar would be the lowest bidder. However, such an evaluation is not required by a reasonable reading of the bid documents.

Both Appellant and Millar bid the work in the identical fashion. Each totaled its bid for each of the three years of the contract and added thereto the \$150,000.00 fixed allowance for extra work. There was no pre-bid complaint concerning the requirement to bid the work in this fashion. Only after bids were opened and prices exposed and Appellant discovered that Millar's was the low bid did Appellant complain. It now argues that the MAA should not determine the low bid based on the total cost criteria which clearly and unambiguously requires adding the \$150,000.00 fixed allowance for parts and extra work as set forth in Part IV to the total bid for each of the three contract years as set forth in Parts I through III.

Appellant did not object to this criteria prior to bid opening and Appellant itself used this criteria to construct its bid. It is now too late to protest the validity of this criteria since a protest based upon alleged improprieties in a solicitation that are apparent before bid opening must be filed before bid opening. COMAR 21.10.02.03A; Merjo Advertising & Sales Promotions Company, MSBCA 1948, 5 MSBCA ¶396 (1996). Apparently recognizing that the law binds it to a

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<sup>2</sup> There is no such estimate of the number of hours of extra work that might be required set forth in the bid documents.

methodology set forth in a solicitation that it fails to object to prior to bid opening, Appellant asserts after bid opening that the MAA did not correctly apply the methodology and that such error in application was not apparent until MAA determined that Millar was the low bid based on the bid as set forth in Part V of Section P without evaluating the extra work hourly rates on Part IV of Section P.

For this assertion to have any merit (and we have rejected it) one must assume arguendo that prior to bid opening Appellant did not actually realize that MAA would determine low price based solely on the total contract cost as set forth on the spaces provided on Part V of the bid documents and that such methodology was not reasonably apparent from a review of the bid specifications (i.e., was ambiguous). However, Appellant must comply with the procedural requirements that pertain to its right to have a post-bid opening protest determined on its merits.

One such procedural requirement is that the protest be filed timely. After bid opening, when prices have been exposed, a protest must be filed not later than seven days after the basis for the protest is known or should have been known, whichever is earlier. COMAR 21.10.02.03B. Appellant attended the public December 16, 1998 bid opening.<sup>3</sup> At bid opening, a reasonably diligent bidder knows or should have known of any alleged deficiencies that are apparent in a bid. Innovation Integration, Inc., MSBCA 1730, 4 MSBCA ¶330 (1993). Whether a bidder knew or should have known of the basis of its protest has been strictly construed by this Board, and protests filed one day late have been dismissed. See, e.g., Ismart, LLC, MSBCA 1979, 5 MSBCA ¶417 (1997). At the December 16, 1998 bid opening, the bids were opened for inspection and Appellant inspected the competing bids and had the opportunity to determine if there were grounds for a protest. Appellant should have observed that a Certificate of Good Standing from the Department of Assessments and Taxation was not included with the Millar bid as required by SP-1.22.<sup>4</sup> Appellant should also have observed that Millar, who constructed its bid in the same fashion as Appellant, had submitted the lower bid and that MAA had announced that Millar was the apparent low bidder. It was therefore clear that the low bid would be determined solely by reference to the bid as it appeared on Part V. Thus, any protest was due within seven days from that day, or December 23, 1998. The protest was not filed until December 30, 1998.

In oral conversations between Appellant and MAA at the conclusion of the bid opening and the next day, MAA conveyed to Appellant that MAA would conduct a review of the bids to determine which bidder had in fact submitted the low responsive and responsible bid. Appellant thus argues that it was not required to file a protest until it received on December 23, 1998, the December 17, 1998 letter from MAA advising that MAA had determined Millar to be the successful low bidder. A reasonable bidder should not have concluded from these conversations that MAA would determine the low bid on any basis other than the total contract cost as set forth by the bidder on Part V of the bid forms and that MAA was simply fulfilling its legal obligation to ensure that the award

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<sup>3</sup> Actual attendance at a public bid opening is not required to trigger the seven day timeliness requirement of COMAR 21.10.02.03B if the alleged defect in a bid would have been apparent when the bids were opened for public inspection.

<sup>4</sup> SP-1.22 required that a foreign corporation such as Millar be registered with the Department of Assessment and Taxation and to submit a Certificate of Good Standing from the Department of Assessments and Taxation with its bid. The Certificate of Good Standing was provided by Millar after bid opening.

of the contract be made to the lowest, responsive and responsible bidder meeting the specifications.<sup>5</sup> Such conversations and testimony afford Appellant no relief from the seven day requirement.

Concerning the assertion that Millar's bid was defective for failure to include a Certificate of Good Standing, Appellant also argues that the fact that MAA was reviewing the bids to ensure that award of the contract would be made to the lowest, responsive and responsible bidder meeting the specifications excused Appellant from the operation of the seven day rule until it was advised by MAA that Millar was the successful bidder. The seven day rule, however, looks to the time the protestor has actual or constructive knowledge of the alleged defect not the time that the agency identifies the successful low bidder. See, e.g., Utz Quality Foods, Inc. and Coca-Cola Enterprises, Inc., MSBCA 2060 and 2062, 5 MSBCA ¶441 (1998).

Appellant has argued that because its hourly rates for extra work are lower than Millar's, Appellant could provide a better value for the State under certain circumstances. However, we have determined that this does not render the solicitation defective or provide a satisfactory basis for the protest. Bids must be evaluated according to the lowest price bid by a responsive and responsible bidder. There must also be a fair and rational way of determining which bid is lowest. It is not inappropriate for a Maryland procurement contract to contain an allowance item. The record reflects that the allowance method was used here because there is no accurate way to determine precisely the number of parts and extra work hours that might be needed. The allowance applies in an even-handed fashion to all bidders in an amount of \$50,000.00 per year for each of the three years of the contract for the total of \$150,000.00 pre-printed on Part IV, and is an acceptable method to ensure that there is both an appropriation for the extra work and that the bidder's hourly rates are fixed. Any difficulty Appellant had with the allowance item not being a price evaluation factor was required to be brought to the State's attention prior to bid opening.

As noted, the protest on this price issue and the Certificate of Good Standing issue was not filed until December 30, 1998. Appellant had knowledge of these issues from the time bids were made public at bid opening on December 16, 1998. Thus the protest was filed more than seven (7) days after Appellant had knowledge of the basis for the protest. Accordingly, this Board is without jurisdiction to hear this appeal since compliance with COMAR 21.10.02.03 is a jurisdictional threshold to the consideration of a bid protest. See COMAR 21.10.02.03C (providing that a protest received by the Procurement Officer after the seven day time limit may not be considered); Spear Window and Glass, Inc., MSBCA 1955, 5 MSBCA ¶399 (1996) at p 3. Thus, the appeal must be dismissed.

Accordingly, it is this 1<sup>st</sup> day of July, 1999 Ordered that the appeal is dismissed with prejudice.

Dated: July 1, 1999

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Robert B. Harrison III  
Chairman

<sup>5</sup> The Procurement Officer testified at the hearing that bidders hourly rates for extra work would have been scrutinized to determine if the rates were commercially reasonable and not materially unbalanced in order to evaluate the responsibility of the bidder.

I concur:

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Candida S. Steel  
Board Member

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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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2125, appeal of Century Elevator, Inc. under Maryland Aviation Administration Contract No. MAA-MC-99-004.

Dated: July 1, 1999

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Mary F. Priscilla  
Recorder