

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeals of CORCON, INC. )  
 ) Docket No. MSBCA 1804  
Under SHA Contract No. P993-701- )  
014 )

May 10, 1994

Responsiveness - Addenda - A bid may be considered responsive despite a bidder's failure to follow direction to attach the pages of the addenda to the bid where the addenda are acknowledged as required and nothing in the bid as submitted indicates an intent not to be bound by the terms of the IFB as amended by the addenda or causes the bid to be ambiguous.

APPEARANCE FOR APPELLANT: Gerard J. Pisarcik, Esq.  
Laws, Staruch & Pisarcik  
Lemoyne, PA

APPEARANCES FOR RESPONDENT: Edward S. Harris  
Scot D. Morrell  
Asst. Attorneys General

APPEARANCE FOR INTERESTED PARTY: Gerald J. O'Brien, Esq.  
Santa Maria, O'Brien,  
Weiss & Associates,  
Chartered  
Gaithersburg, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest by the State Highway Administration (SHA) that the bid of the apparent low bidder, Oliver B. Cannon & Son, Inc. (Cannon Sline) was nonresponsive.

Findings of Fact

1. The Contract at issue is for the cleaning and painting of the bascule spans of the Woodrow Wilson Bridge over the Potomac River in Prince George's County, Maryland.
2. On February 8, 1994, bids for the Contract were opened by SHA. Cannon Sline submitted the lowest bid in the amount of \$1,848,900.00. Appellant submitted the second lowest bid in the amount of \$1,947,100.00

3. Prior to the bid opening, SHA issued two amendments to the solicitation entitled Addendum No. 1 and Addendum No. 2.
4. Addendum No. 1 addressed the estimated time frame for structural inspections and testing and included changes in the prevailing wage rates.
5. Addendum No. 2 clarified that emissions (pollution) insurance was also required in addition to Liability Insurance.
6. Addendum No. 2 also contained specifications for an Engineer's Boat. A line item with a lump sum price for an Engineer's Boat was included in the original solicitation, but no specification for the boat was included. Addendum No. 2 addressed the specifications for the Boat but did not alter the manner or form for bidding on the boat.
7. Copies of the addenda and "Receipt Forms" were sent to all the purchasers of the contract documents including Cannon Sline.
8. Prior to bid opening, which was scheduled for January 28, 1994, Cannon Sline signed both Receipt Forms acknowledging receipt of both addenda. The Receipt Forms included the contract number, addendum number and project description. The forms also state that before bids are received, SHA must receive verification that all purchasers of contract documents have received addenda for the contract.
9. The forms were to be returned to SHA's Deputy Chief Engineer - Bridge Construction. Sha received the executed forms acknowledging receipt of the addenda from the purchasers of the contract documents prior to the bid opening. In addition, SHA prior to bid opening contacted the prospective bidders by telephone to inquire whether they had received the addenda. When contacted, Cannon Sline confirmed to SHA that it did receive Addendum No. 1 and Addendum No. 2.
10. Each addendum advised bidders to remove the original sheets from the Invitation for Bids (IFB "[i]nset and securely fasten the attached sheets in their proper sequence." The IFB advised bidders that failure "to attach all addenda may cause the bid to be irregular." At the bid opening, both Cannon Sline and Appellant submitted bids with the same schedule of prices including the identical line item and lump sum requirements. Both bids were also signed on identical signature sheets by an appropriate corporate officer. Canon Sline's bid, however, did not have the addenda pages attached to its bid documents. As a result, Cannon Sline's bid was

announced as irregular at the bid opening.<sup>1</sup>

11. Thereafter, Appellant sent a letter to the procurement officer timely protesting any decision by the procurement officer to award the Contract to Canon Sline.
12. The SHA Procurement Officer issued the procurement officer's final decision on March 17, 1994, determining that Cannon Sline's bid was the lowest responsive bid. The procurement officer determined that Cannon Sline's pre-bid acknowledgement of the addenda was sufficient and that the bid, on its face, did not raise doubts as to whether Cannon Sline intended to be bound by the amended solicitation requirements. The procurement officer concluded that the failure to attach the addenda sheets did not affect the responsiveness of the bid where the new sheets did not add any new line items or otherwise create an element of work for which a separate bid price was required.
13. Appellant noted an appeal from the procurement officer's decision denying its protest on March 28, 1994. No party requested a hearing and the appeal is decided on the written record and the pleadings of the parties.

#### Decision

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?

Appellant contends that the Addenda must not only have been acknowledged pursuant to SHA's receipt form procedure but also have been attached to the bid in order for the bid to be considered responsive. The State procurement regulations require a bidder to acknowledge receipt of all amendments (addenda) to a bid. COMAR

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<sup>1</sup>SHA uses the term irregular in this specific context as an indication at the public bid opening of an unusual or atypical characteristic in the bid. The "irregular" designation is not an indication of nonresponsiveness and is intended solely to communicate an area of potential further inquiry.

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 amendments affect 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.

The actual changes made by Addenda Nos. 1 & 2 included the following:

1. The specification for the Engineer's Boat was added.
2. A paragraph was added to the insurance specification which paragraph clarified that the pollution insurance was an additional requirement over and above the Liability Insurance already required.
3. The estimated time for the structural inspections and testing between cleaning and painting operations was now estimated to be approximately one hour.

Every one of the above changes were material since they had more than a "trivial" or "negligible" impact on the services to be supplied for this project notwithstanding that no new line items were added to the IFB.

Prior to Addendum No. 2 being issued, the bidding documents did not contain any specification for the Engineer's Boat. The bidders were, thus, left with their individual expectations as to what exactly was required and how to price this particular requirement. Upon issuance of the amendment the bidders would have to consider the specifics of the specifications relative to length, number of passengers and engine power of the boat.

The pollution insurance that was added by addendum No. 2 imposed an additional legal obligation on the contractor that was not contained in the original solicitation for this project. Addition of a legal obligation may constitute a material event notwithstanding that the amendment may have little or no effect on the bid price or work to be performed. Oaklawn Development Corporation, supra. We are further advised by Appellant that it was required to add tens of thousands of dollars to its bid to cover the cost of this additional insurance. Any bidder could have a potential economic advantage if it did not have to include the cost of this insurance in its bid.

Finally, the estimated time for structural inspections added by Addendum No. 1 was critical to the bidders' estimates. During the Pre-Bid Conference held on January 12, 1994, the question was asked if other work could be performed while structural inspection was occurring. The bidders were instructed to plan on no work in the particular containment area where inspection was being performed. Considering that the cost per day for the contractor's crew could reach several thousand per day on this project, the addition of this "one-hour inspection time" provision could have been a consideration in the pricing of the bid.

Since we find the amendments to be material the question becomes whether or not Cannon Sline by acknowledgement of the addenda, agreed to be and is legally bound thereby; i.e. is the Cannon Sline bid responsive, notwithstanding its failure to attach the addenda sheets to its bid.

Cannon Sline clearly complied with the COMAR requirement to acknowledge an amendment. SHA sent Cannon Sline copies of the

addenda. Cannon Sline's Vice President signed the receipt form which "acknowledges receipt of the Addendum" and "the corresponding proposal sheets."<sup>2</sup> Cannon Sline then returned the receipt form to SHA by mail and facsimile. Additionally, an SHA inquiry by telephone before the bid opening confirmed that Cannon Sline received both addenda.

Nevertheless, Cannon Sline neglected to comply with the portion of the addenda instructing bidders to "[i]nset and securely fasten" the amended pages to its bid. Although there are some Maryland procurement cases addressing the omission of certain documents in a bid, see e.g. Carl Belt, Inc., MSBCA 1743, 4 MSBCA \_\_\_\_ (Nov. 8, 1993), we are aware of no Maryland cases specifically addressing a failure to attach amended solicitation pages where receipt of such pages is otherwise acknowledged. Compare Grady & Grady, Inc., MSBCA 1721, 4 MSBCA \_\_\_\_ (May 27, 1993); Recon. Denied June 21, 1993; Rev'd. Circuit Court for Baltimore City, August 17, 1993. We believe that a pre-bid acknowledgement 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).

Likewise, there are circumstances where acknowledgement of the amendment prior to bid opening is not, by itself, sufficient where, for instance, the bidder neglected to use an amended price schedule provided by addendum or did not insert a price for the additional item quantities or for the additional work added by the amendment and thus the bid on its face, raises doubts as to whether or not the bidder intends to be bound by the amended solicitation

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<sup>2</sup> The receipt form also states that "before bids may be received, SHA must receive verification that all purchaser (sic) of Contract Documents have received Addenda issued for Contracts."

requirements. See E.H. Morrill Co., B-214556, 84-1 CPD ¶508 (1984); Engineering Technologies Associates, Inc., B-250567, 93-1 CPD ¶121 (1993).

In Engineering Technology Associates, Inc. (ETA), supra, the addendum did not add any new quantity or line item, per se. The addendum divided an existing line item into two items to reflect the fact that the specification had been changed. Original Line Item No. 5 was for 150 units of testing and referenced Paragraph 1.04 of Section 01415 of the specifications. The addendum took 50 of those original 150 units and made new Line Item No. 6 with 50 units, referencing amended Paragraph 1.04 of Section 01415 and leaving Line Item No. 5 with 100 units and referencing the original specifications.

The Comptroller General stated:

"ETA's bid was submitted on the original bid schedule. That schedule referenced specifications which did not require the BTEX test for soil and/or water samplers associated with heating fuel oil tanks. The revised schedule, dated August 13, 1992, referenced the same specification, but that specification was revised by an addendum also dated August 13, 1992 to require the BTEX test along with the previously-required TPH test.

Although ETA acknowledged the amendment that revised the specification, by submitting its bid on the original bid schedule ETA could have been offering to comply only with the unrevised specification since it was the unamended specification that was referenced by the original schedule. In other words, we think ETA's bid was subject to reasonable doubt as to whether it was based on intended compliance with the revised specification or with the specification as it originally existed." ETA at pp. 4-5.

The decision in ETA rests not on the fact that there is a new line item or new quantity, but rather on the fact that without the amended specifications being somehow referenced in ETA's bid, ETA's bid was subject to reasonable doubt as to whether the bidder based its bid on the revised specification or the amended specifications.

In this Appeal, the Board finds that the Cannon Sline bid, on its face, does not create doubt as to whether Cannon Sline intended to perform the amended solicitation requirements. Both Cannon

Sline and Appellant submitted a bid with the exact same schedule of prices and signed the exact same signature sheet. For each item upon which Appellant bid, Cannon Sline also bid on that item. There was nothing in Cannon Sline's bid, as submitted, which was contrary to or inconsistent with the requirements of the solicitation including the addenda pages. The subsequent failure to actually attach the addenda sheets to the bid documents must be viewed as a minor irregularity (a failure in form not of substance).

In Fisher Berkeley Corporation, B-196432, 80-1 CPD ¶26 (1980), the Comptroller General held that "in some cases, the required commitment need not be made in the manner specified by the solicitation; all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirement's." Cannon Sline, we find, has committed itself to providing the amended solicitation requirements by returning its signed acknowledgement prior to bid opening. Cannon Sline's bid, therefore, is responsive.

Appellant argues that Cannon Sline could have a "second bite at the apple" because it did not attach the addenda sheets to its bid. The Controller General has observed that where a bid is subject to two reasonable interpretations under one of which it would be responsive and under the other nonresponsive, the bidder is not permitted to explain his intended meaning after bid opening and the bid is considered nonresponsive. See International Signal & Control Corp.; Stewart-Warner Corporation, B-185868, 76-1 CPD ¶180 (1976). This Board has made similar observation. See the National Elevator Company, MSBCA 1291, 2 MSBCA ¶135 (1986) at p. 5. Cannon Sline's acknowledgement of the addenda prior to the bid opening requires them to provide every item as provided in the amended solicitation. Cannon Sline would not be able to 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. Thus,



the pre-bid acknowledgement does not provide Cannon Sline with a "second bite of the apple."

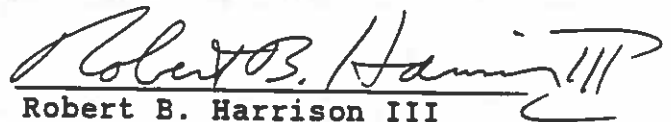
Recently, this Board ruled that the failure to submit the entire "invitation for bids" (proposal) book did not make a bid submitted to SHA nonresponsive. Carl Belt, Inc., MSBCA 1743, supra. This Board recognized pursuant to the facts presented in the appeal that the bidder's commitment to perform was not defined or limited by the contract pages actually attached to the bid.

Given the facts of the pre-bid acknowledgement of the amendments and the nature of the amendments in this appeal we find that the addenda form a part of the Cannon Sline bid whether attached or not. The failure of Cannon Sline to actually attach the pages was thus properly waived.

For the reasons stated above, the appeal must be denied.

It is therefore Ordered this 10~~th~~ day of May, 1994 that the appeal is denied.

Dated: May 10, 1994

  
Robert B. Harrison III  
Chairman

I concur:

Candida Steel  
Candida S. Steel  
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 1804, appeal of Corcon, Incorporated under SHA Contract No. P 993-701-014.

Dated:

*May 10, 1994*

*Mary F. Priscilla*  
Mary F. Priscilla  
Recorder