

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF HERZOG )  
CONTRACTING CORP. )  
 ) Docket No. MSBCA 2245  
Under MTA Contract T-8000-0079 )  
 )

October 11, 2001

Responsiveness - Where a bidder submitted one bid for the work required by the IFB and included additional costs for contingent items, the bid was deemed to be qualified and therefore non-responsive.

APPEARANCE FOR APPELLANT: Scott A. Livingston, Esq.  
Lydia B. Hoover, Esq.  
Rifkin, Livingston, Levitan & Silver, LLC  
Baltimore, MD

APPEARANCE FOR RESPONDENT: Steven L. Tiedemann  
Assistant Attorney General  
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: Danny B. O'Connor, Esq.  
(Amtrac Railroad Contractors of Severn, O'Connor & Kresslein  
Maryland, Inc.) Frederick MD

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals from a final agency action that denied its bid protest that it should be awarded a contract under the Mass Transit Administration's (MTA) solicitation for a track and signal maintenance contract.

Findings of Fact

1. The Contract was advertised on June 5, 2001.
2. Four (4) addenda were issued that modified the bid documents.
3. Appellant submitted several Requests for Clarification, but never sought clarification of employee travel expenses, and mobilization/demobilization costs related to extra work, which costs are the subject of this appeal.
4. No protest, based on the alleged omissions or improprieties in the solicitation or contract documents that Appellant now complains of, was filed before bid opening.
5. Bid opening was scheduled for July 17, 2001. On July 17, 2001 three (3) bids were re-

ceived.

6. The bid totals shown on the bid forms for "Base Scope of Work" column on the bid sheet (Pricing Form BF 4 of 6) were read aloud as follows:

Appellant, \$275,605 per year  
Amtrac Railroad Contractors of Md., Inc., 420,083.60 per year  
Balfour-Beatty Rail Systems, Inc., \$511,383.40 per year

7. Appellant was orally identified and announced as the apparent low bidder .  
The Procurement Officer later reviewed the bids in greater detail, including Appellant's bid sheet and cover letter.  
The cover letter explained two (2) notes on the bid sheet by stating, "we have added Notes 1 and 2 to the Pricing Form BF 4 of 6, which will reimburse us for employee travel expenses for extra work if required, and mobilization/demobilization costs for equipment brought to the project for extra work."
8. Appellant added the two (2) notes to its bid sheet under the rates it had listed for Reimbursable Extra Work for Labor and Equipment on the project. Note 1, placed in the "Labor - Reimbursable Extra Work" column, stated, "Should any of these positions be required to travel to the project, a charge will be added for travel plus meals and lodging at actual cost plus 5%." Note 2, placed in the "Equipment - Reimbursable Extra Work" column, stated, "Mobilization and demobilization to be charged at actual cost plus 5%."
9. The Board finds that these notes made Appellant's bid conditional and rendered it non-responsive.
10. By letter dated July 18, 2001, the Procurement Officer properly rejected Appellant's bid as non-responsive.
11. Appellant filed a bid protest with the Procurement Officer on July 26, 2001 asserting that its bid substantially conformed in all material respects to the requirements contained in the IFB and alleged that the Federal Transit Administration's (FTA) regulations applied and did not allow or permit the inclusion of transportation, mobilization and demobilization costs and expenses in daily equipment rates. Appellant further alleged that it would, therefore, have been improper for any bidder to include these costs in its daily rates for Reimbursable Extra Work. Appellant maintained that its two (2) footnote references on its bid sheet were merely for informational purposes and that inclusion of such extraneous matters in its bid did not render the bid non-responsive.  
Appellant asserted that the MTA should give it the opportunity to correct its bid and that any rejection of its bid would be an agency action which is "arbitrary, capricious, clearly erroneous, and abusive of discretion."  
Appellant also alleged that the inclusion of the footnotes is a minor informality and that the MTA may waive such informalities in a bid.
12. On August 6, 2001, the Procurement Officer and Agency Head issued MTA's final appealable decision. In that decision, MTA rejected Appellant's bid protest and in relevant part determined that:
  - (a) No protest was filed before bid opening based on the alleged irregularities in the IFB. Therefore, to the extent the protest was based on those alleged improprieties, the bid was rejected as un-

timely.

- (b) Appellant's bid did not conform in all material respects to the requirements contained in the IFB, and was rejected as non-responsive.
  - (c) Appellant's non-conforming bid was not a "mistake" that may be corrected, and was rejected as non-responsive.
  - (d) Appellant's non-conforming bid was not a technicality or minor irregularity that may be waived, and was rejected as non-responsive.
  - (e) There is no provision in any applicable federal rule or regulation that proscribes MTA's rejection of a bid with conditional pricing.
13. On August 13, 2001, Appellant filed its appeal. In its appeal Appellant contends that MTA should have rejected all bids and re-bid the Contract. Otherwise, Appellant argues, MTA should have bifurcated the Contract by awarding the base work to Appellant and re-bid the extra work. Appellant also restated its argument based upon certain federal requirements, this time with citation to a specific Federal regulation.

#### Decision

MTA seeks dismissal for Appellant's failure to file a timely protest. Specifically, Appellant alleges that the bid specifications contained a contradiction with applicable Federal law. Since such alleged defect was ascertainable from a review of the bid documents, Appellant should have notified MTA of its concerns pre-bid and if unsatisfied with the MTA response (or in the absence of response) filed a protest prior to bid opening. Instead, Appellant waited until it received the letter rejecting its bid.

Appellant asserts that Federal law prevents this Contract from including mobilization, demobilization and transportation costs in daily equipment rate line items. The IFB, however, required Appellant to furnish "all labor, equipment, and materials and perform all work described in . . . the Contract documents for the consideration of the amounts, lump sum and unit prices listed in the attached Unit Price Schedule. . ." Appellant's protest based on alleged improprieties in the solicitation, in that the terms of the solicitation allegedly deviated from a requirement of applicable Federal law, is one Appellant perceived before bids were opened since Appellant included with its bid the clarifying footnotes and bid cover letter to address this perceived problem.

COMAR 21.10.02.03(A) requires that a protest based upon alleged improprieties in a solicitation that are apparent before bid opening shall be filed before bid opening. Herein, Appellant knew or should have known of the alleged conflict with Federal law it now alleges at the time it read the IFB, prepared its bid, and included the subject footnotes. Appellant did not inquire, or otherwise alert MTA, prior to bid opening that the proposed Reimbursable Extra Work rates allegedly could not include transportation costs and mobilization/demobilization costs

without violating Federal law, and did not file a protest on such grounds prior to bid opening. Appellant was aware of the clarification process because it filed several requests for clarification before bid opening. However, Appellant failed to seek clarification on the issue it now raises.

As noted, a protest based on alleged improprieties in a solicitation that are apparent before bid opening must be filed before bid opening. See COMAR 21.10.02.03(A); see also American Sanitary Products, Inc., MSBCA 2110, 5 MSBCA ¶455 (1999) at p. 3; Merjo Advertising & Sales Promotions Co., MSBCA 1948, 5 MSBCA ¶396 (1996). The failure to file a timely protest deprives the Board of jurisdiction to hear the appeal. See, e.g. ISMART, LLC, MSBCA 1979, 5 MSBCA ¶417 (1997). The Procurement Officer correctly determined that Appellant's protest on these grounds was untimely and an appeal on such grounds must be dismissed. However, because of Federal funding concerns, we will briefly address the merits.

Appellant asserts that MTA's rejection of its bid runs afoul of applicable Federal procurement regulations concerning federal cost principles.

C.F.R. 18.36(a) provides

§ 18.36 Procurement

(a) States. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations.

49 C.F.R. 18.36(a) (emphasis added).

Part 18, of which 49 C.F.R. 18.36(a) is a part, provides "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" and we have noted that 49 C.F.R. 18.36(a) provides that states procuring services under a federal grant must follow the same policies and procedures used for procurement from the State's non-Federal funds. This is exactly what MTA, as a State agency, has done. This is not a situation where Federal law takes precedence as a condition of receipt of Federal funds.

The specific Federal law provision cited by Appellant [48 C.F.R. 31.105(d)] which Appellant asserts required it to qualify its bid, is applicable to a cost analysis process required only for negotiated (not sealed bid) contracts or for contracts that specifically allow for determination, negotiation and allowance of cost after contract award. In other words, it has nothing to do with the competitive bidding process and the Contract in this case. Accordingly, the appeal on such grounds would have been denied if the Board had jurisdiction to consider it.

We now turn to Appellant's other grounds of protest. Appellant asserts that it was the responsible bidder that submitted the responsive low bid for the above-referenced Contract. The Procurement Officer, however, rejected Appellant's bid as non-responsive. COMAR

21.01.02.01(78) defines "responsive" as "a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements contained in the invitation for bids."

The IFB requested prices for three general areas of work: "Firm Fixed Price - Base Scope of Work," "Labor-Reimbursable Extra Work," and "Equipment - Reimbursable Extra Work." For the Firm Fixed Price, Appellant submitted a bid of \$275,605.00 as the annual lump sum amount. There is not any dispute as to the responsiveness of this bid on this item of work.

Next, with respect to the Labor - Reimbursable Extra Work category, the IFB required bids for hourly rates for various laborers, such as a general supervisor, welder, and equipment repairman. This category represented the labor rates for laborers who might be needed during the three-year term of the contract if extra work (i.e., work outside of the scope of the original Contract requirements) is required. Appellant submitted a bid for the hourly rates for these employees, as required by the IFB. However, it qualified this bid by the insertion of Note 1 adding contingent costs for travel, meals and lodging. Appellant asserts that such travel costs are incidental costs that would be negotiated later and that instead of awaiting that later date, Appellant informed the State what its prices would be for those incidental costs. Appellant thus asserts that its bid for Labor - Reimbursable Extra Work constituted a definite and unqualified offer to meet the material terms of the IFB and cites Fortran Telephone Communication Systems, Inc., MSBCA 2068 & 2098, 5 MSBCA ¶460 at p.5 (1999). Appellant states that its inclusion of the costs for alleged additional, incidental work was not required by the IFB and thus did not affect the price, quantity, quality or delivery of the services sought by the IFB because the IFB did not require prices on such incidentals in order to evaluate the bids or select the low bidder. This simply is not the case. From the face of the bid documents it is apparent that Appellant submitted two bids. Appellant submitted one bid for the reimbursable extra work required and another bid for the reimbursable extra work plus an additional amount for travel expenses. This clearly affects price and qualifies the bid. As we observed in Telephone Communication Systems, Inc., supra at p. 5, quoting from General Electric Company, MSBCA 1316, 2 MSBCA ¶143 (1987) at p. 3:

A "responsive" bidder is defined in COMAR 21.01.02.01.60 to mean a person who has submitted a bid under procurement by competitive sealed bidding which conforms in all material respects to the requirements contained in the IFB.

As this Board noted in Oaklawn Development Corporation, MSBCA 1306, 2 MSBCA ¶138 (1986) at pp. 4-5, citing Long Fence Company, Inc., MSBCA 1259, 2 MSBCA ¶123 (1986) at p. 6:

It is a well established principal of procurement law that in order for a bid to be responsive it must constitute a definite and unqualified offer to meet the material terms of the IFB. Free-Flow Packaging Corporation, Comp. Gen. Dec. B204482, 82-1 CPD 162. The material terms of an IFB are those that could affect the price, quantity, quality or delivery of the goods or services sought by the IFB. Solon Automated Services, Inc., MSBCA 1046 (January 20, 1982). The government must have an unqualified right to performance in strict accordance with the IFB based on the form of the bid at the time of the bid opening. Aeroflow Industries,

Inc., Comp. Gen. Dec. B-197628, 80-1 CPD 399. (Underscoring added).

The bid form called for one all inclusive bid for reimbursable extra work, not two bids.

Likewise, with respect to the Equipment - Reimbursable Extra Work category, the IFB required bids for hourly rates for various equipment, such as a hi-rail speed swing (loader), flat bed truck, and crane (under 50 tons). This category represented the equipment rates for various pieces of equipment that might be needed during the three-year term of the Contract if extra work (i.e., work outside of the scope of the original Contract requirements) is required. Appellant submitted a bid for the hourly rates for the equipment, as required by the IFB.

It then qualified the bid by submitting a cost for mobilization and demobilization of the equipment. Appellant again asserts that such costs are incidental costs that would be negotiated later and that instead of awaiting that later date, Appellant informed the State what its prices would be for those costs. Just as with the above item, Appellant's bid for Equipment - Reimbursable Extra Work constituted a qualified offer to meet the material terms of the IFB. Fortran Telephone Communication Systems, Inc., supra at p. 5.

Appellant's inclusion of two sets of costs where only one was sought by the IFB clearly affected price. Appellant submitted a bid that was non-responsive. See The National Elevator Company, MSBCA 1291, 2 MSBCA ¶135 (1986) and cases cited at p. 5.

Appellant next asserts that any non-conformity in its bid, i.e. the two notes that qualified its bids for labor and equipment, should be waived by the Procurement Officer as a minor irregularity or informality.

COMAR 21.06.02.04 provides:

- 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.

It is not possible to quantify what travel costs and mobilization and demobilization costs might actually be involved. However, such costs could involve many thousands of dollars and we decline to find that the Procurement Officer abused her discretion in not finding such costs to be trivial when contrasted with the total scope of the procurement.

Thus, the appeal on such grounds is denied. Nor may Appellant's two notes be viewed as a "mistake". The notes are clearly evidence of deliberate action and no relief will be afforded on grounds of mistake in bid.

For the foregoing reasons the appeal is denied. Wherefore, it is Ordered this 11<sup>th</sup> day of October, 2001 that the appeal is denied.

Dated: October 11, 2001

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Robert B. Harrison III  
Board Member

I concur:

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Randolph B. Rosencrantz  
Chairman

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Anne T. MacKinnon  
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 2245, appeal of Herzog Contracting Corp. under MTA Contract T-8000-0079.

Dated: October 11, 2001

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Mary F. Priscilla  
Recorder