

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of JTE CONSTRUCTORS, )  
INC. )  
) Docket No. MSBCA 1939  
Under SHA Contract No. B 850-509- )  
424 )  
)

March 4, 1996

Bid Evaluation - An agency may not evaluate bids and make an award in a competitive sealed bid procurement based on requirements differing from those solicited in the invitation for bids.

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Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the State Highway Administration (SHA) made a material change to the bid documents after prices were exposed at bid opening and prior to award.

Findings of Fact

1. After various delays, bids for the captioned contract, a noise abatement project on I-695 (Baltimore Beltway) from Charles Street to York Road in Baltimore County were opened on October 24, 1995.

2. The project, as advertised and bid, contained an Alternate A and an Alternate B retaining wall system. Prior to bid opening, SHA issued a series of addenda. Addendum No. 4, issued on September 6, 1995, states that if a "Contractor chooses Alternate B, the Contractor must submit computations and drawings sealed by a registered P.E. in the State of Maryland for review and approval by the Engineer." However, on October 2, 1995, Addendum No. 6 was issued removing the language requiring the contractor to submit computations and drawings for the Alternate B retaining wall. Addendum No. 8 issued on October 19, 1995, added language to GP-7.03 which eliminated the indemnification and hold harmless provisions of GP-7.03 with respect to the design of the retaining walls if a contractor submitted a bid based on the use of Alternate B and did not enter into an agreement with Appellant, JTE Constructors, Inc., who allegedly held a proprietary design for the Alternate B retaining wall system based on copyright registrations.<sup>1</sup> No protests were filed concerning the Addenda Nos. 6 & 8 or otherwise prior to bid opening.

3. With respect to the bids for the Alternate B retaining wall system, Six-M Company, Inc. submitted the apparent lowest bid in the amount of \$7,707,077.85. G.A.&F.C. Wagman, Inc. submitted the next lowest bid in the amount of \$8,334,050.50. Appellant was the apparent third lowest bidder submitting a bid of \$8,712,558.69. Ratrie Robins & Schweizer, Inc submitted a bid of \$9,891,378.02. Corman Construction, Inc. submitted the highest bid of \$10,467,041.10, but such bid was premised on the Alternate A retaining wall only.

4. Appellant filed a protest on December 7, 1995, 44 days after bid opening stating that its "protest is generally based on circumstances surrounding the plans, specifications and Special Provisions of the Contract" and that "a more detailed basis for the formal protest will be forwarded as soon as possible." Appellant also stated that its protest "has to do with the knowledge which we just acquired that we feel did not give all interested parties the same opportunity to present a competitive bid. We have been advised that the apparent low bidder did not include the cost of

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<sup>1</sup> In this regard Addendum No. 8 provided:

If the Contractor has submitted a bid based on the use of retaining Wall Alternate B and the Contractor has not entered into an agreement with JTE, Inc., the indemnification and hold harmless provisions of this GP-7.03 are not applicable to claims by JTE relating to Alternate B so long as the retaining wall actually constructed by the Contractor is consistent in all respects with Alternate B as specified.

design in their bid and may seek recovery of the design costs and associated changes in the scope of work and time delays.”

5. The Procurement Officer issued his Final Decision on January 4, 1996 denying Appellant’s protest. The denial was based on the belief that the protest was untimely and that the claims raised in the protest were speculative, vague, and dealt with contract administration.

6. Appellant filed a Notice of Appeal with this Board on January 12, 1996. In its Notice of Appeal, Appellant claims that the “design contained in Alternate B was illegally included in the plans” because of Appellant’s alleged proprietary interest.<sup>2</sup> Appellant also asserted that for the first time on December 5, 1995, it learned that a meeting between SHA and Six-M was held in which SHA allegedly evidenced an intent to award the contract on a different basis than that reasonably conveyed by the content of the bid documents at bid opening.<sup>3</sup>

#### Decision

Appellant in its protest asserts that all interested parties were not given “the same opportunity to present a competitive bid”, allegedly because Six-M “did not include the cost of design in their bid and may seek recovery of the design costs and associated changes in the scope of work and time delays.” We deny Appellant’s appeal on this ground. Addendum No. 6 removes the language requiring bidders to include the computations and drawings (i.e. the design) for the Alternate B retaining wall in their bids. We find that a reasonable bidder would have understood at the time of bid opening when all addenda had been issued that the responsibility for preparing computations and drawings for the Alternate B retaining wall, and the cost of such design, would be the responsibility of SHA. The record further reflects that Rummel, Klepper & Kahl (RK&K), SHA’s engineer for the project, is responsible for actually providing the design. Therefore, there

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<sup>2</sup> The Board declined in a pre-hearing ruling on a motion in limine to decide the validity of Appellant’s assertions of proprietary design based on Federal patent/copyright law; because the Board believes that it lacks jurisdiction to decide such matters.

<sup>3</sup> The Board finds that Appellant did not discover the grounds of its protest involving an alleged change in the basis for award until December 5, 1995. Its protest on such grounds, two days later, was therefore timely under COMAR 21.10.02.03B and the Board denies SHA’s motion to dismiss the appeal on timeliness grounds.

was no requirement for Six-M to include such design costs with its bid. Appellant also intimates that the apparent low bidder may, nevertheless, seek recovery of any design costs it may incur internally to perform the work through the filing of post award claims. This is speculative and in any event is a matter of contract administration not properly before the Board for decision because any dispute that may subsequently arise would not be a dispute relating to formation of a State contract.

Of more serious concern is whether there has, in fact, been or will be a change in design occurring after bid opening and before award<sup>4</sup> that represents a material change in the salient features of the plans and specifications that could have affected the outcome of the bidding had the change been promulgated prior to bid opening. Appellant contends, citing this Board's decision in Honeywell, Inc., MSBCA 1317, 2 MSBCA ¶148 (1987), that such a change has occurred and thus SHA intends to make an improper award on a basis different than that set forth in the invitation for bids and addenda.<sup>5</sup> This issue we believe flows directly from the specific grounds of protest articulated in Appellant's letter of protest of December 7, 1995, although it was not until February 23, 1996, three days before the hearing of the appeal, that Appellant received through a pre-hearing document discovery request material that suggested that a post bid opening, pre-award change to the bid documents could have or might occur. However, after an evidentiary hearing on the matter, the Board finds that no pre-award material change to the bid documents has occurred or is about to occur.

A subsidiary issue raised by the evidence is whether the bid documents and addenda provided enough information for bidders to reasonably bid on the Alternate B retaining wall. No one protested prior to bid opening that the bid documents did not enable bidders to compile meaningful bids. Any such issue is therefore untimely. See COMAR 21.10.02.03A.

Nevertheless, the Board received evidence on the question in connection with the evidence adduced on the issue of a post bid opening, pre-award change to the bid documents. While SHA itself admitted that it might have been better or "convenient" to have provided certain design

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<sup>4</sup> SHA has not executed the contract. SHA has determined not to award the contract until this Board issues a final decision concerning this appeal. See COMAR 21.10.02.11.

<sup>5</sup> In Honeywell, Inc., *supra.*, the Board held that an agency may not evaluate bids and make an award in a competitive sealed bid procurement based on requirements differing from those solicited in the invitation for bids.

information prior to bid opening, rather than after, the record reflects that there was sufficient information contained in the bid documents at the time of bid opening to enable prospective bidders to submit a reasonable bid on the Alternate B retaining wall. Four of five bidders submitted bids on the Alternate B retaining wall system without pre-bid protest that they either did not understand the plans and specifications or believed that inadequate information was conveyed by the bid documents to enable a reasonable bid to be compiled. The Presidents of Appellant and Six-M Company testified that they could put together a competitive bid on the Alternate B retaining wall.<sup>6</sup> Two SHA employees involved in the bid, the project manager who was responsible for the bid documents and the project manager for the structural aspects of the project, both testified that the bid documents contained enough information for the bidders to submit a bid even though the bid documents only included one "detail" or sheet (sheet no. 74) out of 116 sheets dealing with the Alternate B retaining wall system. The project manager for the structural aspects of the project testified that:

Q. Can you briefly describe, I know Mr. Califano went into this, but how the items are bid on this particular project?

A. Okay. We broke it out. We had different items for the alternate A wall and different items for the alternate B. Being for alternate A we had the square foot for panel, we know how much noise wall we needed, so we had a square foot for that. We had a linear foot for caissons. And then we also, wherever our retaining wall was, we had a lump sum price for that.

And that also deals with the alternate B wall. We had the square footage for the wall in there, the linear feet of caisson, and lump sum for the retaining walls. There's also one other item I forgot, it's piling, too, the alternate A retaining wall needed piling in some spots, which is steel H piles.

(Tr. pp. 176-177).

The project manager responsible for the preparation of the bid documents [Mr. Califano] gave similar testimony. The Board finds that the bid documents contained sufficient detail for the

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<sup>6</sup> Appellant's President testified that his particular knowledge of the Alternate B retaining wall system enabled him to bid. He stated, however, that he did not believe other bidders could do so because there were no "plans" and only one "sheet, one detail", included with the bid documents for the Alternate B retaining wall.

bidders to submit a reasonable bid on the Alternate B retaining wall system. The schedule of prices contained estimates of quantities and lump sum items required for either wall system.

We return now to the central issue of whether there was or will be a change in design prior to award of a material nature or scope that represents a change in requirements from those reasonably anticipated by a bidder based on the content of the bid documents at the time of bid opening.

At the time of the hearing RK&K was approximately 90% finished the design<sup>7</sup> (computations and drawings). The work that RK&K had performed in this regard was described by the SHA project manager dealing with the structural aspects of the project who had actually seen RK&K's work as follows:

Q. I believe my last question was have you seen the plans that RK&K has provided on this job?

A. Yes, I have.

Q. Okay. And I was going to ask you to draw the Board a picture of basically what those plans are showing.

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A. What we have now in the contract, we have alternate A plan and elevation shown, it's basically showing the top of the wall and it might step, okay.

Now, this is the top of the noise barrier. Now, if we're on top of the retaining wall, let me draw that in. So let's say our retaining wall is from here to here, so we're retaining fill behind this wall here. Now, this is based on 12 foot.

BY MR. MORRELL:

Q. That's alternate A?

A. This is alternate A. What we asked RK&K to do was not come up with a design but come up with the plans showing 16 foot. So basically they'll be taking these 12-foot plans and maybe extend this out to 16 foot and this is

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<sup>7</sup> RK&K was issued an oral directive on November 9, 1995 to do this work in its role as consultant engineer to SHA for the entire I-695 corridor. The work performed on this particular project since oral notification to prepare the design on November 9, 1995 has involved a total of 760 engineering hours, development of 22 or more plan sheets and a \$32,000 cost.

where the new post would be and then they come out here and the new post comes down here.

Q. Let me just give you another color.

A. That might be better. So let's say now the 16-foot, it's like this, like this, like this. So we do have -- so this is what RK&K will be and has provided us is drawings to this effect and there is no redesign for alternate B, the design was already done as part of the big contract. You have caisson lengths already involved in there. So I'm just saying there's no redesign involved in this other than coming up with new wall height elevations.

BOARD MEMBER ROSENCRANTZ: So you're saying essentially there's no difference in the square footage whether it's 12 foot or 16 foot?

THE WITNESS: There will be a difference, there will be a small percentage difference, because let's say this little corner detail here, we have to take that up into account. We figured we had an item in there for square footage under the original bid. There will be some design -- I guess I misspoke because, let's go to the plan, okay. The geometric layout of the wall. We have -- let me get a new sheet. It will come under the same circumstances here. We have a wall that would go like this, then like this, this is looking down flying overhead, let's say.

\* \* \*

A. Let's see, this is from one point to the next point, this is based on 12-foot post spacing. Now, we'll come up with 16 foot. So to do that, of course, there will be here, a new post here, new post here. What are you going to do over here? You might have to extend the wall out a little bit to get the 16 foot in there, then turn the wall, because you want to stay within the right-of-way that we have on the job. So there will be some -- there is redesign in that, but only for the geometric layout, not for anything else.

Q. Okay. Did you make any type of evaluation of how much the area was off in the plans that you've seen?

A. There is a difference between 12-foot spacing and the 16-foot spacing and we're talking percentage, basically so we can get a smooth, a smooth top of wall. We don't want a wall that juts up and down because we're going to different post spacings. Your wall is going to change a little. We have something that will look smooth with our transition from the top of the wall here. I think it would catch some motorists' eye if the wall juts up and down as they drive by, so we make sure the transition along the top of wall looks smooth. It might be a foot difference.

Q. A foot in relation to?

A. What was on the 12-foot alternate A plans.

Q. I'm still a little unclear as to when you say a foot. For the entire project?

A. No, it's only for certain parts of this wall.

Q. Just certain parts?

A. Certain parts trying to get the transition right, might have to change the elevation. Instead of this being where this purple is, maybe to get the transition to look better we might have lowered it a foot just so it matches up to the panel next to it.

Q. That's what RK&K is developing?

A. They developed that and they submitted it to us for our review. We did review it and we sent it back to RK&K.

Q. Can you give me an idea of substantially how complete they are in this process?

A. I'd say about 90, 95 percent.

(Tr. pp. 178-183).

The Board finds this testimony to creditably represent the design work, as performed and being performed by RK&K. The Board further finds that such work, to the extent it may even be viewed as creating a change to the bid documents, does not represent a change to the bid documents that was not reasonably contemplated by a reasonable reading of the bid documents and addenda as they existed at the time of bid opening. Accordingly, the appeal based on allegations that SHA proposed or proposes to award the contract on a basis different than that reasonably conveyed by the content of the bid documents at bid opening is denied.<sup>8</sup>

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<sup>8</sup> As a result of a VECP submitted by Appellant on another project in the I-695 corridor which has been accepted it is possible that a similar change could be ordered on the instant project. Such change, if ordered, would add an "Architectural Pilaster" on the exposed side of the retaining wall at every other noise wall post location. Such change, if ordered for this project, would not result in an award based on different criteria from that set forth in the bid documents.



Wherefore, it is ORDERED this 4th day of March, 1996 that the appeal is denied.

Dated: March 4, 1996

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Robert B. Harrison III  
Chairman

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 1939, appeal of JTE Constructors, Inc. under SHA Contract No. B 850-509-424.

Dated: March 4, 1996

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Mary F. Priscilla  
Recorder