

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of JOSEPH AVERZA & SONS,)
INC.)
) Docket No.
Under DPS&CS Project Nos.) MSBCA 1544
KJ-005-861-101 and)
KJ-006-961-001)

October 2, 1990

Responsiveness - Minor Irregularity - where criterion used to determine the low bid was not affected by a bidder's failure to place the sum in the space on the Price Schedule and the space on the bid form - this sum was the sole determinant of the low bidder.

The failure of the Price Schedule to include blanks for filling in prices for items of work included in the specifications does not convert a waivable minor irregularity to a material defect.

APPEARANCES FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

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APPEARANCES FOR INTERESTED
PARTY:

Cam Construction Co., Inc.

Louis J. Kozlakowski, Jr.,
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OPINION BY MR. PRESS

Appellant timely appeals a Department of Public Safety and Correctional Services (DPS&CS) procurement officer's final decision sustaining the protest of the Interested Party, Cam Construction Co., Inc. (CAM) that Appellant's bid was non-responsive.

Findings of Fact

1. On June 15, 1990, DPS&CS issued an Invitation for Bids (IFB) for construction of Phase I Site Work and Utilities and Perimeter Security at the Maryland House of Correction in Jessup, Maryland. The bidders were to submit their bids on the 22 page Construction Bid Form, which was made available to Bidders in the Project Manual. (Agency Report, P-2).

2. Pages 5 through 22 of the Construction Bid Form contain a Price Schedule, listing 85 items for which the contractor is to provide individual prices. Items 1 through 22 of the Price Schedule are lump sum items which encompass most of the work the contract documents require for the project. The Price Schedule contained an "Amount" line for insertion of each lump sum bid item. Items 23 through 85 list various types of work, for which DPS&CS required the contractor to provide unit prices. With respect to items 23 through 85 the contract documents instructed bidders to extend their unit price figure for a particular item by the quantity indicated in the "Quantity" column and arrive at a dollar amount, which is then inserted in the "Amount" column. (Agency Report, p 3&4).

3. The bidders were instructed to total all the "amounts" for both the unit price items and lump sum items¹ and include this in their base bid price, which was to be written in on page 2 of the Construction Bid Form. The Form provided in relevant part as follows:

Having carefully examined the "Instruction to Bidders," the "General Conditions," the specifications, drawings, addenda and having received clarifications on all items of conflict or upon any item on which doubt arose, the undersigned proposes to furnish all material, labor, equipment, supervision, managerial and professional services necessary for the project in accordance with the contract documents for the stipulated sum of:

Base Bid: _____
(written)

Dollars: \$ _____
(figures)

The Base bid price includes all applicable taxes and fees including sales tax. The Base bid price includes the Lump Sum price of all work shown in the Contract Documents and also includes the

¹Bidders were also instructed to provide a subtotal amount for the lump sum and unit price items and a total amount for such items on page 22 of the Price Schedule.

prices for the quantities of additional work shown on items 23 through 85 of the attached Price Schedule.

(Agency Report, Exhibit 2, page 2).

4. It was anticipated there might be a large amount of work that would have to be paid for under the unit price figures, therefore the project engineer (O'Brien & Gere Engineers, Inc.) and DPS&CS decided to estimate how much additional work might be needed in each of the unit price categories and include the cost of that amount of work in the contract price. The estimates provided the quantity figures in the "Quantity" column of the Price Schedule. (Agency Report, P-5)

5. At the bid opening on August 2, 1990 six bids were received, and the base bid amounts written on page 2 of the Construction Bid Forms were read aloud. Appellant's bid was not read aloud because it had not filled in the base bid lines on page 2. The lowest bid read aloud was that of CAM which was \$15,352,715.00. Appellant's bid contained prices for all the items in the Price Schedule. However, because of Appellant's failure to fill in the base bid lines on page 2, DPS&CS treated Appellant's bid as incomplete. (Agency Report, P-6). All other bidders submitted bids in which their base bid amounts on page 2 as written in words and figures equaled the sum of the eighty-five bid items on the Price Schedule. See Exhibit A attached.

6. S.K. Kulkarni, a DPS&CS engineer assigned to the project, reviewed all the bids submitted after bid opening. In reviewing Appellant's bid, he ascertained that Appellant had filled in all of the 85 items on the Price Schedule, but had failed to total those items on the Price Schedule and on the lines indicated on page 2 of the Construction Bid Form. (Agency Report,

P-6). It was determined through mathematical addition of each of the individual bid items that Appellant's total for the 85 items was \$15,249,100.00.

This figure was lower than CAM's base bid by \$103,615.00. Mr. Kulkarni called Appellant and requested it to confirm its bid. (Agency Report, P-6).

7. On August 6, 1990, Appellant telefaxed a letter to DPS&CS confirming its bid at \$15,249,100.00. Upon receipt, Dale Strait, Director of Engineering and Construction for the Department of General Services (DGS)² concluded Appellant's failure to total all of the 85 items in the Price schedule was a minor irregularity and that its bid had been correctly confirmed by Appellant. Mr. Strait reported this to Earl Seboda, Secretary of DGS, who telephoned Appellant on August 7, 1990 to advise it of Mr. Strait's conclusions and that it would be up to DPS&CS to make an award. (Agency Report P-7).

8. On August 7, 1990, the Tabulation of Bids was revised by Dorothy N. Niemeyer, Chief of the Contract Services Division of DGS, to include in the Base Bid column the sum total of Appellant's prices for items 1 through 85 on the Price Schedule. This sum was \$15,249,100.00 (\$103,615.00 less than CAM's bid). By letter dated August 8, 1990, Ms. Neimeyer notified all bidders of this revision. (Agency Report, P-7).

9. On August 10, 1990 CAM filed a protest alleging Appellant's bid was non-responsive. The protest indicated items 1 through 22 in the Price Schedule did not include all items of work pursuant to the contract documents. In particular, the work required to be performed under Division 11 among others³ was not included in any items listed in the Price Schedule. CAM thus alleged DPS&CS was not able to add all of the totals for items 1

²Both DPS & CS and DGS had certain administrative responsibilities for this procurement.

³The Price Schedule did not cover any of the work set forth in Divisions 11 and 13 and did not cover portions of the work set forth in Divisions 2 and 15. For a description of the work omitted from the Price Schedule see the contract specifications (Board Exhibit 1).

through 85 to arrive at the base bid price intended, because the Price Schedule did not include any costs for certain work. Therefore, CAM argued Appellant's bid was non-responsive due to its omission in not inserting a base bid on page 2 of the Construction Bid Form, because Appellant allegedly was not offering to perform all the work required by the contract specifications but only offering to perform work listed in the Price Schedule. (Agency Report, P-7&8).

10. CAM, in addition, alleged Appellant's bid bond was defective. Appellant's bid bond stated its amount was "5% of the amount bid." CAM concluded that if the amount of the bid was uncertain, then the amount of the bid bond was uncertain and defective. Also, Appellant in the appropriate space on Page 2 of the Construction Bid Form entered the figure \$726,500.00 as 5% (the penal sum) of its total bid price. \$726,500.00 is 5% of \$14,530,000.00, not \$15,249,100.00 which is the total of Appellant's prices entered for the 85 bid items. CAM therefore asserted the bid bond amount was unclear thus raising a question regarding the intended base bid amount. (Agency Report, P-8).

11. In view of the matter raised by CAM's protest the Procurement Officer concluded the omissions in Appellant's bid rendered it non-responsive and sustained CAM's protest by letter dated August 27, 1990. (Agency Report, Exhibit 10).

12. On August 29, 1990, a notice of Appeal was filed with the Appeals Board in which Appellant maintains (1) its errors or omissions on the bid form were obvious and caused no disadvantage to other bidders, (2) its failure

to place a Base Bid amount in the spaces provided was and is a minor irregularity which could be properly corrected from the face of the bid documents, and (3) Appellant's incorrect Bid Bond penal sum was an arithmetic error which could be corrected. (Appellant's Notice of Appeal, P-3&4)

Decision

During the course of the hearing all parties accepted DPS&CS statement of facts with respect to the IFB, bid opening and post bid developments.

It was further agreed Appellant's bid form contained omissions, ie. it failed to complete the Base Bid lines on the Construction Bid Form.

The precise issue is whether the Appellant's obvious omissions on the bid form were material thus rendering its bid non-responsive or minor irregularities which the Procurement Officer might waive.

DPS&CS first determined that the omissions were minor relying on the provisions of COMAR 21.06.02.04 which 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 of irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State

The Appellant's bid was incomplete, because sub-totals for items 1 through 22 and items 23 through 85 of the Price Schedule had not been totaled in the spaces provided on page 22 of the Price Schedule and the spaces for the Base Bid price in words and figures on page 2 of the Construction Bid Form had not been completed. DPS&CS personnel initially treated these omissions as minor irregularities, and the failure to provide the totals on page 22 of the Price Schedule and the totals on page 2 of the Construction Bid Form were waived as minor irregularities by the Procurement Officer.

Therefore, the Procurement Officer after evaluating the Appellant's bid determined to treat as a minor omission as to form Appellant's failure to enter the amounts in the spaces provided and waive such deficiencies.⁴

The Board finds (and the parties agree) that the Procurement Officer should properly have concluded that Appellant's bid suffered from minor irregularities of an inconsequential and insignificant nature had the Price Schedule included all the work. Appellant's omissions would not have prevented the bid from being in substantial compliance.

We thus find DPS&CS personnel and the Procurement Officer were on the correct path when initially adding items 1 through 85 and deriving a base bid total of \$15,249,100 and treating the Appellant's failure to include such total on page 22 of the Price Schedule and page 2 of the Construction Bid Form as a minor irregularity.

⁴During the hearing DPS&CS and Cam acknowledged that Appellant's bid bond amount could be determined by a mathematical calculation and abandoned any separate grounds of protest based on any defect in Appellant's bid bond as such. We agree that Appellant's bid was not rendered non-responsive by any defect relating to its bid bond.

When the Procurement Officer was made aware that the Price Schedule did not include line items for a bidder to insert its price for certain work (i.e. Division 11) the Procurement Officer concluded the law no longer permitted Appellant's omissions to be waived as minor irregularities.

In this appeal, however, the Board finds that the determination of whether the omissions were minor is not affected by the fact that the Price Schedule did not contain a line item for certain work (i.e. Division 11).

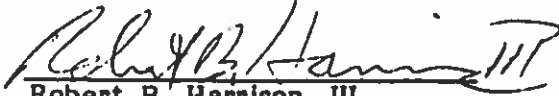
All bidders (save Appellant) took the arithmetic sum of items 1 through 85 and placed such sum in the appropriate space on the Price Schedule and on page 2 of the Construction Bid Form. This sum was the sole determinant of the low bidder. This sum controlled before CAM filed its protest and after CAM filed its protest. The failure of the Price Schedule to include blanks for filing in prices for items of work contained in the contract specifications does not convert a waivable minor irregularity to a material defect making Appellant's bid non-responsive where all other bidders in the instant case submitted a Base Bid price consistent with the sum of the 85 items on the Price Schedule.

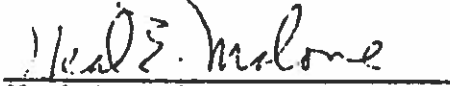
Therefore, the appeal is sustained.

Dated: *October 2, 1990*


Sheldon H. Press

I Concur:


Robert B. Harrison, III
Chairman


Neal A. Malone
Board Member

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSCBA 1544, appeal of JOSEPH AVERZA & SONS, INC., under DPS&CS Project Nos. KJ-005-861-101 and KJ-006-961-001.

Dated: 10/2/90

Mary F. Priscilla /m c

Mary F. Priscilla
Recorder

EXHIBIT A

<u>CONTRACTOR</u>	<u>LUMP SUM SUBTOTAL</u>	<u>UNIT PRICE SUBTOTAL</u>	<u>TOTAL BASE BID</u>
Joseph Averza & Sons, Inc.	\$14,530,000	+ \$ 719,100.00	= \$15,249,100.00
CAM Construction, Inc.	\$14,396,400	+ \$ 956,315.00	= \$15,352,715.00
Cherry Hill Construction, Inc.	\$14,752,646	+ \$ 969,271.75	= \$15,721,917.75
W. M. Schlosser, Inc.	\$14,976,825	+ \$1,220,175.00	= \$16,197,000.00
Whiting-Turner Contracting Co.	\$16,538,677	+ \$1,432,589.00	= \$17,971,266.00
Triangle General	\$17,144,500	+ \$1,279,950.00	= \$18,424,450.00

* These figures are taken from the face of the bids of each bidder.