BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of K&K PAINTING, INC.	)	
	)	
Under DGS Project No.	)	Docket No. MSBCA 1530
MDE 88/001/TESH-1	)	
Contract No. 4	)	
	)	

September 26, 1990

Responsiveness - Appellant's bid on a removal of lead paint and lead in the soil project to be performed in 1990 failed to acknowledge an addendum to the IFB substituting an updated 1990 wage scale which differed materially from the 1990 wage scale originally included in the IFB. This failure to acknowledge the addendum rendered Appellant's bid non-responsive since the bid was not a commitment to the further legal obligation to pay the higher wage rates and thus did not constitute a definite and unqualified offer to meet a material term of the IFB affecting price.

APPEARANCE FOR APPELLANT:	Marc A. Klitenic, Esq. Margolis, Pritzker & Epstein, P.A. Towson, MD
APPEARANCE FOR RESPONDENT:	Michael P. Kenney Assistant Attorney General Baltimore, MD
APPEARANCE FOR INTERESTED PARTY: Con-Quest Construction, Inc.	Robert E. Sharkey, Esq. Gordon, Feinblatt, Rothman, Hoffberger & Hollander Baltimore, MD

OPINION BY MR. PRESS

Appellant timely appeals a Department of General Services (DGS) procurement officer's final decision awarding a contract to another bidder.

Findings of Fact

1. The contract seeks to accomplish the removal of lead paint and lead in the soil at various residential properties in the Park Heights section of Baltimore City. The Maryland Department of Environment (MDE) Bid Form listed twenty-eight (28) "preparation

and painting" items, seven (7) soil work items, and four (4) miscellaneous tasks. (Agency Report, P-1&2).

2. This is the fourth contract in the Baltimore area; and funding for these contracts is derived from the United States Environmental Protection Agency's "Superfund". (Agency Report, P-1).

3. MDE determined that the Maryland Prevailing Wage Law was not applicable. However, since the project is 100% federally funded, the Davis-Bacon Act applied. Consequently, the original solicitation for this contract (as well as for the prior four contracts) contained a copy of the U.S. Department of Labor's General Wage Decision No. MD 89-1, covering Baltimore City, for the construction type "Building and Heavy". The aforementioned wage scale was chosen, as most applicable for the work which included handling and removing hazardous materials, including soil. (Agency Report, P-3).

4. Prior to the date for receipt of bids for the instant contract MDE issued Addendum Number 1, substituting General Wage Decision MD 90-1 for MD 89-1. (Agency Report, Exhibit 4). The amendment is an update of the wage scale issued by the Department of Labor which supersedes the 1989 schedule, and was issued because the contract work was to be performed in 1990. (Agency Report, P-3). The amendment provided a wage scale for laborers of $10.96 and a wage scale for painters of $14.00. The difference in wage rates between 1989 and 1990 for laborers is 44 cents. There is no material difference in wage rates for painters. (Agency Report, Exhibits 4 and 14).

5. Bids were opened and tabulated on July 11, 1990. The apparent low bidder was Appellant at $343,843.24 (corrected by Procurement Officer subsequently due to minor errors in price extensions). Appellant's bid, however, failed to acknowledge receipt of Addendum Number 1.

6. On July 13, 1990 Appellant sent the following letter to DGS:

> Gentlemen:
>
> I would like to inform you of the following:
>
> I did receive and have read carefully the ADDENDUM NUMBER 1 dated June 25, 1990.
>
> I missed to acknowledge the addendum on the bid form.
>
> Also, I do recognize the wage rates for painters and laborers.
>
> I do honor the wage rates.
>
> I guarantee payments to all laborers will be according to the addendum wage rates, or more.
>
> My bid is with no errors and is a good firm bid.
>
> Enclosed are copies of affidavits and bribary.
>
> For further information do not hesitate to contact us.
>
> Sincerely,
>
> K&K Painting, Inc.
>
> (signed)
>
> Evangelos Kaliakoudas
>
> President

7. Con-Quest Construction, Inc. (Con-Quest) the second lowest bidder, filed a timely bid protest on July 13, 1990 (Agency Report, Exhibit 7), alleging Appellant's bid should be declared non-responsive for its failure to acknowledge a material amendment.

The Procurement Officer sustained the protest in a final decision dated July 20, 1990 finding that failure to acknowledge receipt of Addendum Number 1 rendered Appellant's bid non-responsive. (Agency Report, Exhibit 8).

8. DGS sent a notice to Appellant and other bidders on July 23, 1990 that the State intended to award the contract to Con-Quest within a few days. (Agency Report, Exhibit 9).

9. Appellant appealed the procurement officer's final decision to this Board on July 25, 1990 and on July 31, 1990, Appellant filed a "Supplemental Notice of Appeal" (Agency Report, Exhibit 11) raising two additional issues which were not raised by Con-Quest's protest nor addressed by the Procurement Officer's final decision.[1]

10. On June 27, 1990, the Maryland Board of Public Works approved the letting of the contract on an expedited basis. (Agency Report, Exhibit 2).

Decision

The parties agree that Appellant failed to acknowledge Addendum No. 1 with its bid. The general rule is that failure to acknowledge an addendum renders a bid non-responsive. However, there is an exception when the amendment by addendum is not "material". Oaklawn Development Corporation, MSBCA 1306, 2 MICPEL 138 (1986).

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[1] Appellant raised the following two points:

a. whether the Building and Heavy wage scale is applicable to this contract, and
b. whether the State violated the law by not requiring a performance bond.

DGS filed a Motion to Dismiss the above two grounds of protest which was granted by the Board during the preliminary stages of the hearing.

The issue for determination in this appeal is whether or not the amendment was material. "The material terms of an IFB are those that could affect price, quantity, quality or delivery of the goods or services sought by the IFB." Solon Automated Services, Inc., MSBCA 1046, 1 MICPEL 10 (1982). When comparing the 1989 wage rate with the 1990 wage rate, the addendum reveals a wide disparity for wage rates for laborers.

Appellant asserts the labor intensive work would be accomplished by painters where there is no disparity between the 1989 and 1990 wage rates. DGS urges the Board on the other hand to accept its position the aforementioned work would be done by laborers with increased costs to the contractor of approximately $17,800, based on the difference in laborers' rates from the 1989 to the 1990 wage scale. As the Board stated in Long Fence Co., Inc., MSBCA 1259, 2 MICPEL 123 (1986) at 6:

> It is a well established principle 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. B-204482, 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.

The Board agrees with DGS the amendment imposes a material obligation on a bidder, i.e. to pay higher wage rates to laborers which were not contained in the original solicitation. We have noted that the materiality of an amendment which imposes new legal

obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. Oaklawn Development Corporation, supra. In the instant appeal the record does not exclude as a reasonable possibility that a bidder might chose to perform the labor intensive work with laborers rather than painters. Thus the addendum clearly presents a material amendment, i.e. legal obligation affecting price. Appellant has only partially obligated itself to be bound, and its failure to acknowledge the addendum was not a commitment to a further legal obligation contained therein to pay the higher 1990 wage rates to its laborers. A bidder's objective intention to be bound, is judged from its bid as submitted at bid opening.

The subsequent letter to DGS on July 13, 1990, is evidence DGS could not consider. If it were considered it is obvious this would be allowing Appellant an advantage over other bidders. Oaklawn Development Corporation, supra.

We, therefore, conclude this is not a minor irregularity in a bid, but a failure to acknowledge a material amendment. The Board thus finds Appellant's bid non-responsive and the appeal is denied.