

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of LIBERTY ROOFING)	
CO., INC.)	
)	Docket No. MSBCA 1184
Under Morgan State University)	
Project No. 101A)	

July 6, 1984

Responsiveness - Waiver of Minor Irregularity - A bidder's failure to submit a price for an alternate item that was not to be considered as a basis for contract award was deemed waivable as a minor informality.

Responsiveness - Waiver of Minor Irregularity - A bidder's failure to specify a unit price for relocating roof drains was waivable as a minor informality where the invitation for bids indicated that only the base bid would be used in determining the lowest evaluated bid and no method for evaluating the unit price was provided.

Bid Protest Procedures - Bid protest procedures are reserved for considering whether an award of a contract complies with statutory and regulatory procedures. Whether the contractually required manufacturer's guarantee of the roofs to be installed would be enforceable is a contract administration matter that cannot be resolved under these bid protest procedures.

Responsiveness - The low bidder's failure to acknowledge an amendment to an invitation for bids did not render its bid nonresponsive where the amendment relaxed the specifications resulting in a decrease in the cost of performance. Under such circumstances, the other bidders were not prejudiced since the low bidder did not have the option of remaining silent and not receiving an award based on the more onerous original specifications.

Responsiveness - Deviations in a bid that are waivable as minor informalities have no greater significance when considered cumulatively so as to render nonresponsive an otherwise responsive bid.

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APPEARANCE FOR RESPONDENT: Edward S. Harris
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OPINION BY MR. KETCHEN

This appeal is taken from a Morgan State University procurement officer's final decision denying Appellant's request that the low bid in the captioned procurement be rejected as nonresponsive and that it be awarded the contract. Appellant contends that the low bid should be rejected as nonresponsive because it failed to provide a price for two bid items and did not acknowledge an amendment to the specifications in its bid.

Findings of Fact

1. On October 28, 1983, the Department of General Services (DGS) issued an invitation for bids (IFB) for the complete removal and replacement of the roofing systems for the Tubman House and Harper House residence halls at Morgan State University.

2. The scope of work included removal of the existing roofing systems for the two buildings and installation of a four ply, glass felt, coal tar pitch roofing system with tapered perlite insulation. The IFB required the successful contractor to provide a manufacturer's five (5) year guarantee for each of the roofs as part of contract performance.

3. The specifications required that the roofing systems be applied in strict accordance both with the procedures set forth in the 1983 NRCA Roofer's Manual and the detailed specifications and general requirements published in the latest manual of the roofing systems material manufacturer.

4. The scope of work as described by Section IV, para. 2 of the contract specifications, in pertinent part, included the following:

- (1) Removal of the existing roofing system down to the deck.
- (2) Relocation of the roof drains, as required, indicated on drawing number 236.
- (3) Installation of a perlite tapered insulation system.

* * *

5. Section IV, para. 8 of the contract specifications provided for application of the roofing systems, in pertinent part, as follows:

- d. The 1/4" tapered perlite insulation shall be installed so that the roof shall slope from four (4) directions to each of the drains.

* * *

- k. Drains shall be clean, reflashed with a minimum 30" square, 2 1/2 pound to 4 pound lead and installed in full accordance with Construction Detail 'W' as published in the latest NRCA Manual.

* * *

6. On November 22, 1983, the Morgan State procurement officer issued Addendum No. 1 to the IFB amending the specifications as follows:

1. SECTION IV 8d: page S-7

Change From 1/4" Tapered Perlite Insulation To 1/8" Tapered Insulation

2. Change Bid Opening Date to December 7, 1983 at 10:30 a.m.

7. On November 30, 1983 Addendum No. 2 to the IFB further amended the specifications as follows:

1. SECTION IV 8d: Page S-7 and Addendum #1 Item 1

Change from 1/4" tapered perlite insulation to 1/8" tapered insulation on Harper House and non-tapered insulation on Tubman House. Minimum thickness around roof drain shall be 1".

8. Section V of the contract specifications provided for a deduct alternate for reroofing only one roof and for a unit price to relocate roof drains as follows:

"V. ALTERNATES/UNIT PRICES

1. ALTERNATES:

- a. Deduct alternate: Replace Harper House roof only

2. UNIT PRICES:

- a. Unit Prices: To divide Harper and Tubman Houses each into a quadrant, and relocate each existing drain into the center of each quadrant, the unit cost shall be per drain."

9. Bids were received and opened on December 7, 1983 with the following results:

Hampden Roofing Co., Inc.	\$58,315
Appellant	65,102
Korb Roofers	66,444
National Roofing Co., Inc.	69,000
Fick Bros. Roofing Co.	75,989

10. The bid sheet submitted by Hampden Roofing Co. (Hampden) was as follows:

BASE BID		"Fifty-Eight Thousand Three Hundred Fifteen Dollars" (handwritten)	\$	"\$58,315.00"
		(Words)		(Numbers)
ALTERNATE #1	ADD	"N/A"	\$	"N/A"
(Circle one)	DEDUCT	(Words)		(Numbers)
UNIT PRICE #1		"N/A"	\$	"N/A"
		(Words)		(Numbers)

Additionally, Hampden failed to acknowledge receipt of Addendum No. 2.

11. At the bid opening, the Morgan State procurement officer initially determined that Hampden's bid was not responsive because it failed to list prices for Alternate No. 1 and Unit Price Item No. 1 and did not acknowledge Addendum No. 2 to the IFB.

12. Mr. Donald Schaefer, Chief of the DGS Plant Management Division, reviewed the Morgan State procurement officer's determination pursuant to COMAR 21.10.02.08B¹ and found that Hampden's bid was responsive since the deviations involved were minor irregularities that could be waived pursuant to COMAR 21.06.02.03.² Mr. Schaefer's decision was based on a

¹COMAR 21.10.02.08B in pertinent part provides:

B. Before issuance, the decision of the procurement officer shall be reviewed by the agency head and appropriate legal counsel. The agency head may approve or disapprove the procurement officer's decision. In disapproving a decision, the agency head may order the procurement officer to effect a resolution. After review by the agency head, the decision of the procurement officer is deemed the final action by the State agency, or its equivalent, as the case may be.

²

COMAR 21.06.02.03 provides:

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 of 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. 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 supplies or services being procured. 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.

determination that the work anticipated under deduct Alternate No. 1 and Unit Price Item No. 1 would not be contracted for. He also believed that any relocation of drains which might be required was included within the contractor's base bid. (Tr. 35). Mr. Schaefer further determined that Hampden's failure to acknowledge Addendum No. 2 was a minor irregularity since Addendum No. 2 to the specifications had the effect of decreasing the cost of the project. In this regard, the change from a 1/8" tapered roof to a 1" flat roof on Tubman House caused Appellant to reduce its bid by \$5,440.00

13. After bid opening, the Morgan State procurement officer contacted Hampden and received verbal acknowledgment that it had received Addendum No. 2 and that it would not change its price. Hampden confirmed its acknowledgment by letter dated January 31, 1984.

14. On March 29, 1984, Appellant filed a protest contending that Hampden's bid was not responsive since it failed to state a price for deduct Alternate No.1 and for Unit Price Item No.1, and did not acknowledge Addendum No. 2 to the IFB.

15. In a final decision dated April 16, 1984, the Morgan State University procurement officer denied Appellant's protest. He found that the irregularities complained of by Appellant were minor and could be waived pursuant to COMAR 21.06.02.03.

16. Appellant noted a timely appeal on April 19, 1984.

Decision

The initial issue we address concerns Hampden's failure to specify a price for deduct Alternate No. 1. Appellant contends that this made Hampden's bid nonresponsive. We disagree.

Pricing alternates contained in solicitations are for the benefit of the procuring agency. Where the procuring agency elects not to award a contract based on the performance of an alternate scheme, a bidder's failure to submit a price for the alternate will not affect the binding nature of his offer to perform exactly what work the solicitation calls for. Casson Const. Co. B-198746, October 24, 1980, 80-2 CPD ¶1318. Absence of a price for an omitted alternate likewise does not affect the quantity or quality of the work where an award is made on the base bid items only. Further, as long as all bids are evaluated based upon the performance of the items which will be awarded, no bidder will be prejudiced. 40 Comp. Gen. 321, 324 (1960);

Casson Construction Co., Inc., supra; Hoyer Construction Co., Inc., B-181974, January 17, 1975, 75-1 CPD ¶136. Accordingly, where a procuring agency decides against an award based on a solicited alternate scheme, it may waive, as a minor informality, the low bidder's failure to specify a price for that omitted alternate and accept the bid. Compare 40 Comp. Gen. 321, 324 (1960). Of course, the bidder who does not submit a price for an alternate runs the risks of having its bid found nonresponsive if a determination is made to award a contract based on that alternate. Hoyer, supra.

Here, Hampden submitted the lowest base bid but elected not to bid on deduct Alternate No. 1. The Morgan State procurement officer administratively determined that it was to the State's advantage not to use deduct Alternate No. 1 which provided for the reroofing of Harper House only. Instead, the contract was to be awarded based on the lowest base bid for reroofing both Harper House and Tubman House. Since the Morgan State procurement officer did not consider deduct Alternate No. 1 as a basis for contract award, Hampden's failure to submit a bid for this item did not prejudice Appellant's competitive position and thus properly could be waived as a minor irregularity pursuant to COMAR 21.06.02.03.

Appellant next contends that Hampden's bid should be rejected as nonresponsive because the bid failed to provide a price for Unit Price Item No. 1 calling for the relocation of roof drains. DGS, however, argues that Hampden's failure to specify a price for Unit Price Item No. 1 may be waived as a minor informality since the IFB did not contemplate the evaluation of this price in determining the low bidder.

The issue here is whether the State properly may waive, as a minor informality, Hampden's election not to provide a unit price for relocating the drains by quadrant. We believe the State could pursuant to COMAR 21.06.02.03.

What constitutes a minor informality in a bid is dependent on the particular circumstances present in each case. Chemical Technology, Inc., B-179674, April 2, 1974, 74-1 CPD ¶160. Here the IFB specifically required a "base bid" for all work required in installing the roofing systems. The IFB did not identify any factor other than the "base bid" that would be used to determine the lowest evaluated bid price. Since there was no means provided in the IFB to evaluate the unit price for relocating drains by quadrant in making an award, the unit price for relocating drains was not material to the evaluation of bids. Accordingly, Hampden's failure to quote a price did not prejudice Appellant's competitive position and thus properly was waivable. C. R. Hipp, Inc., B-212093, October 4, 1983, 83-2 CPD ¶418; Wickman Contracting Co., Inc., B-190490, March 28, 1978, 78-1 CPD ¶232.

Appellant also argued that at some point in time roof drains will have to be installed to avoid the ponding of water, particularly on the Tubman House roof. Otherwise, the manufacturer's guarantee that the contract requires be provided to cover each roof would not be enforceable. However, whether roof drains later are required to be relocated as part of the contractor's design and whether the contractor will be able to provide the required manufacturer's guarantee of the roof is a function of contract administration and thus is not for resolution under our bid protest procedures.

Our bid protest procedures are reserved for considering whether an award of a contract complies with statutory and regulatory requirements. SMI (Watertown), Inc., B-188174, February 8, 1977, 77-1 CPD ¶98.

Appellant next contends that Hampden's failure to acknowledge Addendum No. 2 to the IFB prior to bid opening rendered Hampden's bid nonresponsive. In this regard it is argued that Addendum No. 2 would result in a significant modification to the costs of contract performance and thus Hampden's failure to acknowledge Addendum No. 2 was a material deviation that could not be waived.

Generally, a bidder's failure to acknowledge a material amendment to a solicitation renders a bid nonresponsive. Shippers Packaging and Container Corp., B-184488, October 17, 1975, 75-2 CPD ¶241. However, the failure of a low bidder to acknowledge an addendum to an IFB which relaxes the specifications and results in a decrease in the cost of performance may be waived as a minor irregularity. Titan Mountain States Const. Corp., B-183680, June 27, 1975, 75-1 CPD ¶393; Shippers Packaging and Container Corp., supra; Hutto Appliance & Refrigeration Service, B-201585, June 16, 1981, 81-1 CPD ¶495; Imperial Fashions, Inc., B-182252, January 25, 1975, 75-1 CPD ¶45. Under such circumstances, there is no prejudice that can result to other bidders by acceptance of the otherwise low responsive bid based on original specifications which are more onerous than the specifications as amended. In this regard, ". . . if we assume that the low bidder's failure to acknowledge the addendum was due to ignorance of its existence then his bid price would not reflect the lessened requirements of the specifications, and, therefore, his failure to acknowledge would only be prejudicial to his competitive position and even possibly beneficial to the position of the other bidders." 41 Comp. Gen. 550, 553 (1962). In addition, where the bidder fails to acknowledge an addendum having the effect of decreasing the cost of performance, the bidder does not have the option of remaining silent and not receiving the award since the failure to acknowledge the amendment may be waived and an award made on the basis of the bid as submitted. Signal, Inc., B-201339, March 10, 1981, 81-1 CPD ¶189; Mills Manufacturing Corp., B-188672, June 15, 1977, 77-1 CPD ¶430.

Here, there is no dispute that Addendum No. 2 imposed a less strict specification standard for the Tubman House roof thereby making performance less expensive. (Findings of Fact No. 12). For that matter, issuance of Addendum No. 2 caused Appellant to reduce its bid by \$5,440.00 because of the reduced requirements. Under these circumstances, Hampden's failure to acknowledge receipt of Addendum No. 2 prior to bid opening did not render its bid nonresponsive. Accordingly, the Morgan State procurement officer may accept Hampden's offer on the basis of the original specifications for tapered roofs for both Harper House and Tubman House. Shippers Packaging and Container Corp., supra.

Appellant, however, directs our attention to several cases in Federal procurements where failure to acknowledge an amendment to a solicitation caused the Comptroller General of the United States to declare the low bids

nonresponsive.³ Those cases are inapposite here since in each one the amendment increased the scope of work. It thus would have been unfair to other bidders in each of those cases to have given the low bidder the option of deciding to become eligible for award by furnishing extraneous evidence that the particular amendment had been considered, or to remain silent and avoid award. The procuring agency otherwise could not make an award because the low bidder would have been legally obligated only to perform to the lesser requirements of the original solicitation based on the bid as submitted. Compare Titan, supra.

Finally, Appellant contends that the three deviations in Hampden's bid, when considered cumulatively, made Hampden's bid nonresponsive. We know of no reason why these three deviations from the IFB requirements when taken together would have any greater significance than if considered singly. No greater prejudice has been demonstrated and, accordingly, we reject this contention.

For the foregoing reasons, therefore, Appellant's appeal is denied.

³Doyon Const. Co., B-212940, February 14, 1984, 84-1 CPD ¶ 194; Protex Systems, Inc., B-213228, March 5, 1984, 84-1 CPD ¶265; J. T. Systems, Inc., B-213308, March 7, 1984, 84-1 CPD ¶277.