

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of LONG FENCE CO., INC.     )  
  )  
  )     Docket No. MSBCA 1259  
Under SHA IFB No.                    )  
HO-292-507-770                     )

February 13, 1986

Responsiveness - Where a letter, submitted with a bid, made reference to certain sections of the IFB but not to an IFB addendum and which also made reference to a conversation with an unauthorized State representative, the bid was determined to be qualified and, therefore, nonresponsive. Such a letter, considered a part of the bid, must speak for itself at time of bid opening and cannot be subsequently clarified.

Responsiveness - A bid subject to at least two reasonable interpretations is considered ambiguous and should be rejected as nonresponsive.

APPEARANCE FOR APPELLANT:             Joel S. Rubinstein, Esq.  
   Sadur and Pelland, Chartered  
   Washington, D.C.

APPEARANCE FOR RESPONDENT:            Stephen M. LeGendre  
   Assistant Attorney General  
   Baltimore, MD

APPEARANCE FOR INTERESTED PARTY:    Allen Poppleton, Esq.  
   Weinberg and Green  
   for Consolidated Steel  
   and Fence Co., Inc.  
   Baltimore, MD

OPINION BY MR. LEVY

This is an appeal from a State Highway Administration (SHA) procurement officer's final decision denying Appellant's protest of the proposed award of this contract to Consolidated Steel & Aluminum Fence Co., Inc. (Consolidated). Appellant maintains that Consolidated's bid was nonresponsive because it was qualified; the bid was materially unbalanced; Consolidated was not registered to do business in Maryland; Consolidated did not write out the amounts of its unit prices; and Consolidated's bid contained a corporate resolution that was not properly certified. SHA, on the other hand, contends that Appellant's appeal is without merit in all respects.

## Findings of Fact

1. SHA's Invitation for Bid (IFB) No. HO-292-507-770 entitled Fencing Along Relocated Md. Route 32-East Side of U.S. Route 29 To The West Side Of U.S. Route 1 requires the erection of 5.84 miles of chain link fence along Md. Rte. 32. Bids were due May 14, 1985.

2. The relevant parts of the IFB for the consideration of this appeal are found at the following:

(A) Standard Specifications For Construction & Materials - Maryland Department of Transportation - State Highway Administration - January, 1982 (sometimes referred to as the Red Book)

(B) Special Provisions (IFB pp. 53-58)

(C) Interim Specifications Addenda To The Standard Specifications For Construction & Materials (1982) (IFB pp. 68-73)

(D) Addendum No. 1 (April 22, 1985) to Interim Specifications (adds new pp. 80A & 80B to IFB)

(E) Standard Specification For Chain Link Fence, AASHTO<sup>1</sup> M 181 (Exhibit M of Agency Report)

3. The relevant parts of the Special Provisions are as follows:

### SPECIFICATIONS

The specifications for all work done on this project shall be done in accordance with the requirements of the Maryland Department of Transportation/State Highway Administration's specifications entitled "Standard Specifications For Construction and Materials", dated January, 1982, revisions thereof or additions thereto, included in this Proposal and the Special Provisions.

In case of discrepancies between various portions of these Special Provisions, the Engineer shall be the sole judge as to the proper procedure to follow. (IFB p. 53).

\* \* \*

### SECTION 804 - FENCES

The chain link fence shall be 6' in height of the type and design as shown on the Standard Plates and Specifications and erected at locations shown on the plans or where directed by the Engineer. The color of the vinyl fabric shall be a uniform warm grey. (IFB p. 57). (Underscoring added).

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<sup>1</sup>AASHTO stands for American Association of State Highway and Transportation Officials.

4. The pertinent parts of the Interim Specifications Addenda (ISA) To The Standard Specifications For Construction & Materials are as follows:

SECTION 800 INCIDENTAL CONSTRUCTION

SECTION 804 - FENCES

485/— DELETE: SECTION 804-FENCES in its entirety.  
INSERT: The following.

SECTION 804 - CHAIN LINK FENCE

804.01 DESCRIPTION. This item shall consist of furnishing and erecting chain link fence as shown on the Plans or as directed by the Engineer. This work shall include all required materials, construction, labor, and incidentals necessary to complete installation of the item in accordance with the Plans, Special Provisions, Specifications, State Highway Administration Standards and as directed by the Engineer.

804.02 MATERIALS. Materials shall meet the following requirements:

Barbed Wire	912.01
<u>Chain Link Fabric</u>	<u>912.02</u>
Concrete Mix No. 2	918
Gates	912.03.02
Posts, Braces, Fittings and Hardware	912.03
Tie Wires, Line Post Clips, Tension Wires, and Tension Wire Clips	912.03.01

804.02.01 Types of Fence. The type of fence shall be the specified height and constructed of one of the six alternates as herein listed, unless specified as a single type.

- (1) Fence composed of galvanized steel and malleable iron components.
- (2) Fence composed of galvanized steel fabric utilizing galvanized steel posts and aluminum line posts.
- (3) Fence composed of aluminum coated steel fabric utilizing galvanized steel line posts.
- (4) Fence composed of aluminum coated steel fabric utilizing aluminum line posts.
- (5) Fence composed of bonded vinyl coated fabric utilizing galvanized steel or galvanized bonded vinyl coated steel line posts and fittings.
- (6) Fence composed of bonded vinyl coated fabric utilizing aluminum line posts.  
(IFB pp. 68-69). (Underscoring added).

5. The pertinent part of The Standard Specifications For Construction & Materials (January, 1982) is as follows at page 643:

SECTION 912 - FENCE AND TRAFFIC BARRIERS

\* \* \*

912.02 CHAIN LINK FABRIC. Chain link fabric shall be 2 in. (50 mm) mesh woven from coated wire gage No. 6 for 6 ft. (1.8 m) or wire gage No. 9 for 5 ft. (1.5 m) fence. The ends shall have a knuckled selvage at the bottom and barbed selvage at the top. The fabric shall meet the requirements of AASHTO M 181. The weight of coating for galvanized fabric shall be Class B.

The manufacturer shall supply a certificate containing the actual test results showing the fabric meets the requirements of AASHTO M 181.

6. Addendum No. 1 to the IFB, issued April 22, 1985, provides for new pages 80A and 80B to be added to the IFB and are titled Interim Specifications Addenda To The Standard Specifications For Construction And Materials (1982). At the bottom of Addendum No. 1 cover sheet the following appears:

If you have any questions, please contact Colbert Stephen, Project Engineer, (301) 659-2299. Failure to comply with these instructions may result in your bid being declared irregular. (Underscoring added).

Page 80A provides, in pertinent part, as follows:

SECTION 900 MATERIALS

SECTION 912 - FENCE AND TRAFFIC BARRIERS

643/— DELETE: 912.02 CHAIN LINK FABRIC in its entirety.  
INSERT: The following.

912.02 CHAIN LINK FABRIC. Chain link fabric shall be 2 in. mesh woven from coated wire gage No. 6 for 6 ft. or wire gage No. 9 for 5 ft. fence. The ends shall have a knuckled selvage at the bottom and barbed selvage at the top. The fabric shall meet the requirements of AASHTO M 181. The weight of coating for galvanized fabric shall be Class B. Vinyl coated steel fabric shall meet the requirements of AASHTO M 181 Type IV, bonded. Vinyl shall be warm grey or black, or as specified on the Plans.

The manufacturer shall supply a certificate containing the actual test results showing the fabric meets the requirements of AASHTO M 181.

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7. Consolidated, the apparent low bidder, included with its bid package the following letter dated May 14, 1985 which was addressed to the State Highway Administration:

The material bid by Consolidated Steel & Aluminum Fence Co., Inc. is as specified in Section 804, Pages 57, 68, 69, 70, 71, 72 and 73 of the bid specifications dated 9-10-84 and as discussed with Mr. Ed Stein, assistant to the Deputy Engineer, Department of Transportation, State of Maryland.

Consolidated also included pages 80A and 80B with its bid package though they were not mentioned in the cover letter.

8. Bids were opened on May 14, 1985 and produced the following results:

Consolidated	\$475,185
Appellant	\$496,623
U.S. Steel Corp./Cyclone Fence	\$525,051

9. Appellant sent a Western Union Mailgram on May 15, 1985 to SHA protesting any award of the contract to Consolidated alleging that Consolidated's bid was nonresponsive. This was followed by a detailed letter of protest, dated May 16, 1985, alleging the following specific grounds of protest:

(1) Consolidated qualified its bid by including the May 14, 1985 letter. The letter had the effect of qualifying the materials it intended to use by limiting them to the seven referenced pages and not including pages 80A and 80B. Additionally, the language in the letter appeared to tie the scope of work to be performed to a discussion with Mr. Ed Stein.

(2) The bid was materially unbalanced because Consolidated "front-loaded" it by including large amounts for maintenance of traffic and for mobilization.

(3) Consolidated was neither registered to do business in the State of Maryland nor maintains a registered agent.

(4) Consolidated failed to include the written out amounts of its unit prices which the IFB required in addition to the arabic numerals.

(5) Consolidated's bid contains a corporation resolution which was not "duly certified by the secretary showing the authority of the person so signing on behalf of the corporation." The resolution was also unsealed.

10. Hal Kassoff, SHA Administrator and the procurement officer, replied to Appellant on July 24, 1985 and denied the protest on all grounds.

11. Appellant filed a timely appeal to this Board on July 29, 1985.

## Decision

Of the five grounds of protest alleged, Appellant places the most significance on its allegation that Consolidated qualified its bid by including the May 14, 1985 letter with its bid submittal which caused the bid to be nonresponsive. Specifically, Appellant alleges, first, that the letter had the effect of qualifying the materials Consolidated intended to use and that, second, it tied the scope of work to be performed to a discussion with Mr. Ed Stein. While the Appellant appears to place the most emphasis on the first argument, we believe the second is more determinative of this appeal.

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.

In the instant appeal the letter attached to Consolidated's bid provides, ". . . and as discussed with Mr. Ed Stein, assistant to the Deputy Engineer, Department of Transportation, State of Maryland" after specifically referencing the pages in the IFB for the materials it planned to supply. There is no other statement as to what was discussed with Mr. Stein or, for that matter, why discussions were held with him when the IFB provides that if there were any questions, bidders were to contact Colbert Stephen, the Project Engineer. (Finding of Fact No. 6). While testimony of Mr. Stein's conversation with Consolidated was allowed into the record at the hearing (Tr. p. 60), it is now apparent to the Board that that testimony should not be considered since it would constitute a clarification of the letter. The letter, which is a part of the bid, must speak for itself at time of bid opening and subsequent clarification cannot be obtained. Inner Harbor Paper Supply Company, MSBCA 1064 (September 9, 1982); Security Ford Tractor, Inc., MSBCA 1127 (July 27, 1983).

What then does the letter mean as far as the discussion with Mr. Stein is concerned? It only states that Consolidated will supply the noted materials as discussed with Mr. Stein. There are no other specifics provided. Did they discuss the quality or delivery of the materials? Was there more than one discussion? We do not know. Consolidated could provide any explanation at time of bid opening as to the content of those conversations and how they affected its bid. Therefore, we cannot say that Consolidated's intention to comply with all IFB specifications can be determined from the face of the bid at the time of bid opening. This inability to determine Consolidated's full intention allows at least "two bites at the apple" since the letter provides it the opportunity to say that it will or will not comply with SHA's interpretation of the IFB. SHA does not have an unqualified right to performance in strict accordance with the IFB since Consolidated could state that because of its conversation with Ed Stein its intention was to supply or do something other than as stated in the IFB.

Appellant next alleges that Consolidated's cover letter's failure to reference pages 80A and 80B created an ambiguity in the bid submittal. While Consolidated physically placed these pages in its bid package, it did not make reference to them in its cover letter. This appeared to create the ambiguity of not knowing whether the specifications on these two pages were or were not going to be complied with. SHA, on the other hand, contends that this did not matter since pages 80A and 80B did not change the material specifications but only clarified what already existed in the specification sections referred to in Consolidated's cover letter. Therefore, it was of no consequence whether Consolidated referred to pages 80A and 80B since it was going to comply with the specification as required. We do not agree entirely with SHA's position.

While Appellant made several arguments with regard to the effect of the absence of a reference to pages 80A and 80B in Consolidated's cover letter, we are satisfied that in most respects SHA was able to provide a reasonable explanation that this absence had no effect. For example, Appellant maintains that Addendum No. 1 at page 80A adds the color black as a possible SHA selection for the vinyl coated steel fabric. At first blush it would seem that this position has merit since it would certainly be logical that by way of a late addendum to the IFB, SHA was expressing its desire to have this additional choice. However, SHA's technical explanation must be accepted that Special Provisions of the IFB control here<sup>2</sup> because the addendum is changing the Standard Specification. Therefore, the warm grey choice provided in the Special Provision at page 57 of the IFB will control.

However, there is one area of conflict in the IFB that we have trouble resolving and the absence of the reference to pages 80A and 80B in the cover letter creates enough of a doubt that we find an ambiguity exists. Section 804.02.01 of the Interim Specifications Addenda To The Standard Specifications (p. 68 IFB) provides for six possible types of fence: 2 galvanized steel, 2 aluminum coated steel fabric and 2 bonded vinyl coated fabric. However, Addendum No. 1, p. 80A amends Section 912 of the Standard Specifications and provides for a whole new section 912.02 Chain Link Fabric. It provides in pertinent part ". . . [t]he weight of coating for galvanized fabric shall be Class B. Vinyl coated steel fabric shall meet the requirements of AASHTO M 181 Type IV, bonded . . ." Since there is no mention of aluminum coated steel fabric in the Chain Link Fabric portion of the addendum, there is a reasonable inference that SHA intended to eliminate that as a choice for a type of fence under the contract. By not referencing page 80A in its cover letter Consolidated has kept aluminum coated steel fabric as a choice. The reference to aluminum coated steel fabric in that portion of the addendum dealing with Posts, Braces, Fittings and Hardware on page 80B does not resolve the conflict created by its absence in the Fabric

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<sup>2</sup>See §103.02.02 of the Standard Specifications For Construction & Materials (p. 89). ". . . In the case of any discrepancy between the Plans and the Specifications, the Plans will govern. If there is a discrepancy between these standard Specifications and Supplemental Specifications, the Supplemental Specifications will govern. Special Provisions will govern over Specifications, Supplemental Specifications and Plans. General Provisions will govern over all Contract Documents unless expressly provided for in the Contract." (Underscoring added).

section on page 80A. Thus, the bid is subject to at least two reasonable interpretations and it, therefore, is ambiguous and should be rejected as nonresponsive. Free State Reporting, Inc., MSBCA 1180 (June 14, 1984).

For the reasons stated above, we determine the Consolidated bid was nonresponsive. This conclusion renders academic Appellant's other contentions that Consolidated's bid was nonresponsive, and we will not consider them.

For the foregoing reasons, we sustain the Appellant's appeal.