BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MADIGAN CONSTRUCTION COMPANY, INC.	)	
	)	Docket No. MSBCA 1350
Under SHA IFB No.AW-824-501-029	)	

October 26, 1987

Responsiveness - Bid Bond Defect - Where a bid bond submitted by the low bidder listed the U.S. Postal Service rather than the State of Maryland as the obligee and provided for 60 days rather than 90 days for automatic extension of the surety's obligation, the bid was properly determined to be nonresponsive since the bond could neither be substituted nor corrected under the provisions of COMAR 21.05.02.12C which requires the intended correction as well as the mistake to be clearly evident on the face of the document.

Responsiveness - Bid Bond Defect - Likewise, the bid was properly determined to be nonresponsive since the two mistakes in the bid bond were substantive requirements and could not be waived as minor irregularities under COMAR 21.06.02.03.

APPEARANCE FOR APPELLANT:	Donald F. Chiarello, Esq. Hochberg, Chiarello, Costello & Dowell Baltimore, Maryland
APPEARANCE FOR RESPONDENT:	Pamila J. Brown Assistant Attorney General Baltimore, Maryland
APPEARANCE FOR INTERESTED PARTY:	Richard L. Chapolini, President Tech Contracting Co., Inc. Baltimore, Maryland

OPINION BY MR. LEVY

This is an appeal of a State Highway Administration (SHA) procurement officer's final determination declaring Appellant's bid nonresponsive. Appellant was the apparent low bidder on the captioned contract but its bid was determined to be nonresponsive because its bid bond designated an improper obligee and provided that Appellant's bid could be extended without notice to the surety for only sixty (60) days rather than the ninety (90) days required in the regulations.

Findings of Fact

1. The Invitation For Bids (IFB) for the captioned project provided for the construction of a Vehicle Service Building, U.S. Route 40, Baltimore County for the SHA.

2. Bids were opened on July 28, 1987 with the following results:

Appellant	$230,728
Tech Contracting Co., Inc.	238,950
Bevco Contractors, Inc.	254,890
L.A. Hilte Associates, Inc.	261,500
Paw Contractors	277,200

3. At the bid opening Appellant's bid was announced as being "irregular" because of improper bid security; the bid bond reflected the United States Postal Service as the obligee rather than the State of Maryland. The bond was a pre-printed form with the United States Postal Service already printed in as the governmental obligee. There were no blanks for the

insertion of an obligee; only the principal and the name of the surety company could be typed in along with the amount of the bond. The bond also provided, in pertinent part, as follows:

> NOW, THEREFORE, if the Principal, upon acceptance by the Postal Services of his bid identified above, within the period specified therein for acceptance (sixty (60) days if no period is specified), shall execute such further contractual documents. . . .
>
> Each Surety executing this instrument hereby agrees that its obligation shall not be impaired by an extension(s) of the time for acceptance of the bid that the Principal may grant to the Postal Service, notice of which extension(s) to the Surety(ies) being hereby waived; provided that such waiver of notice shall apply only with respect to extensions aggregating not more than sixty (60) calendar days in addition to the period originally allowed for acceptance of the bid.

4. Within hours of the discovery of the error at the bid opening, Appellant attempted to substitute a corrected bid bond; however, the procurement officer refused to accept it.

5. Appellant's bonding agent had made the mistake in the preparation of the bond by using the wrong form bid bond; one with the United States Postal Service already printed as the obligee was used rather than the correct form supplied to the agent by Appellant.

6. This project had previously been bid in August 1986 but was subsequently cancelled after bids had been submitted. Appellant had submitted an appropriate bid bond with its bid in August 1986.

7. On August 5, 1987, Bob B. Myers, Chief Engineer for SHA and acting as the procurement officer sent a letter to Appellant formally advising Appellant that its bid was rejected as nonresponsive and advising Appellant it had fifteen (15) days to note an appeal with this Board. The procurement officer reissued his final determination on August 10, 1987, this time advising Appellant that it had ten (10) days to note an appeal with this Board.[1]

8. Appellant filed its notice of appeal with this Board on August 17, 1987.

9. On August 24, 1987, the SHA procurement officer supplemented his August 10, 1987 final determination and advised Appellant that:

> ". . . in addition to failure to designate the proper obligee, the bond limits automatic extensions of the surety's obligation to an aggregate of 60 days beyond the original bid acceptance period. The bid bond prescribed in Exhibit E, COMAR 21.06.07.09 requires a 90 day aggregate period. This deviation is material and therefore may not be cured. Therefore, your bid is nonresponsive and must be rejected for this reason as well."

Decision

The Appellant's primary argument before the Board is that a clerical error was made when the wrong form bid bond was submitted and that it should be allowed to substitute the correct form bid bond. This position, as stated by Mr. Chiarello, is "based upon all the papers that were available for the officer who opened the bids, that the intention of the parties was clear, and that the error, which was a clerical error, was the kind of clerical error that can and should be corrected in fairness to all the parties." (Tr. p. 4). In the alternative, Appellant seemed to also argue, though not as clearly, that if it cannot substitute a correct form bid bond then the mistakes that are apparent on the bond submitted are of a nature that they can be corrected or waived as minor irregularities and the bond accepted as is. In affect, the Appellant was arguing throughout its presentation at

[1]The former fifteen (15) day appeal period was amended effective July 1, 1987 to ten (10) days. See §11-137(f)(1), Md. Ann. Code, State Fin. and Proc. Article, (1987 Supp.). The procurement officer reissued his final determination to avoid a potential jurisdictional issue (p. 2, Sept. 3, 1987 letter from Pamila J. Brown, Assistant Attorney General to MSBCA).

the hearing about two distinct types of mistake; the mistake of using the wrong form of bond, which was a clerical error made by its bonding agent in the preparation of the bond and the actual errors in the bid bond submitted.

COMAR 21.05.02.12 entitled "Mistakes in Bids" provides, with regard to mistakes discovered after opening but before award of the contract, as follows:

> C. Confirmation of Bid. When the procurement officer knows or has reason to conclude that a mistake has been made, the bidder may be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if any of the following conditions are met:
>
> (1) If the mistake and the intended correction are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.
>
> (2) A bidder may be permitted to withdraw a low bid if:
>
> (a) A mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or
>
> (b) The bidder submits proof of evidential value which clearly and convincingly demonstrates that a mistake was made.

Pursuant to the above language, the conditions necessary to mandate the correction of a bid are twofold. Both the mistake and the intended correction must be clear upon examination of the bid document. If both are present, the document must be corrected to the intended correction and the document may not be withdrawn. Dick Corporation, MSBCA 1321, 2 MICPEL ¶]52 (June 10, 1987).

As noted above, the Appellant in its primary argument contends that the obvious submission of the wrong form bond is the clerical mistake itself and should be allowed to be corrected by submitting a new correct form. The problem with Appellant's position is that Maryland procurement law is specific as to the conditions under which the corrections may be made. Pursuant to COMAR 21.05.02.12C(1) the form bid bond could not be substituted since the correct form is not apparent on the face of the form which was submitted. It is only obvious that a wrong form was submitted. The twofold test cannot be satisfied.

It is also noted that the Comptroller General of the United States has dealt with this same issue in the past. In Yank Waste Co., Inc., Comp. Gen. Dec. B-180418, April 11, 1974, 74-1 CPD ¶190 it was stated:

> While our Office has stated in the past that the failure to use a designated bid bond form is not sufficient to render a bid nonresponsive, if the use of other than the prescribed bid bond form varies the rights and obligations of the parties, then the bid must be rejected. 39 Comp. Gen. 83, 84 (1959).

Applying the Comptroller General's test would produce the same result. The two main differences between the bid bond submitted by Appellant and the one required under COMAR 21.06.07 "Bid and Contract Security/Bonds" are (1) the failure to name the State of Maryland as the correct obligee; and (2) the bond limits automatic extension of the surety's obligation to 60 days rather than 90 days. It is obvious that the designation of the wrong obligee raises the possibility that SHA may have no rights under the bond at all and if it did then it would have lost 30 days of automatic extension privileges of the surety's obligations. This obviously varies the rights and obligations of the parties under the two form bonds in the event of default and the bid should therefore be rejected.

Having determined that the bond form itself cannot be substituted, we will now examine Appellant's bid bond as submitted to determine if it can be accepted. In other words, can the two mistakes noted either be corrected under COMAR 21.05.02.12C or waived as minor irregularities under COMAR 21.06.02.03.

As we noted above, under COMAR 21.05.02.12C, both the mistake and the intended correction must be clear upon the examination of the document in order to allow correction. In looking at the mistake of naming the wrong obligee it is apparent that the United States Postal Service is not the correct governmental agency, but it is not clear from the face of the bond who was intended as the correct obligee. Likewise, the mistake of the limitation on the automatic extension of the surety's obligations is apparent but the correction is not. Therefore, correction of the bond should not be allowed.

We are mindful of an unpublished Comptroller General Decision, B-170694, (Dec. 3, 1970), 15 CCF ¶84,147; 13 Government Contractor ¶66, where the State of Alaska rather than the United States was incorrectly named as the obligee in a bid bond and the Comptroller General ruled that the bid bond need not be rejected. He relied on the fact that the submitted bond identified the correct principal, the correct bid invitation number, identified the correct name and location of the construction project and was acceptable in all other respects. Therefore, the correct obligee could be inferred and identified. Based on this it was determined that the bond could have been enforced against the surety in the event of default.[2]

Since the Appellant's bid bond (Agency Report, Exhibit F) also contains information identifying the principal, the project, and the IFB number, it could reasonably be argued that the correct obligee could be identified and the correction allowed. However, the bond under review is not acceptable in all other respects. As previously noted, there is also the mistake of the limitation of automatic extension of the surety's obligation to 60 days rather than 90 days. Therefore, the theory of Comp. Gen. Dec. B-170694, supra, cannot be applied in all respects to the bond before us, since the bond could not be enforced against the surety, if it could at all, beyond 60 days of automatic extension of the surety's obligations. The 90 day requirement provided for in COMAR 21.06.07.03C(1) cannot be ascertained from any other information found on the face of Appellant's bond. Thus, we must hold that the bid bond cannot be corrected under COMAR 21.05.02.12C.

Looking next at the minor irregularity argument, COMAR 21.06.02.03, "Minor Irregularities in Bids or Proposals," 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 of [sic] 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.

What constitutes a minor informality in a bid is dependent on the particular circumstances present in each case. Liberty Roofing Co., Inc., MSBCA 1184, 1 MICPEL ¶77 (July 6, 1984). In the matter before us it is obvious that both of the mistakes in the bid bond are substantive matters rather than form or procedural matters. The two defects are material and of consequence to the price, quantity, quality and delivery of the contract work; the defects affect the contract in all respects since they affect the ability of SHA to have the protection it seeks to make an award of a contract at the lowest responsive and responsible price. The Appellant in fact has acknowledged that the required 90 day automatic extension of the surety's obligations is a "relevant" matter. (Tr. p. 73). And the Comptroller General similarly has held that bid acceptance periods are a material requirement of the solicitation which cannot be waived. McNamara-Lunz Vans and Warehouses, Inc., Comp. Gen. Dec. B-188100, August 26, 1977, 77-2 CPD ¶149. While the similar mistake in the bid bond under review does not deal with the initial bid acceptance period, we believe that the same principle applies to the automatic extension period of the surety's obligations.

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[2]The opinion distinguishes those cases where the bid bond should be rejected when the wrong principal is named, see Comp. Gen. Dec. B-155837, 44 Comp. Gen. 495 (Feb. 17, 1965), because the intended principal could not be determined from the information in the bond.

To permit a waiver of a bid bond requirement provided for in the solicitation would tend to compromise the integrity of the competitive bid system. A surety could pick and choose those occasions when it would request a waiver after assessing its potential liability in light of the other competitive bids. Such a procedure would give the low bidder "two bites at the apple", a practice we do not endorse, and an advantage over its competitors. H.A. Harris, Inc., MSBCA 1109, 1 MICPEL ¶38, (February 4, 1983). We hold, therefore, that the two mistakes in the bonds cannot be waived as minor informalities.

For all of the above reasons, therefore, we deny Appellant's appeal.