

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MELKE MARINE, INC.)	
)	Docket No.
Under DGS Contract No.)	MSBCA 1499
T-000-878-003)	

April 24, 1990

Responsiveness - Waiver of Minor Informality - Where a mistake is made on a bid item but the bid remains low under any reasonable interpretation; the mistake may be waived as a minor irregularity.

APPEARANCE FOR APPELLANT: Peter P. Mitrano, Esq.
Fairfax Station, Va.

APPEARANCE FOR RESPONDENT: Brian Craver
Assistant Attorney General
Baltimore, MD

OPINION BY MR. MALONE*

Appellant appeals a Department of General Services (DGS) procurement officer's final decision denying Appellant's bid protest that a competitor's bid should not have been considered.

Finding of Fact

1. On December 13, 1989 Department of General Services issued an IFB for the repair of certain pedestrian walkways in the Classroom II complex at Towson State University, Towson, Md.
2. The bid package prepared by DGS contained pre-printed forms entitled "Special Form of Proposal". Upon these bid forms the bidders were to place their price information for repairs to the pedestrian walkways to include a base bid for repairs and alternate bids for certain additional repairs.

*Following the hearing the Board issued its opinion dated April 24, 1990 substantially in the form of the opinion herein reserving the right to issue the instant opinion for purposes of publication in MICPEL. The original written is available at the Board's offices.

3. The bid sheets provided blank spaces for a base bid and blank spaces for alternate bids No. 1, No. 2 and No. 3. .
4. Each bidder was admonished on the form to "carefully examine" the instruction to bidders, the general conditions and the specifications and plans for the subject construction.
5. The instruction to bidders specifically required that the bidders submit duplicate copies of the special form of proposal form with their bids.
6. Bids were opened at 2:00 p.m. on January 9th, 1990
7. One of the bidders, Pioneer Contracting, Inc. (Pioneer), submitted two copies of the special form of proposal form filled out as follows:

SPECIAL FORM OF PROPOSAL

Department of General Services
 STATE OF MARYLAND
 Earl F. Seboda, Secretary
 301 West Preston Street
 Baltimore, Maryland 21201

Date: 1-9-90

DOS Project No.: T-000-876-003

Gentlemen:

We hereby submit our proposal for repairs to pedestrian walkways at the Classroom II Complex at Towson State University.

Having carefully examined the "Instructions to Bidders," the "General Conditions", and the Specifications and Plans for the subject construction -

Specifications numbered 1 thru D16-2
 Drawings numbered 1 thru 6
 Addenda numbered None

and having received clarification on all items of conflict or upon which any doubt arose, the undersigned proposes to furnish all labor, materials and equipment called for by the said documents for the entire work, in strict accordance with the Contract Documents, for the stipulated sum of:

BASE BID ONE HUNDRED NINETEEN THOUSANDS Dollars (\$ 119,400.00)
 (Written) FOUR HUNDREDS ⁰⁰/₁₀₀ (Figures)

ALTERNATE #1: Repairs to easternmost pedestrian walkway at the Administration Building at Towson State University.

SIX THOUSANDS ⁰⁰/₁₀₀ Dollars (\$ 6000.00)
 (Written) 6000 (Figures)

ALTERNATE #2: Repairs to center pedestrian walkway at the Administration Building at Towson State University.

SIX THOUSANDS ⁰⁰/₁₀₀ Dollars (\$ 6000.00)
 (Written) 6000 (Figures)

ALTERNATE #3: Repairs to westernmost pedestrian walkway at the Administration Building at Towson State University.

SIX THOUSANDS ⁰⁰/₁₀₀ Dollars (\$ 6000.00)
 (Written) 6000 (Figures)

UNIT PRICES FOR CONTINGENT ITEMS

Administration Building Bridges:

Flat Surface Patch	\$(<u>20.00</u>)	per square foot	<u>40.50</u>
Crowned Surface Patch	\$(<u>45.00</u>)	per square foot	<u>45.00</u>
Route and Patch Crack	\$(<u>25.00</u>)	per square foot	<u>25.00</u>
Inject Crack with Grout	\$(<u>25.00</u>)	per square foot	<u>25.00</u>
Painting of Concrete Surface	\$(<u>5.00</u>)	per square foot	<u>8.00</u>
Construction of Pilasters And Installation of Bearing Plates at Six Locations	\$(<u>1500.00</u>)	per lump sum	<u>1500.00</u>

SPECIAL FORM OF PROPOSAL

Department of General Services
STATE OF MARYLAND
Earl F. Seboda, Secretary
301 West Preston Street
Baltimore, Maryland 21201

Date: 1-9-90

DGS Project No.: T-000-876-003

Gentlemen:

We hereby submit our proposal for repairs to pedestrian walkways at the Classroom II Complex at Towson State University.

I having carefully examined the "Instructions to Bidders," the "General Conditions", and the Specifications and Plans for the subject construction -

Specifications numbered 1 thru D16-2
Drawings numbered 1 thru 6
Addenda numbered None

and having received clarification on all items of conflict or upon which any doubt arose, the undersigned proposes to furnish all labor, materials and equipment called for by the said documents for the entire work, in strict accordance with the Contract Documents, for the stipulated sum of:

BASE BID ONE HUNDRED NINETEEN Dollars (\$ 119,400.00)
(Written) THOUSAND FOUR HUNDREDS (Figures)

ALTERNATE #1: Repairs to easternmost pedestrian walkway at the Administration Building at Towson State University.

SIX HUNDREDS Dollars (\$ 600.00)
(Written) 100 (Figures)

ALTERNATE #2: Repairs to center pedestrian walkway at the Administration Building at Towson State University.

SIX HUNDREDS Dollars (\$ 600.00)
(Written) 100 (Figures)

ALTERNATE #3: Repairs to westernmost pedestrian walkway at the Administration Building at Towson State University.

SIX HUNDREDS Dollars (\$ 600.00)
(Written) 100 (Figures)

UNIT PRICES FOR CONTINGENT ITEMS

Administration Building Bridges:

Flat Surface Patch	\$(<u>40.00</u>)	per square foot
Grooved Surface Patch	\$(<u>45.00</u>)	per square foot
Rout And Patch Crack	\$(<u>25.00</u>)	per square foot
Inject Crack with Grout	\$(<u>28.00</u>)	per square foot
Painting of Concrete Surface	\$(<u>8.00</u>)	per square foot
Construction of Pilasters and Installation of Bearing Plates at Six Locations	\$(<u>1500.00</u>)	per lump sum

8. When the bids were tabulated by DGS, Pioneer was the apparent low bidder using either the \$600 or \$6,000 figure on the special forms of proposal forms accompanying their bid.

9. Pioneer was contacted by DGS immediately after the bid opening and asked to explain the differences (\$6,000 v. \$600) in the bid prices for the alternate items on the special form of proposal. Pioneer's President, Mr. Patel, explained that he had lacked a duplicate form when he first prepared the bid, and eventually obtained a duplicate form and completed it in haste. He had recalled the figure \$600 from another section of the form, and by mistake entered incorrectly the \$600 figure on the second form where he had previously written \$6,000 on the first form.

10. The procurement officer determined Pioneer's submission of \$6,000 and \$600 as a minor irregularity and waived it under COMAR 21.05.02.12A. Appellant filed a timely bid protest from this determination.

11. DGS denied the protest by final decision dated February 13, 1990 and postmarked February 16, 1990.

12. Appellant received the decision on February 20, 1990 and took a timely appeal to this Board on March 1, 1990.

13. It was apparent on the face of the bids received that the bid of Pioneer was low under any reasonable interpretation, i.e. whether the \$6000 or \$600 bid price for the alternate items was used to determine the Pioneer bid.

14. DGS awarded the contract to Pioneer using the \$600 figure despite Mr. Patel's clarification after bid opening that he intended to bid \$6000.

However, it is clear from the record it was never implied or suggested by DGS that Mr. Patel would get the contract only if he took the lower figure

between \$6,000 and \$600. There is no indication that there was a "quid pro quo" for Pioneer to accept the \$600 price. At the hearing of the appeal Mr. Patel testified that he accepted the \$600 price "because it was his mistake."

Decision

COMAR 21.05.02.03B, states in relevant part: "1. Bids shall be based upon the specifications contained in the invitation for bids." In this case, the IFB required duplicates of the special form of proposal form to be submitted with the bid. Pioneer submitted forms containing prices in the blanks provided of \$6,000 handwritten in numbers and letters on one form, and \$600 handwritten in words and numbers on the other form.

Testimony was undisputed at the hearing that this was a mistake. The procurement officer in reviewing the bids found this to be a minor irregularity. A minor irregularity is defined in COMAR 21.06.02.04 as follows:

- 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 the 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 bidder 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 or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State.

COMAR further states that "minor irregularities" in bids may be waived if the procurement officer determines that it shall be in the State's best interest. COMAR 21.05.02.12A. The Board has determined from the record that in completing the handwritten price information for the alternate items on the duplicate form an innocent mistake was made by Mr. Patel. It

should be noted that whichever figure, \$6,000 or \$600, is used there was no displacement; displacement in this factual context meaning that Pioneer's bid was lowest under any reasonable interpretation.

The procurement officer followed COMAR 21.05.02.12C after concluding that a mistake was made and confirmed the bid at the higher price of \$6,000. There was no displacement whichever price was used and DGS determined to award at the lower price.¹

In cases factually similar to the instant case, the Comptroller General has upheld an award where both prices were lower than that of the next lowest bid. See Comp. General B-176378 1972 (unpublished); Pacific Coast Utilities Service, Inc., B-210285, 83-2 CPD ¶43 (1983); Miller Disposal Services, Inc., B-205715, 82-1 CPD ¶543 (1982) at 6.

The rationale behind the Comptroller General decisions is based on an absence of prejudice to other bidders since the bid containing the defect remains the low bid no matter how the defect is resolved. In this case the procurement officer made his decision based on specific regulatory authority not available to the Comptroller General. The procurement officer's decision was reasonable based upon the procedure outlined in COMAR. It is well established under Maryland's General Procurement Law that a procurement officer has discretion to consider whether the alleged irregularity either is waivable or fatal to the responsiveness of the bid. Where a discretionary determination is involved this Board will not disturb the procurement officer's

¹It has been held that if a price is entered on a bid in such a way that it is not clear to which bid item it applies, and the price would be low only if the bidder's explanation, made after opening, is accepted then the bid must be rejected as non-responsive. If, however, the bid would be low under either interpretation, the bidder would probably be offered the award under the conditions more favorable to the government. See Energy Maintenance Corporation/Turbine Energy Service, B-215281.3 and B-215281.4, 85-1 CPD ¶341 (1985).

discretionary determination unless it finds that it was fraudulent or so arbitrary as to constitute a breach of trust. See Calvert General Contractors Corp., MSBCA 1314, 2 MICPEL ¶140 (1986).

As stated above, there was no displacement, and thus no prejudice to other bidders since Pioneer is lowest at either price. The \$5400 (\$600 v. 6000) variation in price in Pioneer's bid was under the facts of this appeal properly found to be inconsequential and immaterial ("trivial and negligible") under any reasonable interpretation when contrasted to the scope (i.e. total bid price) of the procurement (\$119,400), even though a large dollar or percentage difference in price (here \$5,400) is involved in the mistake. For all the foregoing reasons, the appeal is denied.