BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF MIDASCO, INC.	)	
	)	
	)	Docket No. MSBCA 2209
Under SHA Contract No. AW 6975186	)	
	)	

January 31, 2001

Rejection of Bids - Rejection of bids and resolicitation is not appropriate where prejudice to bidders and harm to the competitive process outweighs the Agency's interest in resolicitation.

APPEARANCE FOR APPELLANT:	Michael J. Jack, Esq. Baltimore, Maryland
APPEARANCE FOR RESPONDENT:	Scot D. Morrell Assistant Attorney General Baltimore, Maryland
APPEARANCE FOR INTERESTED PARTY: Rommel Engineering & Construction	None

OPINION BY CHAIRMAN ROSENCRANTZ

Appellant appeals the rejection of its protest of the State Highway Administration's (SHA) determination to reject all bids on the above captioned Contract.

Findings of Fact

1. The Contract is for the furnishing and installation of advanced traffic management equipment on I-83, I-795 and I-70 in Baltimore County. SHA plans to resolicit the project with a revised scope of work and correct at least one quantity error in the readvertised Schedule of Prices.
2. Bids for this project were opened on August 24, 2000. Although 14 different companies purchased the bid documents, only two bids were received. Appellant was the apparent low bidder on the Contract with a bid in the amount of $948,900.00. The Interested Party, Rommel Engineering and Construction, was the second low bidder with a bid in the amount of $1,229,000.00.
3. One day prior to bid opening, the Appellant advised SHA that there was an error involving Bid item 8048.
   This estimated quantity bid item is for the furnishing and installing of 4-inch Schedule 80 Multi-Duct PVC Conduit-Direction Bored. The Index of Quantities indicates 430 linear feet

for this item and Appellant's takeoff from the plans indicated 465 linear feet. The Schedule of Prices, however, where the bidders set forth their bids, indicated 8,215 linear feet for the conduit item. However, the Procurement Officer was not advised of the discrepancy until his receipt of the report discussed in Findings of Fact No. 6.

4. Appellant bid one penny per linear foot for this item resulting in an extended price of $82.15. The Interested Party bid $15.80 for the same item resulting in an extended price of $129,797.00. The $15.80 price bid by the Interested Party was approximately 65% of the SHA estimated price (engineers estimate) for this item. The record reflects that $25.00 per linear foot was a probable actual cost.

5. SHA determined that such a discrepancy in the quantity for this item, for which Appellant bid one penny, could necessitate the use of the Variation in Estimated Quantities provision of the contract, GP-4.04. The SHA Procurement Officer's decision reflects concern that negotiation for pricing of this item may or may not lead to Appellant's bid resulting in the lowest ultimate cost to the State.

6. The Procurement Officer's decision also reflects concern that Appellant's bid may be materially unbalanced. However, the Procurement Officer declined to reject Appellant's bid on such ground as recommended by his subordinates in a report prepared by his subordinates dated September 19, 2000 and testified that in his opinion, the bid by the Appellant was not an unbalanced bid.

7 The report presented to the Procurement Officer was prepared pursuant to an SHA policy requiring analysis of bids where the low bid was either 10% over the engineer's estimate or 15% under the engineer's estimate (over/under [1] review).

8. Ultimately, the SHA Procurement Officer determined to reject all bids pursuant to COMAR 21.06.02.02C and resolicit the project to clarify and correct the discrepancy for all potential bidders pursuant to COMAR 21.06.02.02. COMAR 21.06.02.02C provides:

> 3. Rejection of All Bids or Proposals.
>
> (1) After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest. Reasons for rejection of all bids or proposals include but are not limited to:
>
> (a) The absence of a continued need for the procurement;
>
> (b) The State agency no longer can reasonably expect to fund the procurement;

1 Because Appellant's bid was more than 15% below the engineer's estimate, such a review was undertaken. SHA issues approximately 300 - 350 procurements annually. Of this number over/under reviews are triggered by the low bid in approximately 20% of the procurements. This review process leads to a determination to reject all bids and resolicit approximately 3 to 5 times a year. Sometimes SHA will not reject the bids and resolicit a procurement even where the over/under review process reveals errors in the bid documents.

(c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;

(d) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;

(e) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;

(f) Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited; or

(g) All otherwise acceptable bids or proposals received are at unreasonable prices.

(2) A notice of rejection of all bids or proposals shall be sent to all vendors that submitted bids or proposals, and it shall conform to §B(2).

9. On October 2, 2000, SHA notified all bidders of its decision to reject the bids and to readvertise the project at a future date.
10. Appellant filed a bid protest on October 5, 2000 protesting SHA's decision to readvertise the project.
11. SHA's Procurement Officer issued a final decision dated October 23, 2000 rejecting Appellant's bid protest and on November 3, 2000 Appellant filed a Notice of Appeal with this Board.

Decision

Under Maryland's General Procurement Law, a state agency may reject all bids if the agency determines that "it is fiscally advantageous or otherwise in the best interests of the State. . ." Maryland State Finance and Procurement Article §13-206(b). See also, COMAR 21.06.02.02C. The determination of whether it is fiscally advantageous or otherwise in the State's best interest to reject all bids is a discretionary determination. See, The Fechheimer Brothers Company and Harrington Industries, MSBCA 1181, 1 MSBCA ¶74 (1984); Williams Construction Company, MSBCA 1639, 4 MSBCA ¶302 (1992) at pp. 15-16; Megaco, Incorporated, MSBCA 1924, 5 MSBCA ¶385 (1995). In making a determination concerning whether a Procurement Officer's decision is otherwise in the State's best interest, the Board's scope of review of the agency's decision is a narrow one. This Board has advised that the State's determination in this regard will not be disturbed unless the Board determines that the decision "was fraudulent or so arbitrary as to constitute a breach of trust." See, Megaco, Incorporated, supra.

The Circuit Courts have also provided guidance on the issue of the appropriateness of the rejection of all bids after they have been opened and prices exposed. It has been argued citing this Board's decisions in Solon Automated Services, Inc., MSBCA 1046, 1 MSBCA ¶10 (1982) and Peter J. Scarpulla, Inc., MSBCA 1290, 1 MSBCA ¶88 (1984), that a balancing test must be applied pursuant to which the procurement agency may not reject all bids after bid opening and resolicit unless a reasonable determination is made that the State's interest in resoliciting outweighs the prejudice to bidders and harm to the competitive process. In both of the cited decisions, however, the Board was reversed by the Circuit Court. See, In the matter of the Admin. Appeals of Solon Automated Services, Inc., Circuit Court for Baltimore County, Misc. Law Nos. 82-M-38 and 82-M-42 (1982) and State v. Scarpulla, Case No. 84 347 041/CL28625, Circuit Court for Baltimore City, May 31, 1985.[2]

As set forth In the matter of the Admin. Appeals of Solon Automated Services, Inc., and State v. Scarpulla, both the Circuit Court for Baltimore County and the Circuit Court for Baltimore City determined that in the context of the provisions of the General Procurement Law and COMAR regarding rejection of all bids and resolicitation, the procurement agency's decision to reject and resolicit may not be disturbed unless it can be shown that the decision was not fiscally advantageous or otherwise not in the best interest of the State to such an extent that it was fraudulent or so arbitrary as to constitute a breach of trust. See also, Hanna v. Bd. of Ed,. of Wicomico Co., 200 Md. 49 (1951).

While there may be factual situations where prejudice to bidders and harm to the competitive process outweighs the agency's interest in resolicitation, an Appellant will bear a heavy burden to show that such a situation exist. Do the facts herein demonstrate that prejudice to bidders and harm to the competitive process outweighs the agency's interest in resolicitation? I think the facts in this case do so.

The Procurement Officer's final decision notes the Agency's concern that negotiations for pricing of Item 8048 casts doubt on whether Appellant's bid would remain low as a result of such negotiations being triggered by the estimated quantities clause of the Contract. The facts do not support this concern.

That clause provides in relevant part:

GP-4.04 VARIATIONS IN ESTIMATED QUANTITIES

> *Where the quantity of a pay item in this Contract is an estimated quantity and where the actual quantity of such pay item varies more than 25 percent above or below the estimated quantity stated in this Contract, an equitable adjustment in the Contract price shall be made upon demand of either party. The equitable adjustment*

2 An appeal of the Circuit Court decision in Scarpulla was dismissed as moot by the Court of Special Appeals in No. 825 [unpublished] (March 3, 1986).

shall be based upon any increase or decrease in costs due solely to the variation above 125 percent or below 75 percent of the estimated quantity.

We recognize that we have no jurisdiction over a contract claim dispute that has yet to be determined by the agency and appealed to this Board. However, we think that the Agency's concern in this regard is misplaced. Based on our understanding of the Court of Special Appeal's decision in Genstar v. State Highway Administration, 94 Md. App. 594 (1993) we believe that it would be exceedingly difficult, indeed if not impossible, for this Appellant to prevail. Based on Appellant's one penny bid on Item 8048 we do not believe Appellant can show that its actual unit costs for 465 linear feet would be greater than its actual unit cost for 8,215 linear feet at least to such an extent as to place in question whether Appellant is still the low bid. However, lacking jurisdiction we make no actual findings in this regard.

The record reveals that a discrepancy between Bid Item 8048 of the Schedule of Prices and the quantity of 430 linear feet set forth in the Index of Quantities was revealed to the Agency by the Appellant on the afternoon of August 23, 2000. In this regard the facts suggest that an estimator for Appellant spoke with Mr. Henkle, a Project Manager at SHA, about the discrepancy over the telephone sometime during the afternoon of August 23, 2000. Appellant's estimator advised Mr. Henkle (who was not the project manager for this Contract) that the Index of Quantities and Appellant's takeoff revealed 430-465 linear feet rather than the 8,215 linear feet set forth in the Schedule of Prices for the conduit item. On the advise from a Ms. Foos, a Project Management Coordinator, who was Mr. Henkle's superior, Mr. Henkle informed Appellant's estimator that Addendum No. 2 had been issued the week before and it was too late to postpone the next day's bid opening. Ms. Foos was responsible for issuing project addendums. She had no authority to postpone a bid opening.

Ms. Foos of SHA was thus advised the day prior to bid opening of the discrepancy, which the record reflects to be material since the total price (of any bid) could clearly be affected. SHA should have postponed the bid opening and sent out an addendum setting forth the correct number of linear feet for Bid Item 8048 and a new bid opening date. However, the SHA Procurement Officer was not advised by Ms. Foos of the discrepancy because Ms. Foos did not know whether the 430-465 number or the 8,215 number was correct, only that there was such a discrepancy.

An analysis of the bid of the Interested Party reveals that even when adjusting that bid to reflect 430 feet at $15.80, that bid is $218,243 greater than the low bid of the Appellant.

8215 ft. @15.80	$129,797
430 ft. @15.80	67,940
Difference	61,858
Actual (Interested Party)	$1,229,000
Adjustment	61,858
Adjust bid price	1,167,143

Adjusted bid price	$1,167,143
Appellant price	948,900
Exceed Appellant's bid	$ 218,243

The record reflects that SHA believes that Appellant could perform the work for its bid price and that Appellant had bonding.

I do not believe there was any fraudulent activity related to this bidding process. I do believe that the SHA made four mistakes which raise the question of trust. One, Item 8048 was incorrectly shown on the pricing sheet. Two, SHA was advised that "something" was wrong with item 8048 and they failed to take timely action. Three, accepting and opening bids thus exposing prices knowing there was a question regard this bid. And four, failing to recognize that in this particular situation, the initial error had no negative consequences to the two bidders who submitted bids or the State.

It is always in the State's best interest to accept the low responsive bid where a discrepancy even where material as in this appeal will not affect the position of the bidders; i.e., the low bid will not be displaced however the discrepancy is interpreted. The only reason for possible legitimate rejection of all bids set forth in the Procurement Officer's decision was that "the quantity listed in the Schedule of Prices for this conduit item was defective for all potential bidders" such that a rebid with the correct number of linear feet was necessary to ensure that all bidders were competing on the same footing. In this instance, both bidders were on the same footing. The two bidders were not hurt. No one bidder had an advantage in this situation. Although 14 companies purchased the bid documents, we have no way of knowing if any declined to bid because of the noted error.

The State failed to demonstrate that any bidder had an advantage, that any bidder (whether they submitted a bid or not) was harmed, and that the State was in anyway damaged. Although one could say that the magnitude of the error was significant. i.e. actual quantity was only 10% of the stated quantity. It had absolutely no negative consequence in the final fiscal evaluation of the bids.

The Appellant would be severely damaged if this project were rebid. The Appellant acted responsibly in notifying the SHA of the error before bids were opened. The SHA had an opportunity to correct the error by simply delaying the opening of the bids until the error was confirmed or corrected. The low bidder brought the discrepancy to the attention of SHA, but nothing was done about it.

Under these facts I find that a resolicitation after prices have been exposed to be clearly not in the State's best interest and grossly unfair to the low bidder. Under these circumstances, I find that the best interest of the State is served by accepting the low bid. Maintaining the concept of sealed competitive bids is a critical element of the State's procurement system. Resolicitation after prices are exposed for no legal or practical reason violates the validity of the system. Bidders trust the State to be fair and reasonable in handling sealed bids.

Board Member Harrison would deny the appeal for reasons set forth in his dissent. Because there are only two Board Members, myself and Mr. Harrison, we believe that the only fair way to

resolve a division among the Board Members is to have the Appellant prevail where one of the two Board Members finds that the Appellant's appeal should be sustained.

Accordingly, the appeal is sustained and the matter is remanded to SHA for appropriate action. So Ordered this 31st day of January 2001.

Dated: January 31, 2001

Randolph B. Rosencrantz
Chairman

Dissenting Opinion by Board Member Harrison

I dissent. It is clear to me that the Procurement Officer, a deputy SHA administrator who testified at the hearing of this appeal, would have postponed the bid opening based on the error in the Schedule of Prices had he known about it prior to bid opening. It is regrettable that he did not find out about the error prior to bid opening but only after bid opening when prices had been exposed. However, in my opinion the record herein fails to reflect that the Procurement Officer's decision to reject all bids and resolicit when he became aware of the problem, particularly given the magnitude of the error in the Schedule of Prices, was fraudulent or so arbitrary as to constitute a breach of trust. See In the matter of the Admin. Appeals of Solon Automated Services, Inc., Circuit Court for Baltimore County, Misc. Law Nos. 82-M-38 and 82-M-42 (1982); State v. Scarpulla, Inc., Case No. 84 347 041/CL28625 Circuit Court for Baltimore City, May 31, 1985; Megaco, Incorporated, MSBCA 1924, 5 MSBCA ¶385 (1995).

As indicated in Chairman Rosencrantz's Opinion, I agree that the Appellant should prevail given the split decision of the Board herein.

Dated: January 31, 2001

Robert B. Harrison III
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2209, appeal of Midasco, Inc. under SHA Contract No. AW 6975186.

Dated: January 31, 2001

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Mary F. Priscilla
Recorder