

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of OAKLAWN DEVELOPMENT )  
CORPORATION )  
 ) Docket No. MSBCA 1306  
Under MTA Contract No. )  
XO-40-12 )

October 27, 1986

Responsiveness - Appellant's bid on a landscape planting project was nonresponsive for failure to acknowledge an addendum to the IFB containing additional specifications pertaining to tree well construction and safety requirements respecting work around an operational rail facility.

Responsiveness - The materiality of the above amendments to the IFB which imposed new legal obligations on the contractor was not diminished by the fact that these amendments might have little or no effect on the bid price or the work to be performed.

APPEARANCE FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

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OPINION BY CHAIRMAN HARRISON

Appellant has timely appealed a Mass Transit Administration (MTA) procurement officer's decision that its bid was nonresponsive.

Findings of Fact

1. On June 20, 1986, MTA issued an Invitation for Bids (IFB) for landscape planting at the Milford Mill and Old Court Stations of the Section B Metro System in Baltimore County. The work to be performed included the furnishing and planting of trees, shrubs, groundcover, as well as turf maintenance, tree fertilization, removal of certain tree and shrub accessories, and selected thinning and erosion repair.

2. Bid opening was originally scheduled for July 22, 1986. However, on July 15, 1986, MTA sent a letter (Exh. 5, Agency Report) to prospective bidders advising that bid opening would be postponed until July 29, 1986 and that this would be confirmed by Addendum No. 1 to be mailed on Friday, July 18, 1986.

3. Addendum No. 1 (Tr. 11, 24, Exh. 6, Agency Report) was issued on July 18, 1986, to all prospective bidders including Appellant and accomplished in relevant part, the following:

- a. Delayed bid opening until July 29, 1986;
- b. Increased the quantity of some of the bid items;<sup>1</sup>
- c. Attached substitute bid form sheets, pages BF 1, 6, and 7 of 10 revised as of July 18, 1986, the latter two pages showing the increased quantities in the bid items;
- d. Enclosed specifications for the furnishing of materials and installation of the tree wells applicable to the contract;<sup>2</sup>
- e. Added a new special provision pertaining to safety, requiring that the contractor's supervisory personnel, including foremen, who would be working in the MTA's operational rail facilities on a regular basis, complete a safety course offered by MTA regarding working in the vicinity of the Metro's electrified track area and requiring the contractor to give daily "tool box safety briefings;"
- f. Enclosed four (4) substitute drawings, sheets 1, 2, 6, and 10 of the contract drawings. These amended drawings showed the increased work covered by Addendum No. 1, including the details of how and where the contractor was to perform the additional work covered by the Addendum.

4. On July 22, 1986, Addendum No. 2 (Exh. 7, Agency Report) was issued to all prospective bidders, including Appellant. This Addendum while not encompassing any changes to the IFB, corrected certain typographical errors regarding the numbering of the pages attached to Addendum No. 1.

5. Prior to the bid opening on July 29, 1986, no potential bidder sought clarification of, or protested the requirements of, the IFB, including Addendum Nos. 1 and 2.

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<sup>1</sup>The estimated quantity of Forsythia plants was increased from five hundred fifty (550) to five hundred eighty-six (586); the estimated quantity of Hedera Helix plants was increased from eight thousand six hundred ninety-two (8,692) to nine thousand and ninety-seven (9,097); and the estimated quantity of square yards of mulch was increased from three thousand two hundred eighty-five (3,285) to three thousand four hundred thirty (3,430). The total price increase for these increased estimated quantities based on Appellant's unit prices would have been \$1,360.00.

<sup>2</sup>These specifications were not available at the time the IFB was issued, the IFB stating on page SP047 dealing with tree well work that they would be further developed by addendum.

6. Sealed bids were opened and publicly announced at 2 p.m. on July 29th, as scheduled. The following three (3) bids were received:

Appellant	\$277,831.40
Greenbrier Farms Landscaping, Inc.	\$295,888.47
Aspen Landscape Contractors	\$321,999.95

The engineer's estimate for the work was \$338,741.80. (Exh. 4, Agency Report).

Also announced at bid opening were those addenda that each bidder acknowledged receiving as shown on sheet BF 3 of 10 of the bid form. (Exh. 8, Agency Report).

7. Immediately following bid opening, MTA began to audit the bids and discovered that the Appellant failed to acknowledge on page BF 3 of 10 the receipt of Addendum No. 1 of July 18, 1986 and Addendum No. 2 of July 22, 1986. In lieu thereof, Appellant's bid acknowledged receipt of an Addendum No. 1 dated July 15, 1986 which was presumedly a reference to MTA's letter dated July 15, 1986 concerning the future issuance of Addendum No. 1. (Exh. 5, Agency Report).

In addition, Appellant's bid failed to enclose and use the substitute bid form sheets, furnished with Addendum No. 1, covering the increased work covered by that Addendum.

8. Appellant admits that it received the addenda and concedes that its bid failed to acknowledge receipt of Addendums No. 1 and 2. (Tr. 11, 24-25). Appellant further acknowledged that it did not utilize Addendum No. 1 in preparing its bid. (Tr. 24-25).

9. After the bids were opened and audited, Appellant's President, Mr. William Mathews, received a telephone call from Mr. George Redifer of the MTA who was performing contract administration matters for the instant procurement at the request of Mr. William Spiva, the designated procurement officer, who was on vacation. (Tr. 29, 35). Mr. Redifer pointed out that Appellant had not acknowledged receipt of the addenda and that the estimated number of Forsythia plants, Hedera Helix plants and estimated number of square yards of mulch had been increased by Addendum No. 1 and that Appellant had apparently based its bid on the original estimates. (Tr. 31). Mr. Redifer asked Mr. Mathews whether Appellant would perform the contract for its original bid price of \$277,831.40, if it was determined to be appropriate to award the contract to Appellant despite the discrepancies in its bid. (Tr. 31). After stating that Appellant would perform the contract for its original bid, Mr. Mathews was informed that MTA would be back in contact with Appellant. No mention was ever made of the tree well specifications or the safety instruction course and daily briefing requirements contained in Addendum No. 1.

10. By letter dated August 14, 1986 the Procurement Officer (Mr. Spiva) issued his final decision<sup>3</sup> concluding that the Appellant's bid was nonresponsive for failing to acknowledge material IFB amendments included in Addendum No. 14 and, therefore, it had to be rejected. (Exh. 9, Agency Report).

11. Appellant timely filed an appeal with this Board on September 2, 1986.<sup>5</sup>

#### Decision

Appellant has appealed the procurement officer's specific determinations that its bid was nonresponsive for failure to acknowledge amendments to the IFB contained in Addendum No. 1 pertaining to increases in estimated quantities of certain plants and mulch and to the added tree well specifications and safety requirements. Since we find that the Appellant's bid was nonresponsive respecting failure to acknowledge the tree well specifications and safety requirements, we need not address its arguments respecting failure to acknowledge the increases in estimated quantities.

Section 13-202(g), Division II, State Finance and Procurement Article, Md. Ann. Code and COMAR 21.05.02.13A require that contract award in competitive sealed bidding is to be made to the low responsive and responsible bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids.

A responsive bidder is defined in COMAR 21.01.02.60 as a person who has submitted a bid under procurement by competitive sealed bidding, which comports in all material respects to the requirements contained in the IFB. See also Section 13-101(i), Division II, State Finance and Procurement Article. As stated by this Board in Long Fence Company, Inc., MSBCA 1259 (Feb. 13, 1986) at pp. 6-7; 2 MSBCA ¶123 at p. 6:

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

<sup>3</sup>There was no formal written protest filed by Appellant. The procurement officer apparently waived this procedural requirement in the interest of saving time and simply issued a final decision on the matter. See DP Service Bureau, Inc., MSBCA 1297 (October 10, 1986) (MICPEL) ¶137.

<sup>4</sup>The procurement officer determined that the failure to acknowledge Addendum No. 2 should be waived as a minor irregularity since Addendum No. 2 contained no further changes to the IFB and only corrected certain typographical errors regarding the numbering of pages in Addendum No. 1.

<sup>5</sup>Appellant's appeal alleged irregularities in other bids. These alleged irregularities were not the subject of a timely protest pursuant to COMAR 21.10.02.03 and may not be considered.

of the bid at the time of the bid opening. Aeroflow Industries, Inc., Comp. Gen. Dec. B-197628, 80-1 CPD 399. (Underscoring added).

Similarly:

A bidder's failure to acknowledge a material IFB amendment by bid opening renders the bid nonresponsive and thus unacceptable since, absent such an acknowledgement, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Power Service, Inc., B-218248, Mar. 28, 1985, 85-1 C.P.D. 374. An amendment is material where it would have more than a trivial impact on the price, quantity, quality or delivery of the item or service bid upon, FAR, 48 C.F.R. §14.405(d)(2) (1984), where it would impact on the relative standing of the bidders, Power Service, Inc., B-218248, *supra*, or where it imposes legal obligations on the contractor that were not contained in the original solicitation. Customer Metal Fabrication, Inc., B-221825, Feb. 24, 1986, 86-1 C.P.D. ¶\_\_\_; Reliable Building Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 C.P.D. ¶344. The materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. Reliable Building Maintenance, Inc., B-211598; *supra*, Navaho Corp., B-192620, Jan. 16, 1979, 79-1 C.P.D. ¶24. (Underscoring added).

Vertiflite Air Service, Inc., B-221668, March 19, 1986, 86-1 CPD ¶272 at p. 3. See also M/A-COM, Inc., MSBCA 1258 (September 23, 1985) at pp. 7-8, 2 MSBCA ¶112 at p. 6. Compare Liberty Roofing Co., Inc., MSBCA 1184 (July 6, 1984), 1 MSBCA ¶77.

Appellant agrees with these legal principles and acknowledges that a nonresponsive bid may not be accepted, even though it would result in monetary savings to the State, since acceptance would be contrary to the maintenance of the competitive bidding system. Vertiflite Air Services, Inc., *supra*. However, Appellant strenuously disagrees with the procurement officer's determination that its bid was nonresponsive for failure to acknowledge amendments to the IFB pertaining to tree well specifications and safety requirements as contained in Addendum No. 1. Appellant contends that the procurement officer erred in not waiving the failure to acknowledge the amendments as a minor irregularity.

A minor irregularity is defined in COMAR 21.06.02.03 as one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in 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. However, we believe that the procurement officer has more precisely framed the issue in his final decision when he states:

[T]he issue is whether [Appellant] failed to acknowledge a material amendment which cannot be waived in the guise of a 'minor irregularity.' The answer is not determined merely by whether the bidder offers to perform in accordance with the addendum after bid opening, even though it is not obligated to do so. 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 [at the time of bid opening] to meet the material terms of the contract documents.

We have noted that the materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. Vertiflite Air Service, Inc., supra. Addendum No. 1 as issued on July 18, 1986 added new legal obligations regarding (1) construction of tree wells in accordance with the specifications included in the addendum, and (2) requirements pertaining to attendance and completion of a safety course and daily safety briefings.<sup>6</sup> Thus, assuming arguendo, as argued by Appellant during the hearing of its appeal, that these additional requirements would have little or no effect on its bid price or the work to be performed,<sup>7</sup> the procurement officer nevertheless reasonably determined that its bid was nonresponsive and unacceptable. Whenever a bidder, as here, does not acknowledge an amendment imposing new legal obligations it may be viewed as attempting (whether in fact it so intends or not) to reserve to itself an election after bid opening to speak up and agree to perform the added requirements or stand silent and let its bid be rejected as nonresponsive. This is the classic "two bites at the apple" circumstance which requires rejection of Appellant's bid as nonresponsive. See Liberty Roofing, supra, 1 MSBCA ¶77, at pp. 7-8. We, therefore, will not disturb the finding of the procurement officer that Appellant's bid was nonresponsive for failing to acknowledge the tree well specifications and safety requirements as contained in Addendum No. 1. Appeal denied.

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<sup>6</sup>The IFB as originally issued on June 20, 1986 provided for the installation of nine (9) tree wells with the specifications to be further developed by addendum and contained no requirements for attendance at a safety course or daily safety briefings. Addendum No. 1 included specifications for installation of nine (9) tree wells, and added a safety specification requiring (1) that the contractor's supervisory personnel, including foremen, who would be working in operational rail facilities on a regular basis be required to complete a safety course conducted by MTA to acquaint them with safeguarding against hazards associated with an operational electrified railroad, and (2) that the contractor hold brief "tool box safety briefings" daily for its employees to keep them aware of their responsibilities to protect themselves and the electrified railroad system.

<sup>7</sup>Appellant characterizes the work called for by the tree well specifications as merely characteristic of "typical" tree well work which could be performed for the \$500 unit price bid for each tree well. Concerning the safety requirements, Appellant takes somewhat alternative and perhaps inconsistent positions that the safety requirements are not material because (1) they are meaningless since the work would not be performed around an operational electrified railroad and (2) Appellant would abide by the requirements as a matter of course. The record does not support Appellant's assertion that the work would not be performed around an operational electrified railroad and whether it would, as it claims, abide by the requirements in any event is not in issue.