BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ORFANOS CONTRACTORS, INC.	)	
	)	Docket No. MSBCA 1391
Under SHA Contract No. B-729-502-429	)	

September 14, 1988

Responsiveness - Waiver of Minor Informality - The procurement officer reasonably determined that the failure to place the total bid number in the space provided at the bottom of the last page of the bid sheets was a minor irregularity which was waivable since the intended total bid was ascertainable from the bid documents. The Board declined to consider whether Appellant may have been prejudiced by any extra time to compile its final bid gained by the low bidder by not adding up unit price extensions and lump sum items to derive a total bid amount.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the low bid was not responsive and that waiver of an irregularity in the bid was improper.

Findings of Fact

1. In late March 1988, the State Highway Administration (SHA) issued an Invitation for Bids (IFB) for work involved in Phase II of the Golden Ring Maintenance Shop at U.S. Route 40 in Baltimore County.

2. The solicitation included a Form of Proposal and Schedule of Prices to be completed by each bidder. A bidder was to insert the total amount of its bid on the first page of the Form of Proposal and to complete the Schedule of Prices for each of the seven lump sum and thirty unit price items listed. The bidder was also to insert the total amount of the bid in the space provided on the last page (page 12) of the Schedule of Prices.

3. At noon on May 26, 1988 the seven bids received were opened and the total of each bid, as indicated on page 12 of the Schedule of Prices, was read aloud.

4. One of the bids received was from the Madigan Construction Co., Inc. (Madigan). Although a total amount ($699,526.00) was shown in Madigan's bid on the first page of the Form of Proposal, the space provided for a total bid amount on page 12 of the Schedule of Prices was blank. Therefore, no amount was read at bid opening for the Madigan bid, and the Madigan bid was announced as irregular.

5. On the basis of the bid total amounts as they appeared at bid opening, SHA identified Appellant's bid of $794,421.55 as the apparent low bid, and so notified Appellant on May 31, 1988. However, Appellant was also advised that "all bids must be verified . . . ."[1]

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[1]The terms "verify" and "verification" are used by SHA sometimes to refer to its audit of bids (its check of the arithmetical accuracy of the bids and correction, when required) and sometimes to refer to solicitation of confirmation of a bid, either as submitted or as corrected for mathematical errors.

6. In auditing Madigan's bid, SHA found that the extensions (the unit price bid x the stated estimated quantity) of nineteen of the unit price items were in error. Applying Contract General Provision GP-3.01[2], the correct extensions were determined and the amounts indicated by "post it" type entries on Madigan's bid. On the basis of these corrections, the total amount of Madigan's bid was $689,450.26. At that point, Madigan was the apparent low bidder, and it was notified accordingly on June 2, 1988. At the same time, SHA wrote to Madigan that it could not confirm the total shown on page 1 of its Form of Proposal ($699,526.00) and because of the nineteen extension errors, it was requesting Madigan to review and verify in writing its bid prices.

7. On June 2, 1988, SHA also informed Appellant that its bid had been displaced by Madigan's as the apparent low bid. That same day, June 2, Appellant filed a written protest with the SHA asserting that Madigan's failure to include the total amount of the bid in the space

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[2]GP-3.01 provides:

> After proposals have been publicly opened and read, they will be audited for mathematical accuracy and reviewed to determine that there are no irregularities as outlined in GP-2.14 and GP-2.26. Upon completion of the aforementioned audit and review, the results will be made available to the public. In the event of a discrepancy between the unit bid prices and the extensions (product of quantity and unit price) the unit price will govern. In the event of a discrepancy between the bid total shown on the bid form and the total determined by mathematical audit of the amounts, lump sum and extensions, that are bid for each item in the price schedule, the amount determined by mathematical audit shall govern. In the case of discrepancy between prices written in words and those written in figures, the written words will govern. In the event that the unit price is not included, the unit price shall be the extended price divided by the quantity.

provided on page 12 of the Schedule of Prices made its bid irregular and that this irregularity could not be waived as a minor irregularity because it was prejudicial to Appellant within the meaning of Contract General Provision GP-2.14.[3]

Appellant asserts that this prejudice arises because Madigan allegedly gained an unfair competitive advantage through the time saved by not adding up the extended unit prices so as to reach a total bid amount. Appellant testified at the hearing of the appeal that the morning of bid opening is generally spent adjusting the components of a bid. On the morning of May 26, Appellant sent its bid to SHA via a 'runner.' The runner maintained telephone contact with Appellant as Appellant sought to obtain lower bids from its subcontractors. Approximately twenty minutes prior to bid opening Appellant stopped its negotiations with the subcontractors in order to properly complete the bid forms and perform the necessary addition and multiplication. Appellant, by analogy to the

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[3]GP-2.14 defines a minor irregularity as:

> . . .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 or 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 and the intent and meaning of the entire bid or proposal is clear. The procurement officer shall either give the bidder or offeror an opportunity 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. (Emphasis supplied).

procedure it employed on the morning of bid opening, thus opined that Madigan's failure to perform the addition of the individual items on its Schedule of Prices gave Madigan a few minutes more time prior to the deadline for submission of bids to negotiate with subcontractors and make adjustments to its unit prices, thereby giving Madigan a competitive edge.

8. Appellant also protested award of the contract to Madigan on the basis that under Contract General Provision GP-2.06A[4] the Madigan bid was not responsive because of the omission of the total amount of the bid on the Schedule of Prices.

9. By letter dated June 14, 1988, Madigan's president, Paul W. Madigan, verified the unit prices for each bid item as being correct. He further stated that the extended prices on nineteen bid items were incorrect because the "totals submitted with my proposal were 'rounded off' in lieu of the actual calculated amount"[5] and that the "bid proposal total" should read $689,450.26. Mr. Madigan testified at the hearing, however, that at the time the bid was prepared the amount of $699,526.00 shown on the Form of Proposal was the intended Madigan bid.

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[4]GP-2.06A provides:

> The bidder shall submit his bid upon the blank form(s) furnished by the Administration. The bidder shall specify a price in dollars and cents for each pay item given, and shall show the products of the respective unit prices and quantities written in figures in the column provided for that purpose, together with the <u>total amount of the bid obtained by adding the amounts of the several items</u>. (Emphasis supplied).

[5]The aggregate dollar amount of the errors in extended prices in the Madigan bid was $122.16. See Respondent's Ex. 15.

10. On July 1, 1988, Appellant filed its appeal from the June 22, 1988 denial of its protest. The appeal contained an additional allegation that the Madigan bid was non-responsive for failure to "include approximately $55,000 in excavation and borrow costs for Item No. 4001. . . ." However, at the hearing of the appeal on August 17, 1988, Appellant withdrew its protest on this additional ground.

Decision

Appellant initially contends that the failure to include the total amount of the bid in the space provided on page 12 of the Schedule of Prices makes the Madigan bid nonresponsive under GP-2.06A and therefore not waivable as a minor irregularity under GP-2.14. We disagree. In Calvert General Contractors Corp., MSBCA 1214, 2 MSBCA ¶140 (1986) this Board upheld the procurement officer's decision to waive a bidder's failure to place a total bid number in the space provided, since it was clear from the face of the challenged bid document that the bidder intended to be bound by the individual line item amounts shown and the intended bid total was ascertainable from the addition of the line item totals. In similar circumstances, the Comptroller General has also held as waivable as a minor irregularity a bidder's failure to enter a total bid price on the bid form. See TCI Limited, Comp. Gen. Dec. B-220578, 85-2 CPD ¶433, OTKM Construction Incorporated, Comp. Gen. Dec. B-219619, 85-2 CPD ¶273. Likewise, in this instance, we conclude that the mere failure to place a total bid number in the space provided on the Schedule of

Prices where the total amount of the bid is otherwise ascertainable from the four corners of the bid document does not render the bid non-responsive under GP-2.06A.[6]

In none of the above referenced cases was the failure to enter a bid total viewed as other than a mere clerical error, the waiver of which did not result in displacement of an otherwise low bidder or otherwise prejudice any bidder.

Appellant here, however, asserts as its second ground of protest that it was prejudiced by the waiver of the failure of Madigan to enter a total bid. Appellant is said to be prejudiced because the time saved by Madigan in not adding up the lump sum and extended unit prices gave Madigan an unfair competitive advantage in that it had more time to make adjustments in compiling the bids of its subcontractors. Appellant further alleges that the failure to add up the lump sum and extended unit prices was not a mere clerical error but rather an intentional effort to gain an unfair competitive advantage. Thus, Appellant claims that application of both GP-3.01 and GP-2.14 by SHA was inappropriate.

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[6]While GP-2.06A speaks in terms of absolutes i.e. "the bidder shall . . . show . . . the total amount of the bid obtained by adding the amounts of the several items," we nevertheless in Calvert General Contractors Corp, supra held such requirement to be waivable.

Concerning Appellant's contention that application of GP-3.01 was inappropriate[7], we note that Mr. Madigan testified at the hearing that it was his intention to be bound by the total bid figure on the first page of the Form of Proposal and that he did not place much importance on the unit price figures. Nevertheless, acceptability of a bid is determined from the face of the bid document and not from the subjective intent of the bidder. Calvert General Contractors Corp., supra. See also The Driggs Corporation, MSBCA 1243, 1 MSBCA ¶106 (1985) and cases cited therein. Therefore, regardless of what Mr. Madigan may have intended, the Madigan bid was properly evaluated from the bid documents on the basis of the sum of the extension figures as per GP-3.01.

Having concluded that application of GP-3.01 was proper, we examine Appellant's contention that the procurement officer improperly applied GP-2.14. GP-2.14 provides in pertinent part:

> A. General. Technicalities or minor irregularities[8] in bids, may be waived if the procurement officer determines that it shall be in the State's best interest. The procurement officer may either give a bidder an opportunity to cure any deficiency resulting from a technicality or minor irregularity in his bid, or waive the deficiency where it is to the State's advantage to do so.

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[7]Appellant has not protested with respect to the arithmetical errors which are apparent on the face of Madigan's bid or the application by SHA of GP-3.01 to arrive at correct extensions and a correct total for the sum of the extensions.

[8]See footnote 3 supra.

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"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 . . . 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 . . . errors in extending unit prices. . . ." (Underscoring added).

As we have previously observed, GP-2.14, which has as its genesis COMAR 21.05.02.12, and GP-3.01 compliment one another and are to be read and applied in harmony whenever possible. The Driggs Corporation, supra. In this case the procurement officer following the procedures outlined in GP-

3.01 derived a total intended bid for Appellant of $689.450.26.[9] This total was then verified in writing by Mr. Madigan as required by SHA. The procurement officer then considered pursuant to GP-2.14 whether to waive the failure to provide this total bid amount in the space provided on page 12 of the Schedule of Prices as a minor irregularity. The procurement officer noted that the intended bid could be derived from the face of the bid documents and refused to consider Appellant's argument that Madigan gained a competitive advantage such that waiver of the omission of the total bid would be prejudicial to other bidders. In this regard we find that the procurement officer acted properly since it is improper for the procurement officer to consider the alleged internal bid processes of the individual bidders in applying GP-2.14 or making other determinations of bid responsiveness. See Calvert General Contractors Corp., supra. Competitive inequities among bidders will always exist by virtue of varying technological capacity, staff expertise, bid preparation techniques or location.[10] We finally note that in making a determination

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[9]After the bids were opened and the Madigan bid was marked as irregular, an audit was conducted for mathematical accuracy. The procurement officer corrected the nineteen extension errors in accordance with the rules of precedence in GP-3.01 which state that when there is a discrepancy between the unit price and its extension the unit price prevails. The sum of the extensions as determined by the audit resulted in a different sum from that shown on the Form of Proposal. Application of GP-3.01 provided that the amount determined by the mathematical audit governs. The bid total from the sum of the extensions was then derived in the amount of $689,450.26.

[10]While not necessary or appropriate to our decision we note that the record does not support Appellant's contention that Madigan used "additional time" (i.e. time saved by not adding up the extensions) to competitively adjust the unit price figures. Madigan's bid preparation process differed from that of Appellant. Madigan completed its bid at its office on the morning of the bid deadline and delivered the completed bid to SHA headquarters. The evidence did not show when Madigan stopped taking bids from subcontractors or how long before deadline Madigan filled in the numbers on its bid forms. The record does not demonstrate therefore that Madigan either needed or used any "additional time" to better its position among the competitors.

under GP-2.14 the procurement officer is given discretion to consider whether the irregularity is either waivable or fatal to consideration of the bid or proposal. This Board will not disturb a procurement officer's discretionary determination unless it finds that it was fraudulent or so arbitrary as to constitute a breach of trust. Calvert General Contractors Corp., supra. We find no evidence in the record that the decision to waive the irregularity herein was improperly exercised.

For the foregoing reasons, the appeal is denied.