

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of P. FLANIGAN
& SONS, INC.

Under MAA Contract No. MAA-
CO-99-011

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Docket No. MSBCA 2121

April 19, 1999

Minor Informality - How Determined - In order to determine whether a defect in a bid or proposal is waivable as a minor informality, the procurement officer must first determine that the defect is immaterial as defined in COMAR 21.06.02.04B, i.e. the significance of the defect as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement.

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APPEARANCE FOR INTERESTED PARTY:
(Columbia Construction Company
Inc.)

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the bid of the Interested Party was non-responsive.

Findings of Fact

1. On February 18, 1999, Appellant's bid and the bid of the Interested Party were opened in connection with the captioned solicitation setting forth a construction period of 240 days from Notice to Proceed to construct a glycol (aircraft de-icer fluid) transmission line and lift station fit-out at Baltimore/Washington/International Airport.

2. Item X-6 Temporary Construction Items of the Technical Specifications for the contract provided for:

Furnishing all labor, materials and equipment for temporary construction items necessary for the safe and proper execution of work and not otherwise included in Contract items. The Contractor will be expected to supply and utilize the items listed below and other items as required in the Construction Notes as contained in the plans and specifications.

Temporary construction items to be provided as follows: construction barricades, flaggers, portable floodlighting, steel plates for temporary covering of excavations and structures as required, and men and equipment as needed to keep all aircraft and vehicle traffic areas free of debris.

Item X-6, Section 6-1.1.

3. Section 6-5.1 of the bid documents titled Basis of Payment provided in part that:

The lump sum price for Temporary Construction Items [Item X-6] shall not exceed three (3%) percent of the total Contract bid amount for base bid less the bid prices for Mobilization/Demobilization and Temporary Construction Items. No payment in excess of three (3%) percent of the total contract bid amount for base bid less the bid price for Temporary Construction items will be made for this item. If the total cost for all items required for Temporary Construction Items are in excess of (3%) percent of the total contract bid amount for base bid less the bid prices for Mobilization/Demobilization and Temporary Construction Items, the Contractor shall include the excess in the unit price of other items of work.¹

While bidders for the contract were required to insert a lump sum price for bid Item X-6-5.1 (Item X-6), payment of this lump sum was to be in installments, with the first payment of 10 percent of the lump sum price to be included in the contractor's first progress estimate.

The remaining 90 percent of the lump sum price was to be included as installments in subsequent progress estimates, each such installment to be based on the ratio of (i) the total work completed to the date of the estimate to (ii) the total contract amount.

4. The bids of the Interested Party (sometimes herein referred to as Columbia) and Appellant relative to such provision [Item X-6] were as follows:

¹ See footnote 4 below.

| <u>Total Bid</u> | <u>Mobilization (Mob)</u> | <u>Temp Construction Item (TCI)</u> | <u>Total Less Mob/TCI</u> | <u>Mob%</u> | <u>TCI%</u> |
|---|---------------------------|-------------------------------------|---------------------------|-------------|-------------|
| Columbia Construction Co, Inc. 4,887,075.58 ² | 202,442.00 | 258,480.00 | 4,426,153.58 | 4.6% | 5.8% |
| P. Flanigan & Sons, Inc. 4,924,152.25 | 175,000.00 | 125,000.00 | 4,624,152.25 | 3.8% | 2.7% |

5. The bid of the Interested Party for the temporary construction bid item (Item X-6)(TCI) thus exceeded the three (3%) percent limitation set forth in Section 6-5.1. The bid of the Appellant did not exceed the three percent (3%) limitation.

6. Initially the MAA determined that the bid of the Interested Party was not responsive because its bid for the temporary construction items (Item X-6) exceeded the three (3%) percent limitation. On February 25, 1999, MAA wrote to the Interested Party that this deviation rendered the Interested Party's bid non-responsive.³

7. On March 4, 1999, the Interested Party filed a protest regarding the MAA finding that the Interested Party's bid was non-responsive because the bid for Item X-6 exceeded the three percent (3%) limitation set by Section 6-5.1.

8. In the protest the Interested Party asserted several reasons why its bid should have been accepted:

1. The Section 6-5.1 limit does not apply to the amount bid by Columbia but only to the amount paid to Columbia after it becomes the contractor.

2. Even though Columbia's Item X-6 bid price exceeds the Section 6-5.1 limit, that section allows MAA to pay Columbia for Item X-6 only the amount of that limit and to reallocate and pay the amount in excess of the limit to Columbia through adjustments to the unit prices for other work items or simply to pay the excess at final acceptance.

3. The solicitation does not provide that Columbia's bid will be rejected based on a deviation from the Section 6-5.1 limit.

4. Since award is to be made to the bidder with the lowest total bid price and since Columbia's total bid price is low, award must be made to Columbia.

5. The deviation may be treated as a minor irregularity and may be

² Columbia's bid when opened appeared as \$4,888,000.00. However, review by the Maryland Aviation Administration (MAA) resulted in a corrected bid amount of \$4,887,075.58 due to several mathematical errors.

³ Independently of this determination by MAA, MAA received a protest on similar grounds from Appellant on February 25, 1999.

waived, i.e., even if Columbia's bid is non-conforming, if acceptance by MAA would not be prejudicial to other bidders.

9. The MAA Procurement Officer only found merit in the fifth ground advanced that the deviation may be treated as a minor irregularity and may be waived, i.e., even if Columbia's bid is non-conforming, its acceptance by MAA would not be prejudicial to other bidders. The Board agrees that the other grounds advanced lack merit on their face and will address only the Procurement Officer's determination on the fifth ground where the Procurement Officer treated the deviation as a minor irregularity.

10. In the Procurement Officer's final decision dated March 17, 1999, the following rationale was set forth for treating the deviation as a minor irregularity:

MAA finds merit only in the last stated ground, which is discussed below. The other grounds are unpersuasive and are rejected without further discussion.

In support of its contention that MAA may accept Columbia's bid despite its deviation, Columbia refers to the Comptroller General's decision in Legare Construction Co., 94-2 CPD ¶173 (B257735, Nov. 4, 1994). That case involved facts similar to those that confront MAA here. Legare's \$1,336,000 bid had been rejected by the National Park Service because its lump sum bid of \$280,500 for a site and utility work item exceeded a limit, specified in the invitation, of 20 percent of its base bid. The excess was \$13,300. The Comptroller General sustained Legare's protest, holding that Legare's bid should have been accepted by the National Park Service because (i) the discrepancy between the solicitation's requirement and what Legare promised was not substantial, (ii) Legare's deviating bid satisfied the Park Service's actual needs, and (iii) acceptance of Legare's bid would not prejudice other bidders. MAA finds that these elements are present here.

In MAA's view of the Section 6-5.1 limit, the discrepancy between the 3 percent limit that Columbia should have bid for Item X-6, \$132,785, and Columbia's actual bid, \$258,480, is not substantial.

In reaching this conclusion, we have reviewed the deviation in the context of the solicitation as a whole, as we are required to do under COMAR 21.06.02.04, which governs, "Minor Irregularities in Bids or Proposals." That regulation provides, in pertinent part, that a "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 procurement."

As in Legare, the 3 percent limitation in section 6-5.1 is intended to avoid bids that are unduly unbalanced as to the time of payment, specifically, the avoidance of an up-front payment substantially in excess of costs incurred, sometimes called front-end loading. Section 6-5.1 accomplishes this result in two ways, first, by limiting the total amount of Item X-6, and, second, by limiting the first or up-front payment for Item X-6 on the initial payment estimate to 10 percent of the amount bid for Item X-6. The specification is structured so that it is likely that any front-end loading for Temporary Construction Items will not exceed 10 percent of the amount bid for Item X-6.

In this case, Columbia's bid for Item X-6 was \$258,480. If Columbia abided by the Section 6-5.1 limit its bid for this item would have been \$132,785. The difference between the two is \$125,695 and the first payment to Columbia will include \$12,570 more (10 percent of \$125,695) than if Columbia's bid conformed to the 3 percent limitation. This is the maximum possible amount of front-end loading that could be achieved by this deviant bid, an amount that clearly is insubstantial.

Legare, commenting upon the potential front-end load of \$13,300, observed that "any cost to the government of having to pay \$13,300 earlier than it otherwise would, could not in any conceivable manner approach the additional \$27,000 that it would have to pay under an award to [the next low bidder]." Legare at 3. Applied here, the cost to MAA of having to pay \$12,570 earlier than it otherwise would have, could not in any conceivable manner approach the additional \$37,077 that it would have to pay under an award to Appellant. As in Legare, Columbia's deviation is de minimis when "contrasted with the total cost or scope of the procurement." COMAR 21.06.02.04B.

The second Legare element also is satisfied. Columbia's deviating bid satisfies MAA's actual needs. Columbia took no other exception and therefore has promised to construct the project exactly as required. Appellant, itself does not complain that MAA's actual needs will not be met.

Finally, as to the third Legare element, there is no prejudice to other bidders if MAA accepts Columbia's bid. Any monetary advantage achieved by Columbia is inconsequential.

[fn.] In the words of Legare, "[t]he \$13,000 deviation gave Legare no advantage over other bidders since any interest Legare would earn on the

sum (or save by not having to borrow it) would not provide a basis for its being able to submit a bid \$27,000 lower than [the next low bidder]."

*Moreover, there is no reason to believe that, had Columbia conformed to the Section 6-5.1 limit, its bid would have been, in total, any higher than the one it submitted. "[I]t is far more likely that . . . [it] would have recalculated its individual item prices to comply with the [3]-percent limitation without raising its total bid price." Legare at 3. This exactly is what Section 6-5.1 mandates: "If the total cost for all items required for Temporary Construction Items [is] in excess of [the Section 6-5.1 limit], the Contractor shall include the excess in the unit price of other items of work."*⁴

[fn]The amounts bid by bidders other than Columbia and Flanigan for Item X-6 were \$70,000, \$153,000, and \$200,000. Although Columbia's \$258,480 bid is highest, it is not grossly out of line and there is no reason to believe that it was not based on anticipated temporary construction item costs.

The Section 6-5.1 limitation is not required either by statute or regulation or even by this agency's general provisions. It is a construct for the provisions specially written for this project and therefore does not have the force of a legal mandate. Like the bid bond requirement in Board of Education of Carroll County v. Allender, 206 Md. 466, 112 A2d 455(1955), the requirement of Section 6-5.1 may be waived on the basis of an insubstantial deviation in the otherwise successful bid. This is the thrust of COMAR 21.06.02.04. The circumstances here are parallel to those in Legare. There appears to be no good reason not to follow that decision.

This decision is the final action of this agency. This decision may be appealed to the Maryland State Board of Contract Appeals.

11. In a companion letter to Appellant (in final decision format) addressing (and rejecting) Appellant's arguments concerning why Appellant believed that Columbia's bid was non-responsive the Procurement Officer also stated that:

Maryland does not follow a "de minimis" rule that permits acceptance of a bid containing a deviation only if the deviation is de

⁴ We note that this requirement to place any "excess in the unit price of other items of work" may conflict with the decision of the Court of Special Appeals in Genstar v. State Highway Admin., 94 Md. App. 594 (1993). Any such issue is, however, not before us.

minimis in some absolute sense. Rather, the Maryland approach regarding bid deviation is relative. A deviation may be considered minor if it is not substantial within the totality of the procurement or the total cost of the contract. COMAR 21.06.02.04. MAA's resolution of Columbia's protest is faithful to that approach.

12. On March 23, 1999, Appellant filed an appeal with this Board from such final agency action.

13. The parties have requested that the Board of Contract Appeals hear and decide Appellant's appeal prior to presentation to the Board of Public Works on April 21, 1999 of a contract for proposed award to the Interested Party and have agreed to an abbreviation of the time frames set forth in COMAR 21.10.07.03.

14. In connection with its decision herein, the Board finds that Section 6-5.1 was drafted by a private consultant to MAA for use in the contract documents for the captioned project.⁵ There was no pre-bid opening complaint concerning such provision filed by any party.

Decision

A non-responsive bid may not be accepted. COMAR 21.05.02.13; Substation Test Company, MSBCA 2016 ¶ 2023, 5 MSBCA ¶429(1997); Fortran Telephone Communication Systems, Inc., MSBCA 2068 ¶ 2098, 5 MSBCA ¶460 (March 22, 1999).

Appellant argues that Columbia's bid is non-responsive because of the admitted defect concerning Columbia's bid on Item X-6. A responsive bid is defined by COMAR to mean a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements contained in the invitation for bids. See COMAR 21.01.02.01(78). As noted above, a non-responsive bid may not be accepted. The Respondent and Interested Party concede that Columbia's bid for Item X-6 deviated from the 3% requirement set forth in Section 6-5.1. The issue is thus whether the Procurement Officer correctly determined pursuant to COMAR 21.05.02.12A and COMAR 21.06.02.04, which are procurement regulations promulgated by the Board of Public Works and binding on Respondent and this Board, that the deviation in Columbia's bid for Item X-6 was waivable as a minor irregularity, i.e. the deviation is not material. The Board finds for the reasons that follow that the defect in Columbia's bid for Item X-6 is not material and accordingly may be waived.

COMAR 21.05.02.12A provides:

.12 Mistakes in Bids.

A. General. Technicalities or minor irregularities in bids, as defined in COMAR 21.06.02.04, 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

⁵ The percentage limitation for temporary construction items is customized for certain projects for which MAA utilizes the services of this particular consultant.

any deficiency resulting from a technicality or minor irregularity in its bid, or waive the deficiency if it is to the State's advantage to do so.

Waiver is thus dependent upon the deviation being a minor irregularity as defined in COMAR 21.06.02.04. We therefore must determine whether the deviation is a minor irregularity as defined in COMAR 21.06.02.04.

COMAR 21.06.02.04 provides:

.04 Minor Irregularities in Bids or Proposals

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 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.

B. 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 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.

The key words in this regulation are "immaterial or inconsequential" as those words are defined in Paragraph B of the regulation. The regulation declares that the defect in the bid (and in this appeal the defect involving the Interested Party's bid price for Item X-6 is admitted) "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."

We agree with the Procurement Officer that application of the above regulation is not confined to those situations where the deviation is de minimis in some absolute sense, i.e. where only pennies or at most a few dollars are involved in a multi-million dollar price range procurement.⁶ The regulation permits waiver (or cure) where the significance of the deviation is trivial or negligible when contrasted with the total cost or scope of the procurement. We shall use the bid from Columbia (the low bidder) as a reasonable approximation of the cost of the procurement noting that the Appellant's bid at \$4,924,152.25 is not grossly out of line with Columbia's low bid, three out of the five bids received were under five million, one was approximately \$5,100,000 and the engineer's estimate was less than four million. [The high bid is in an amount that exceeds \$5,100,000. The exact amount on the bid tabulation is illegible.]

The question in this appeal, therefore, becomes whether a deviation of \$125,695.00 may be

⁶ Excepting of course a situation where the low bid and the next low bid are separated by such a few pennies or dollars.

considered "trivial" and/or "negligible" in a bid of \$4,887,075.58 and thus the variation or defect immaterial or inconsequential. We conclude that such amount (\$125,695.00) may not reasonably be considered trivial or negligible when contrasted with the total cost (\$4,887,075.58) of the procurement and would reach such conclusion if the total cost of the procurement is viewed as the high bid in this procurement. Compare Melke Marine, Inc., MSBCA 1499, 3 MSBCA ¶247 (1990).

Such a finding would ordinarily end our inquiry and we would sustain the appeal. However, the bid specifications herein directed bidders to include amounts for temporary construction items that the bidder believed would exceed the three percent (3%) limit in the unit price of other items of work.

The record reflects that Columbia did not reduce its anticipated costs for temporary construction items in Item X-6 to the 3% maximum (\$132,785.00) and place the additional costs of \$125,695.00 for this item in other bid items as it was directed to do by the bid specifications. Instead Columbia included all costs for temporary construction items in Item X-6 (\$258,480.00) and did not otherwise increase any other bid items relative to such costs. Columbia's total bid thus remained the same. There is no change in its bid from what it would have been had it complied with the bid specifications and limited its item X-6 bid amount to \$132,785.00 and placed the remaining amount of \$125,695.00 in other bid items. Therefore, the deviation is in fact trivial or negligible. Because Columbia's bid for Item X-6 exceeded the 3% limitation it will receive payment of \$12,570.00 earlier in the job under Item X-6 due to the Item X-6 installment payment schedule permitting receipt by the contractor of 10% of the bid for Item X-6 on the first installment.⁷ Receipt by the contractor of \$12,570.00 earlier in the job rather than later has no impact on determination of the total low bid. Columbia's cost for Item X-6 does not change and earlier payment of \$12,570.00 is not in and of itself substantial in terms of the \$4,887,075.58 cost of the procurement. We thus find that the Procurement Officer did not err when he determined that the deviation in the bid was trivial or negligible and that waiver thereof would not be prejudicial to other bidders, as contemplated by COMAR 21.06.02.04.

We have concluded for the reasons stated that the defect in Columbia's bid for Item X-6 is not material and thus the defect could have been waived as permitted by COMAR 21.05.02.12A and COMAR 21.06.02.04C. Compare Substation Test Company, *supra*, at pp. 7-9. The Appellant's appeal is therefore denied.

Wherefore, it is Ordered this 19th day of April, 1999 that the appeal is denied.

Dated: April 19, 1999

Robert B. Harrison III
Chairman

⁷ Ten percent (10%) of the amount of \$125,695.00, which is the amount by which Columbia's bid exceeds the \$132,785.00 maximum for Item X-6, is \$12,570.00.

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 2121, appeal of P. Flanigan & Sons, Inc. under MAA Contract No. MAA-CO-99-011.

Dated: April 19, 1999

Mary F. Priscilla
Recorder