

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF PILE FOUNDATION)
CONSTRUCTION CO., INC.)

Under SHA Contract No.)
PG 3415173R)

) Docket No. MSBCA 2238

December 7, 2001

Responsibility - Discretionary Determination - The rejection of an unbalanced bid is tied to the agency's discretionary determination of responsibility.

APPEARANCE FOR APPELLANT:

John B. Simoni, Jr., Esq.
Goetz, Fitzpatrick, Most &
Bruckman, LLP
New York, New York

William M. Huddles, Esq.
Huddles & Jones, P.C.
Columbia, MD

APPEARANCE FOR RESPONDENT:

Scot D. Morrell
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY
Tidewater Construction Corp./
Kiewit Construction Co./ Clark
Construction Group, Inc.,
A Joint Venture (TKC)

Scott A. Livingston, Esq.
Rifkin, Livingston, Levitan &
Silver, LLC
Baltimore, MD

Henry P. Bouffard, Esq.
Vandeventer & Black LLP
Norfolk, Virginia

OPINION BY BOARD MEMBER HARRISON

This second appeal by Appellant under the same subject Contract is from a decision by the State Highway Administration (SHA) denying on its merits and dismissing as untimely Appellant's bid protest.¹ Appellant has again submitted a protest against the award to the

¹ Appellant had previously filed an appeal to the Board concerning the dismissal on timeliness grounds and denial on the merits of an earlier protest under the subject Contract. That previous appeal (MSBCA 2224) was dismissed by this Board on June 20, 2001. The Board hereby incorporates by reference the Board's opinion in MSBCA 2224, which decision has been appealed to the Circuit Court for Baltimore City.

apparent low bidder, Tidewater Construction Corp./ Kiewit Construction Co./Clark Construction Group, Inc., a joint venture (TKC), of a contract for construction of the foundation of the new Woodrow Wilson Bridge. The new protest was filed on June 15, 2001 and SHA rendered its decision on July 12, 2001. The instant appeal was timely filed with the Board on July 19, 2001.

This Contract has been awarded and notice to proceed occurred on May 17, 2001.

Findings of Fact

1. The SHA Contract at issue in this appeal, Contract No. PG 3415173R (Contract), is for construction of pier foundations for the Bridge. This work extends from just west of Rosalie Island in Prince George’s County, at the east end, to Jones Point Park in Alexandria, Virginia, at the west end, for a total distance of 1.136 miles. The Contract includes construction of various foundations, including pier pedestals, pile caps, piles, post-tensioning bars and tendons, submarine cable pipes, stand pipes, and electrical systems for lighting. This work requires installation of cofferdams, excavation, dewatering, and other activities needed for completion of the foundations. Additionally, a steel sheet pile bulkhead will be installed along the Virginia shoreline in Jones Point Park. Monitoring the existing bridge for vibration and movement and dredging are also part of the Contract.
2. Bid opening for the Contract occurred on March 22, 2001. By the appointed time, five bids had been received. The five bidders and their total bids are listed below, together with the unit price of each bidder on Bid Item 4001 (Dredging) and Bid Item 1007 (Mobilization), the bid items of concern in this appeal.

	Total Bid	Item 1007 (Mobilization)	Item 4001 (Dredging)
TKC	\$125,396,511	\$19,500,000.00	\$.01
Appellant	128,480,712	29,124,467.67	11.20
Jay Cashman, Inc.	134,122,525	26,500,000.00	25.00
Potomac River Constructors	134,454,905	26,000,000.00	5.00
Modern Continental Construction Co., Inc.	187,347,360	46,641,000.00	25.00

3. On June 15, 2001, Appellant filed a new, second protest with SHA under the subject Contract. Appellant asserts in its second protest letter to the Procurement Officer that “[b]ased upon Mr. Walker’s testimony, Appellant now believes that there exist... new grounds for protesting the award of the Contract to TKC.” First, Appellant claims that TKC is in violation of GP-2.17(b)(3)(b) because its bid contains a penny bid for Line Item 4001 that is approximately \$250,000² below the actual cost of performing the re-

² The actual cost was estimated by TKC to be \$255,802. The figure that appears in TKC’s bid work sheet for the lump sum Mobilization Line Item is \$250,000 for the bulkhead dredging.

quired dredging work, which \$250,000 cost is improperly moved to Line Item 1007 covering mobilization. Second, Appellant asserts TKC failed to bid on 90% of Line Item 4001. Third, Appellant asserts TKC's bid for Line Item 4001 and Line Item 4007 will result in a huge windfall for TKC at the expense of SHA. Fourth, Appellant asserts SHA's acceptance of a bid allegedly in violation of GP 2.17B(b)(3)(b) placed all bidders at a competitive disadvantage. Based on these assertions, Appellant argues that TKC should be declared not responsible or its bid declared non-responsive.

4. Bid Item No. 4001 is for dredging, which is described in Category 400 of the Contract Special Provisions. Under the specifications at page 788 dredging includes "all dredging for the proposed access channel and staging/berthing area adjacent to the National Harbor site, as shown on the Plans, dredging adjacent to the bulkhead at Jones Point Park [and other maintenance dredging and debris removal]."
5. A portion of the dredging work covered by Item No. 4001 is "optional," i.e., the necessity for this portion of the dredging work will be determined by the bidder and will depend upon the bidder's choice of how to get its equipment to the work area. This "optional" aspect of the bid item is provided in Category 400 of the Special Provisions, in two places. At page 788, the Special Provisions state:

Dredging at the access channel and staging/ berthing area, as shown on the Plans, is at the Contractor's option based on the Contractor's requirements for access to the staging area.

At page 793, the Special Provisions inform that:

The dredging of the access channel, staging/ berthing area, the area adjacent to Rosalie Island, the Jones Point Park bulkhead area and the construction channel adjacent to the proposed bridge (previously dredged under an earlier contract), is for the convenience of the Contractor.

Thus, the need by the contractor to dredge in the areas described in these parts of the Special Provisions will be dictated by the contractor's means and methods for access to these areas. For instance, a contractor may not need to dredge at these locations if it uses barge equipment that is not impeded by the existing river bottom.

6. TKC understood and its bid took advantage of the optional nature of the dredging work. TKC explained the reasons for its penny bid to SHA before the Procurement Officer decided the first protest. TKC stated that it had examined the plans and specifications and concluded that it would not have to dredge either the access channel or the staging/berthing area but would have to perform bulkhead dredging. Because only a single estimated quantity of 44,700 cubic yards had been given for Item 4001 and TKC wanted to distinguish between those quantities of dredging which it would have to perform and those which it would not, during the pre-bid process, TKC submitted the following question, which was answered by SHA for all potential bidders as Question 144.

Question 144: Can you provide a breakdown of the [State's] quan-

tity for dredging of the optional access channel, optional staging area, and the required bulkhead area?

Response: The breakdown of dredging quantity is as follows:

- Access Channel 22,400 CY
- Staging Area 17,400 CY
- Bulkhead Area 4,900 CY

These quantities include the one-foot over dredge allowance.

In its written response to the first protest, TKC represented the rationale for its penny bid as follows:

TKC reasonably interpreted the bid documents to mean that of the 44,700 CY estimated quantity listed in the bid form, only 4,900 CY were required for contract performance. According to TKC's intended means and methods for performance of the work, it does not intend to perform the optional dredging. TKC evaluated Line Item 4001 and decided to submit a price \$0.01 per CY for substantially optional work "at its convenience" that it did not intend to perform, accepting a nominal fee for the small amount of associated required work.

7. TKC also asserted that the anticipated cost of the required portion of dredging under Item 4001 would be a "de minimis increase" to the cost of the large amount of dredging incidental to work under other bid items. *Id.* As to the required bulkhead dredging, TKC's estimated cost was approximately \$52.00 per cubic yard for a total of approximately \$255,000 ($\$52.00 \times 4,900 = \$254,800$). It placed this amount rounded to \$250,000 in the Lump Sum Bid Item for Mobilization, Bid Item 1007.
8. Item 1007 is a Lump Sum Bid Item for Mobilization. It is not a Unit Price Item, such as Item 4001 - Dredging. TKC's bid for the lump sum mobilization item is \$19,500,000.00; Appellant's bid for the item was \$29,124,463.00, a difference of over \$9,600,000.00.
9. After this appeal was filed with the Board, SHA filed a Motion to Dismiss, or In the Alternative, Motion For Summary Disposition (Motion) alleging that (1) Appellant failed to file its protest with SHA within seven days of when it knew or should have know of the basis for its protest; (2) the appeal is barred by res judicata and (3) the redacted letter of June 15, 2001 to SHA's Procurement Officer did not constitute a valid protest under COMAR. After receiving argument of counsel on the Motion (and Appellant's written response thereto) the Board denied the Motion for the reasons stated at the hearing of the appeal on November 27, 2001.

Decision

As stated in the Agency Report for MSBCA 2224, an unbalanced bid offers “*unreasonably low* prices on some items, and compensat[es] for them by “*unreasonably high* prices on other items.” P. Schnitzer, *Government Contract Bidding* at 11-19 - 11-20 (3d ed. 1992) (emphasis in original). Recognizing that what constitutes an unbalanced bid is not defined in the General Procurement Law or COMAR, we will accept such a definition for purposes of this decision. As well we accept Appellant’s assertion that placing money for work that belongs in a line item for dredging in a lump sum item for mobilization or any other line item or lump sum item where it does not belong may result in or constitute an unbalanced bid.

Appellant was bidding in Maryland for the first time on the subject Contract. What Appellant complains of is that it believed that the language of GP 2.17(b)(3)(b) which provides that a determination of nonresponsibility may be made where the unit prices contained in a bid are unbalanced precluded it from submitting a bid that was unbalanced. If it submitted a bid that was unbalanced and was determined to be non-responsible for doing so by Maryland Officials, Appellant feared debarment based on such Maryland determination in the geographic area of New Jersey and New York which would prohibit it from bidding on public projects for up to seven years following such a finding. Appellant alleges that it would have submitted a bid that was lower than TKC’s bid by unbalancing bid items had it not believed such a practice was condemned by GP 2.17 and the potential adverse consequences thereof for bidding public work in the New York and New Jersey area where it performs most of its work.

There is no prohibition in the General Procurement Law against accepting an unbalanced bid and, as noted, what constitutes an unbalanced bid is not defined. For this reason, an unbalanced bid should be rejected only if its acceptance would violate the requirement for award to the responsible bidder submitting the lowest responsive bid which meets the requirements and evaluation criteria set forth in the invitation for bid. Section 13-103(e) State Finance and Procurement Article; COMAR 21.05.02.13A. A distinction may be made between (1) a bid that only is “mathematically” unbalanced, *i.e.*, the bid, although unbalanced, will result in the lowest price to the governmental body, and (2) a bid that is “materially” unbalanced, *i.e.*, there is substantial doubt that the unbalanced bid represents the lowest price.

Appellant alleges that TKC is not a responsible bidder and that SHA is required to determine that TKC is not responsible because TKC submitted a penny unit price for Bid Item 4001 and also placed the actual cost for performing the required dredging work (approximately \$250,000) in Item 1007 a lump sum item for mobilization. We assume for purposes of this decision that TKC will be paid \$250,000 for bulkhead dredging when it is paid for mobilization, a lump sum item for which it bid \$19,500,000 to include the \$250,000 for the cost of the approximate quantity of 4,900 cubic yards of bulkhead dredging. For purposes of this decision we assume Appellant will also be paid one penny per cubic yard under the dredging unit price line item (Bid Item 4001) for each cubic yard it actually dredges. Appellant argues that such a bidding strategy or conduct makes TKC not a responsible bidder and bases its argument on Contract General Provision GP 2.17(b)(3)(b).

Appellant's argument, however, cannot stand in the face of the actual language of Contract General Provision GP 2.17(b)(3)(b), on which Appellant purports to rely. That Contract General Provision provides, in pertinent part, that "[a] determination of non-responsibility may be made [if] ...the unit prices are unbalanced." (Emphasis added.) Thus under the Contract General Provision, unbalanced unit prices may or may not be a reason for a non-responsibility determination. Since the word may denotes discretion the decision regarding responsibility as further discussed below resides in the sound discretion of SHA, acting through its Procurement Officer and in the event of a protest such responsibility determination must be approved by the agency head or designee. We have also observed that Item 1007 is a lump sum item, and not a "unit price" item and GP 2.17(b)(3)(b) refers to the unit price items. Thus GP 2.17 (b)(3)(b) by its terms may not apply. However, we shall proceed for the purposes of this decision from the assumption that GP 2.17(b)(3)(b) does apply to an unbalancing involving a lump sum item and a unit price item.

This Board previously has held that "the rejection of an unbalanced bid is tied to the agency's discretionary determination of responsibility." *James Julian, Inc.*, MSBCA 1514, 3 MSBCA ¶245 (1990) at p. 5. Moreover, in determining responsibility, "a State Procurement Officer has broad discretion and latitude and ...the Board will not disturb such a determination unless it is found to be unreasonable, arbitrary, an abuse of discretion or contrary to law or regulation." *id.*

In this case, the Board similarly shall affirm SHA's decision. Appellant has argued that TKC's penny bid for Bid Item 4001 and the movement of \$250,000 for performing the required dredging to Line Item 1007 mandates a determination that TKC is non-responsible. SHA has determined that TKC's responsibility is not adversely impacted by its penny bid for Bid Item 4001 or its bid on Bid Item 1007. This dispute involves a difference of opinion between Appellant and SHA. Under the law, it is SHA's Procurement Officer and agency head or designee who are authorized to resolve this disagreement and we find that the agency's determination is reasonable and dispositive of Appellant's appeal. TKC's bidding conduct in placing the dredging cost for the bulkhead dredging in the mobilization item is not such an affront to the concept of fairness in public bidding in Maryland for the Board to conclude that the agency's determination on the matter was arbitrary, capricious or unreasonable or that a violation of Maryland law is involved.

Appellant also argues or asserts that TKC's bid must be rejected because it is non responsive. This argument is predicated on an alleged failure to bid on the optional dredging. A "responsive bid" is 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. COMAR 21.01.02.01(78).

Appellant's non-responsiveness argument ignores the fact that TKC bid on all items in the Schedule of Prices, including Line Item 4001. A review of TKC's Schedule of Prices shows that TKC placed a numerical price per cubic yard for its unit price for Line Item 4001 (\$0.01), that the unit price was multiplied by the estimated quantity (44,700 cubic yards) to derive an extended price (\$447.00) and that the extended price is reflected in TKC's total bid price. Appellant's argument that TKC's bid did not contain a price for Line Item 4001 and should be rejected as non-responsive is thus rejected.

Appellant also argues or asserts as it did in the first Appeal, that TKC will receive a windfall at the expense of SHA because of its penny bid on Bid Item 4001. Appellant alleges that, at the end of the job, SHA will be entitled to a credit change order for the optional dredging work not performed under Bid Item 4001 (Dredging). However, The dredging item, Item 4001, is a unit price item. Thus TKC will be compensated for, and SHA will be charged for, only those unit quantities actually performed. Therefore, during the performance of the Contract, TKC will be compensated for, and SHA will be charged, a penny for each cubic yard dredged.

Appellant also argues that, during the close-out process, under GP 7.26 TKC would be required to certify that its costs for the credit change order are accurate and any such certification under these circumstances would be untrue. First, as stated above, TKC will only be paid under Bid Item 4001 for the work actually performed. SHA is not entitled to receive a credit change order for unperformed work. Second, a certification on cost information is not required under the Contract for quantities of work that are not performed. At the end of the project, TKC will have to certify the accuracy of final quantities. However, we entertain no opinion at this time in the context of a contract claim concerning whether TKC may be required to reduce its costs by \$250,000 relative to payment of the lump sum bid amount for mobilization now that the bid protest process has highlighted this issue. However, Appellant's bidding strategy in this regard does not require rejection of its bid.

Appellant's final "new grounds" for the protest is that SHA placed all the bidders at a competitive disadvantage by allowing TKC to submit its bid in violation of GP-2.17(B)(3)(b). Appellant asserts that if it had been able to ignore GP-2.17(B)(3)(b) it would have been the low bidder on the Contract. Appellant alleges that it would have submitted an unbalanced bid to become the low bidder but for its concern with a possible non-responsibility finding as a result of such tactics.

However, Appellant's post bid opening assertions on how Appellant would have bid this Contract differently is not relevant in determining the responsiveness of TKC's bid or the responsibility of TKC and the Board will not disturb SHA's findings that TKC's bid was responsive and that TKC was responsible.

Accordingly, the appeal is denied. Wherefore, it is Ordered this 7th day of December 2001 that the appeal is dismissed with prejudice.

Dated: December 7, 2001

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
Chairman

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 2238, appeal of Pile Foundation Construction Co., Inc. under SHA Contract No. PG 3415173R.

Dated: December 7, 2001

Mary F. Priscilla
Recorder