

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of PORTER)
CONSTRUCTION MANAGEMENT, INC.)
) Docket No. MSBCA 1994
Under MAA Contract No. MAA-CO-)
96-022)

January 22, 1997

Responsiveness - Ambiguous Bid - An ambiguous bid must be rejected as nonresponsive.

APPEARANCE FOR APPELLANT: Ronald G. Kane, Esq.
Schuman, Kane, Felts &
Everngam, Chartered
Bethesda, Maryland

APPEARANCE FOR RESPONDENT: Louisa H. Goldstein
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Louis J. Kozlakowski, Jr., Esq.
Blum, Yumkas, Mailman, Gutman
and Denick, P.A.
Baltimore, Maryland

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that its bid should not have been found to be nonresponsive.

Findings of Fact

1. On August 29, 1996, Maryland Aviation Administration (MAA) opened sealed bids for Contract No. MAA-CO-96-022 (MAA Office Renovations) at the MAA Office of Planning and Engineering, Lower Level Pier A, BWI Terminal Building.
2. Appellant submitted the apparent low bid.
3. Upon subsequent review of Appellant's bid documents, the MAA noted two discrepancies.
4. On page BF.22 of the bid documents (Bid Tabulation Form #1), Item 5 is required to be the total of Items 1 through 4. Items 1 through 3 are specific allowances with designated dollar amounts totaling \$43,000. Item 4 is the bid item to be filled in by the bidder indicating its price for renovation work in the Office of Marketing. Item 5 is the sum of Item 1 through 4 and therefore Item 5 should be greater than Item 4. In Appellant's bid, Items 4 and 5 are each \$209,000. It is not possible to determine from the bid document whether Appellant's

intended total bid is \$209,000 or \$252,000, which is the total of \$209,000 plus pre-priced Items 1, 2 and 3. See Appellant's Bid Tabulation Form #1 attached.

5. On page BF.23 of the bid documents (Bid Tabulation Form #2), Item 9 is required to be the total of Items 6, 7 and 8. The total of Items 6, 7 and 8 as bid by Appellant is \$89,600. For Item 9, Appellant inserted \$89,600, which is shown in numbers, and \$84,600, which is shown in words. See Appellant's Bid Tabulation Form #2 attached.
6. On September 5, 1996, MAA sent to Appellant via facsimile a letter requesting clarification of the noted discrepancies. A letter was received via facsimile from Appellant on September 9, 1996 acknowledging receipt of MAA's September 5, 1996 letter, and responding that its intended bid for BF.22 Item 5 was \$209,000 and for BF.23 Item 9 was \$84,600.
7. By letter dated October 29, 1996, MAA rejected Appellant's bid as nonresponsive because of the above noted discrepancies.
8. On October 31, 1996, MAA issued a Notice of Recommended Award to John E. Day Associates, Inc., whose total bid was \$338,136, as the lowest responsive and responsible bidder. Appellant's total bid as listed in figures and words was \$307,100, which is the total of \$209,000, \$84,600 and an undisputed amount of \$13,500 as set forth in Appellant's Bid Tabulation Form #3.¹
9. On November 1, 1996, MAA received an undated letter labeled "PROTEST" from Appellant regarding MAA's rejection of its bid. The Basis of the Protest was to state that Appellant's bid was responsive. The protest noted the following objections:

Your interpretation of bid document BF.22. . . appear to be discretionary at best. Line Item #4 description does not specifically define what is requested. The term 'Base Bid' would be broad and general and was clarified on our response of September 9, 1996.

With regard to the second discrepancy between the written number and written words noted by MAA on Bid Document BF.23, Appellant states:

. . . this was also clarified in our letter of September 9, 1996. The written number is in fact a four (4) and not a nine (9) as further stated in the enclosed affidavit.

Further, Appellant stated:

You fail to acknowledge or even mention the fact that this was a lump sum solicitation as evidenced by Bid Form #25 and BF.26 [Grand Total of Base Bid and Bid Alternate]. . . of which there are both no errors nor inconsistencies when compared to the totals submitted with the area breakdowns provided on Forms BF.22 [Bid Tabulation Form #1] and BF.25. These documents are merely a matter of form and not the substance of the project or solicitation.

Appellant's protest also referred to "Standard Provisions for Construction Contracts, Volume One, December 1993, Section GP-2.14, Mistakes in Bids," (Tab 1) and asserts Appellant:

¹ Bid Tabulation Form #'s 1 and 2 constituted the Base Bid and Bid Tabulation Form #3 Constituted the Bid Alternate. Appellant's Bid Tabulation Form #3 is attached as are Appellant's Bid Tabulation Forms for the Base Bid and Base Bid plus Bid Alternate.

never alleged a 'mistake'. MAA inquired as to what they felt was a possible irregularity in which we clarified and replied no variation in cost submitted, therefore, we object. No mistake was made.

Finally, Appellant's argues in its protest that if MAA:

could then reasonably infer a minor irregularity occurred, I would then direct your attention to GP-2.15, Paragraph A, . . . a lower responsible bidder is always in the state's and taxpayers best interest. Paragraph B is assumably the process we should now endeavor. Paragraph C appears to absolutely be appropriate.

10. By final decision dated November 27, 1996, the MAA denied the Appellant's protest and Appellant appealed.

Decision

Appellant's intended bids for the Base Bid items, Bid Tabulation Forms #1 and 2, are not clearly evident on the face of the bid forms. In each of the two cases, there is an ambiguity in the bid because the bid is subject to two different, reasonable interpretations. As to page BF.22 (Bid Tabulation Form #1), the first interpretation is that Item No. 4 should have been \$166,000 and Item No. 5 is \$209,000. The second interpretation is that Item No. 4 is \$209,000 and Item No. 5 is \$252,000. The ambiguity results because the same amount of \$209,000 is shown for Items Nos. 4 and 5 and there is no indication apparent on the face of the bid document as to how to correct the bid. Both interpretations are reasonable.

As to the second discrepancy on page BF.23, Appellant's bid shows a total, written in numbers of \$89,600, and a total written in words of \$84,600. The arithmetic total of the component items, as bid by Appellant is \$89,600. As with the first discrepancy, it cannot be determined from the face of the bid document which total is correct, although applying the order of precedence clause as set forth in General Provision 2.19 C.3 could lead to adopting \$84,600 because it is written in words.²

COMAR 21.05.02.13 provides in relevant part that the contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the most favorable bid price or evaluated bid price. This Board has held that a bid must be determined responsive from the face of the bid document and not from information subsequently obtained through the verification process or other extrinsic evidence. See Inner Harbor Paper Supply Company, MSBCA 1064, 1 MICPEL ¶24 at p.4 (1982); Excelsior Truck Leasing Company, Inc., MSBCA 1102, 1 MICPEL ¶50(1983); Long Fence Company, Inc., MSBCA 1259, 2 MICPEL ¶123(1986). The Board has further held that an ambiguous bid must be rejected as nonresponsive. See Free State Reporting, Inc., MSBCA

² We note that Appellant would remain the low bidder regardless of whether \$84,600 or \$89,600 was intended if such were the only discrepancy and the other \$43,000 discrepancy did not exist. See Melka Marine, Inc., MSBCA 1499, 3 MICPEL ¶247(1990). We also caution that the order of precedence clause must be applied in a manner, which does not lead to an improbable result. See Denison Landscaping, Inc., MSBCA 1538, 3 MICPEL ¶258(1990).

1180, 1 MICPEL ¶75(1984); Computer Services of America, MSBCA 1465, 3 MICPEL ¶221(1989).

Because the intended corrections are not clearly evident on the face of the Appellant's bid, the bid thus must be rejected as nonresponsive unless the ambiguities presented by the bid may properly be viewed as minor irregularities under General Provision 2.15. In accordance with General Provision 2.15 Minor Irregularities/Informalities, and COMAR 21.06.02.04, a minor irregularity is defined as:

. . . 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 or 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 \$43,000 discrepancy in Appellant's base bid at BF.22, i.e. \$252,000 versus \$209,000, as referenced above, cannot be considered as a minor irregularity since the correction would not be inconsequential because it would be prejudicial to other bidders since Appellant is not the low bidder if the \$252,000 price is used rather than the \$209,000 price. The amount of this discrepancy is also significant as to the price, representing over 15% of the Appellant's total bid no matter how the total bid is calculated. The order of precedence clause as set forth in GP-2.19C.2 which provides that the sum of the extended prices will govern in the event of a discrepancy between the total lump sum bid and the extended prices does not resolve the question of the \$43,000 discrepancy presented by Appellant's bid.

Appellant, nevertheless, asserts that it intended to bid the lower amounts and that extrinsic evidence should be considered to prove what the intended bid was. To preserve fairness in the competitive bidding system, the Board has followed the rule that a bidder not be allowed "two bites of the apple." This rule precludes considering extrinsic evidence of what was intended where the intended bid cannot be discerned from the four corners of the bid itself. The reason for the rule is to prevent a bidder after its competitors bids are exposed at bid opening from affirming a higher or lower bid price after it has had an opportunity based on review of the other bids to determine if it wants to perform the contract at the lower bid price or allow award to be made to its competitor by affirming a higher bid price. See Techlawn International, Inc., MSBCA 1848, 4 MICPEL ¶374(1995) at p. 7. The rule is one of general application by the Board, and by referring to it we do not suggest that Appellant did not intend to bid the lower amounts. We simply make no finding as to Appellant's subjective intent. However, the Appellant's bid was ambiguous on its face and was thus properly rejected.

Finally, we reject Appellant's argument that the State should only consider its grand total bid (base bid and bid alternate) since award was to be made to the "lowest total price bid." Appellant's argument is based on the assertion that the bid is a single lump sum bid. The total bid is not a single lump sum bid, but consists of several (five) different components which must

be added up to determine the "lowest total price bid." Consideration of the components of Appellant's bid reflects ambiguity in Appellant's intended bid price under one reasonable interpretation of which Appellant is not the low bidder.

For the foregoing reasons, the appeal is denied.

Wherefore, it is Ordered this 22nd day of January, 1997 that the appeal is denied.

Dated: January 22, 1997

Robert B. Harrison III
Chairman

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 1994, appeal of Porter Construction Management, Inc. under MAA Contract No. MAA-CO-96-022.

Dated:

Mary F. Priscilla
Recorder

BID TABULATION FORM #1
MAA Office Renovations
OFFICE OF MARKETING

ITEM NUMBER	DESCRIPTION	UNIT	APPROXIMATE QUANTITY	UNIT PRICE	TOTAL PRICE
1	ALLOWANCE: MOVING EXISTING FURNISHINGS	EA	1	\$5,000.00	\$5,000.00
2	ALLOWANCE: NEW FURNITURE	EA	1	\$35,000.00	\$35,000.00
3	ALLOWANCE: MISCELLANEOUS WORK	EA	1	\$3,000.00	\$3,000.00
4	BASE BID PRICE AT DIVISION OF MARKETING, EXCLUDING BID ALTERNATE NO. 1				\$209,000
5	TOTAL AT DIVISION OF MARKETING INCLUDING LINE ITEMS #1, #2, AND #3 @ Two hundred twenty thousand _____ DOLLARS _____ CENTS				\$209,000

MAA-C0-96-022
 MAA Office Renovations
 Addendum No.2, August 22, 1996

Technical Provisions
 Bid Forms
 Section 6 Bid Tabulation Forms

BF.22

BID TABULATION FORM #2
MAA Office Renovations
OFFICE OF ENGINEERING AND NOISE

ITEM NUMBER	DESCRIPTION	UNIT	APPROXIMATE QUANTITY	UNIT PRICE	TOTAL PRICE
6	ALLOWANCE: MOVING EXISTING FURNISHINGS	EA	1	\$5,000.00	\$5,000.00
7	BASE BID PRICE AT DIVISION OF ENGINEERING, INCLUDING STOREFRONT DOOR ADDITION	EA	1		\$89,000
8	BASE BID PRICE AT DIVISION OF NOISE				\$000.00
9	TOTAL AT DIVISION OF ENGINEERING AND NOISE INCLUDING LINE ITEM #6 @ <u>Eighty Four Thousand Six Hundred</u> DOLLARS <u></u> CENTS				\$89,600

MAA-CO-86-022
 MAA Office Renovations
 Addendum No.2, August 22, 1996

Technical Provisions
 Bid Forms
 Section 6 Bid Tabulation Forms

BF.23

BID TABULATION FORM #3
MAA Office Renovations
BID ALTERNATE

ITEM NUMBER	DESCRIPTION	UNIT	APPROXIMATE QUANTITY	UNIT PRICE	TOTAL PRICE
10	BID ALTERNATE NO. 1: DEDUCT HALF HEIGHT "DRY-WALL" PARTITIONS	EA	1		\$ <u>1500.00</u>
11	BID ALTERNATE NO. 1: ADD SYSTEM FURNITURE PARTITION - Steelcase series 9,000, with aventer fabric. Panel height 61". This system to be used in lieu of partition type 'C' (A 5'-6" high partition wall located in the Division of Marketing)	EA	1		\$ <u>15,000</u>
12	TOTAL BID ALTERNATE NO. 1 @ <u>Thirteen Thousand Five Hundred</u> DOLLARS <u></u> CENTS				\$ <u>13,500</u>

MAA-CO-98-022
 MAA Office Renovations
 Addendum No.2, August 22, 1996

Technical Provisions
 Bid Forms
 Section 6 Bid Tabulation Forms

BF.24

CONTRACT NUMBER MAA-C0-96-022

MAA OFFICE RENOVATIONS

AT

BALTIMORE/WASHINGTON INTERNATIONAL AIRPORT

BID TABULATION FORM

TOTAL BASE BID (ITEM 5 + ITEM 9)

FOR

MAA OFFICE RENOVATIONS

AT

BALTIMORE/WASHINGTON INTERNATIONAL AIRPORT

293,600

Written in Numerals

Two hundred ninety three thousand six hundred Dollars

Written in Words

CONTRACTOR

Porter Construction Management

MAA-C0-96-022
MAA Office Renovations
Addendum No.2, August 22, 1996

Technical Provisions
Bid Forms
Section 6 Bid Tabulation Forms

BF.25

CONTRACT NUMBER MAA-CO-96-022

MAA OFFICE RENOVATIONS

AT

BALTIMORE/WASHINGTON INTERNATIONAL AIRPORT

BID TABULATION FORM

GRAND TOTAL OF BASE BID + ALTERNATE NUMBER 1 (ITEM 5+9+12)

FOR

MAA OFFICE RENOVATIONS

AT

BALTIMORE/WASHINGTON INTERNATIONAL AIRPORT

307,100

Written in Numerals

Three hundred Seven Thousand one hundred Dollars

Written in Words

CONTRACTOR

Porter Construction Management

MAA-CO-96-022
MAA Office Renovations
Addendum No.2, August 22, 1996

Technical Provisions
Bid Forms
Section 6 Bid Tabulation Forms

BF.26

