

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of R.R. DONNELLEY & SONS)
COMPANY)
Under DGS RFQ #Q11667)

Docket No. MSBCA 1463

August 11, 1989

Contract Award - Late Bid - Burden of Proof - The evidence of record failed to support the assertion of Respondent that the lateness of a bid received after bid opening should be excused pursuant to the exception set forth in COMAR 21.05.02.10B permitting consideration of a late bid where the bid would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees. The Respondent and Interested Party (whose late bid upon opening was discovered to be lower than the lowest timely bid received) asserted that the bid documents prepared by State personnel contained an ambiguity concerning the proper address for receipt of bids which caused the Interested Party's bid to be late. While agreeing that the exception set forth in COMAR 21.05.02.10B would encompass action of State personnel as reflected in their preparation of bid documents, the Board opined there was no ambiguity in the bid documents concerning the proper address for receipt of bids. The Board went on to hold that assuming arguendo that the bid documents contained an ambiguity was patent concerning the proper address for receipt of bids, such ambiguity was patent thereby requiring an attempt at pre-bid clarification where none had occurred. The Board therefore sustained the appeal of the bidder whose bid was the low bid of those timely filed.

APPEARANCE FOR APPELLANT:

William Alden McDaniel, Jr., Esq.
Murphy & McDaniel
Baltimore, MD

APPEARANCE FOR INTERESTED
PARTY:
Fry Communications, Inc.

Robert Swift, Esq.
Kohn, Savett, Klein &
Graf, P.C.
Philadelphia, PA

APPEARANCES FOR RESPONDENT:

Allan B. Blumberg,
Michael P. Kenney
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that a competitor's bid should not have been considered.

Findings of Fact

1. The Department of General Services (DGS) issued RFQ #Q11667 for the printing of Maryland State income tax packets and forms on June 7, 1989.
2. Bids were due to be opened and were opened at 2:00 p.m., Tuesday, July 11, 1989.
3. Each bidder was sent pre-printed standard form DGS bid sheets for commodity purchases¹ upon which to type in its bid (price) information. Every page of the standard bid sheet has printed in bold-face type under the block

¹ These forms in this present format have been in use since the summer of 1988.

provided for insertion of the DGS buyer (in this case a Mr. Larmore) the following address:

State of Maryland
Purchasing Bureau
301 W. Preston Street
Baltimore, Maryland 21201

This address as stated in the Instructions to Bidders was the proper address for receipt of bids. See Finding of Fact No. 6. The same printed address (apparently with additional Zip Code information) also appears at the top of each bid sheet.

Every page of the bid sheets also had typed on it after the block indicating the "Ship To" ² address the following:

Comptroller of the Treasury
Income Tax Division
301 W. Preston St., Room 903
Baltimore, MD 21201

The precise placement of the aforesaid language on each bid sheet is shown in the copy of the first page of the Appellant's bid sheets attached as Exhibit A.

4. Printed at the bottom of each bid sheet in capital letters appears the instruction to:

RETURN EACH QUOTATION INDIVIDUALLY
IN SPECIAL ENVELOPE ENCLOSED

Folding of the bid sheet in a particular manner would have placed the Purchasing Bureau address in a window in the special envelope, although there were no folding instructions, the special envelope was not preaddressed, and the envelope was a die cut window envelope without window covering and not well suited to contain the bulky bid sheets.

²The "Ship To" address is the address of the using agency where the finished goods (commodity) are to be normally shipped. However, the specifications in the instant procurement directed delivery of the finished products to two different locations under the delivery schedule. This fact is not material to our decision.

6. The Instructions to Bidders accompanying the bid sheets provided at paragraph 11 as follows:

Bids may be mailed or hand delivered.
All bids must be received by the Purchasing Bureau by the time set forth in the request for quotations. (emphasis supplied).

7. Twelve (12) responses (4 bids and 8 no bids) were timely received. Six of the no bids received were sent through the U.S. mail addressed to the Purchasing Bureau; the remaining timely responses were hand delivered.

8. The bid of Fry Communications, Inc. (Fry), the interested party, was received late. The Fry bid was hand delivered by a private delivery service, Federal Express, to the Comptroller of the Treasury, Income Tax Division, Room 903, 301 W. Preston Street. The Comptroller of the Treasury is a separate State agency from DGS with offices in Annapolis as well as at 301 W. Preston St. in Baltimore. The Federal Express envelope (airbill) containing the Fry bid shows an address for the recipient as follows:

"Purchasing Bureau
Comp. Treas.
Income Tax Division
State of Maryland
Rm 903
301 W. Preston St.
Baltimore, MD 21201"

9. The Fry bid was signed for in Room 903, 301 W. Preston St. at 10:03 a.m. on July 11, 1989 by an employee of the Comptroller of the Treasury. The Fry bid was delivered to DGS the next day, July 12, 1989, the day after the bid opening.

10. On July 18, 1989, DGS determined to accept the Fry bid (which upon opening was found to be lower than Appellant's) pursuant to COMAR 21.05.02.10B which provides in relevant part that a late bid may be considered where the bid "would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees." DGS

also determined at this time to award the contract for the printing services called for in the RFQ to Fry. Appellant was advised of these determinations by the procurement officer on July 26, 1989.

11. On August 1, 1989, Appellant protested the decision to open and consider the Fry bid and award a contract to Fry. On August 2, 1989, the procurement officer issued his decision denying the protest. Also on August 2, 1989, counsel for Appellant and DGS contacted the Board's Chairman and requested expedited consideration of Appellant's appeal by the Board. With the consent of the parties, the appeal was heard on Tuesday, August 8, 1989. No contract has been awarded pending this Board's consideration of the appeal.

Decision

The Fry bid was late and should not have been opened and considered unless the lateness was excused by virtue of the exception set forth in COMAR 21.05.02.10 for consideration of late bids. COMAR 21.05.02.10 provides in this regard as follows:

.10 Late Bids, Late Withdrawals, and Late Modifications.

A. Policy. Any bid received at the place designated in the solicitation after the time and date set for receipt of bids is late. Any request for withdrawal or request for modification received at the place designated in the solicitation after the time and date set for receipt of bids is late.

B. Treatment. A late bid, late request for modification, or late request for withdrawal may not be considered. Upon the written approval of the Office of the Attorney General, exceptions may be made when a late bid, withdrawal, or modification is received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees....

DGS argues that Fry misdirected its bid based on ambiguity in the bid documents concerning the proper address for receipt of bids and that since DGS employees prepared the bid documents the exception set forth above for receipt of late bids applies.

We agree that COMAR 21.05.02.10B in dealing with the exception for late bids would encompass action or inaction by appropriate State personnel as reflected in their preparation of the bid documents. See 48 Comp. Gen. 765 (1969). However, a proper address for receipt of bids did appear on the bid sheets. This address, i.e. the address appearing under the block for the DGS buyer ("Larmore"), was:

State of Maryland
Purchasing Bureau
301 W. Preston Street
Baltimore, Maryland 21201

DGS, does not disagree that this address for the Purchasing Bureau is a proper address for receipt of bids. It asserts, however, that the inclusion of the "Ship To" address for the Comptroller of the Treasury created an ambiguity concerning where the bids were to be received - the Purchasing Bureau for which no room number was provided or the Comptroller of the Treasury for which a room number was provided. However, DGS bears the burden to show that an ambiguity in fact exists, i.e., that bidders reasonably would have been confused as to the proper address. The evidence, however, fails to demonstrate that bidders would (or might) have been confused and thus DGS has not met its burden.

We find from the record that the inclusion of the "Ship To" address did not create an ambiguity and that a reasonable bidder should have determined from the bid sheet itself (and certainly from the clear direction in paragraph 11 of the Instructions to Bidders) that the address for receipt of bids was the Purchasing Bureau address and not the Comptroller of the Treasury address. This Board has stated that the exception to COMAR 21.05.02.10(B) applies only when "improper State action is the sole or paramount cause of the late receipt." American Air Filter Co., MSBCA 1199, 1 MSBCA ¶89 (1984); Patco Distributors, Inc., MSBCA 1270, 2 MSBCA ¶128 (1986). In the instant appeal

the facts reveal that the cause of the late receipt of the Fry bid was Fry's unreasonable disregard of clear directions in the RFQ to deliver the bid to the Purchasing Bureau and Fry's incorrect direction to Federal Express to deliver the Fry bid to the Purchasing Bureau in care of the Comptroller of the Treasury, the using agency, at the "Ship To" address indicated on the bid sheets. Thus, the primary cause of Appellant's bid being late was Fry's actions in giving directions to its agent for hand delivery and not the action or inaction of State personnel directing the procurement activity or their employees.

Even if we assume, arguendo, that the inclusion of the "Ship To" address along with the address of the Purchasing Bureau on the bid sheets created an ambiguity³ concerning where bids were to be received, such ambiguity is patent. In other contexts involving patent ambiguity in bid documents we have consistently required bidders to seek pre bid clarification or be held to the consequences of their interpretation. See Cherry Hill Construction, Inc., MSBCA 1313, 2 MSBCA ¶172 (1988) and cases cited therein at p.6.

While we have not previously decided an appeal where the alleged ambiguity involves the proper address for receipt of bids, we believe the same rationale should apply. At a minimum, where a bidder alleges confusion in the context of its subjective understanding of the proper address for the receipt of bids, we believe that such bidder should be required to have at least made a reasonable attempt to inquire about the proper address prior to bid opening.

³While offering no evidence in the appeal that it was in fact misled, Fry as an interested party has adopted in its legal memorandum filed with the Board the asserted position of DGS that the bid documents were ambiguous as to the proper address for receipt of bids and thus Fry must have been confused.

See G.M. Coen & Associates, Inc., Comp. Gen. Dec. B-225554, February 12, 1987, 87-1 CPD ¶156.⁴ No actual inquiry or even attempt at pre bid clarification was made here.

For all the foregoing reasons the appeal is sustained.

⁴The parties have looked to the decisions of the Comptroller General and the Federal Acquisition Regulation dealing with late receipt of bids. We should note that certain of the decisions of the Comptroller General dealing with late bids that are cited involve late delivery of hand delivered bids where reliance on the mailing address may not ensure timely hand delivery. E.g. Rodale Electronics Corp., Comp. Gen. Dec. B-221727, April 7, 1986, 86-1 CPD ¶342. We should also note that the specific exception in the Federal Acquisition Regulation (FAR) 52.214-7 for late receipt of bids sent by regular mail applies where the late receipt is due solely to mishandling by the Government after receipt at the Government installation. Neither of these circumstances applies here.

STATE OF MARYLAND
PURCHASING BUREAU
301 W. PRESTON ST.
BALTIMORE, MD 21201-2388

RETURN BY
2:00 P.M. ON

DATE BID DUE	VENDOR ID
07/11/89	08346

UNIT	BUTER	NO.	PHONE
025	LARHORE	011667	(301)-225-4426

DELIVERY DUE 10/23/89

STATE OF MARYLAND
PURCHASING BUREAU
301 W. PRESTON STREET
BALTIMORE, MARYLAND 21201

07/11/89

STATE FIRM DELIVERY AFTER RECEIPT OF ORDER 14 WEEKS
UNLESS SPECIFIED BELOW. THIS IS TO BE YOUR BEST DELIVERY
A.R.O. F.O.B. DESTINATION
FAILURE TO PROVIDE THIS INFORMATION MAY RESULT IN
DISQUALIFICATION OF QUOTATION.

RECEIVED
JUL 28 1989
M & M

R R DONNELLEY & SONS CO
5203 LEESBURG PIKE
SUITE 509
FALLS CHURCH VA 22041
Employer ID 136-1004130

SHIP TO
COMPTROLLER OF THE TREASURY
INCOME TAX DIVISION
301 W PRESTON ST, ROOM 903
BALTIMORE MD 21201

UA NO.: 240190001

QTY	PART NUMBER	QUANTITY	UOP	NET UNIT PRICE
		SMALL BUSINESS PREFERENCE	5%	
01	96650-570212 PRINTING BOOKLET 8 1/4 X 11 TWO COLOR SADDLE	3200.0	MX	\$164.38/MX
	1989 MARYLAND INCOME TAX PACKETS CONSISTING OF 22 SHEETS, 44 FOLIO PAGES OF COPY, MARYLAND INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS WITH RETURN ENVELOPE, 28 COVER, RETURN AND SCHEDULE PAGES, 16 INSTRUCTION PAGES, TRIM SIZE 8 1/4" X 11" ENVELOPE TO BE PLACED IN PACKET IN A MANNER WHICH ALLOWS THEM TO BE EASILY REMOVED BY THE USER AND YET WILL NOT BE DETACHED THROUGH NORMAL HANDLING PROCESSES. SEE ATTACHED SPECIFICATIONS. VENDOR TO FURNISH ENVELOPES AND PIGGYBACK LABELS AND INCLUDE IN BID. IN ACCORDANCE WITH THE ATTACHED SPECIFICATIONS AND INFORMATION.			
02	96612-050203 FLAT FORM 8 1/4 X 11 ONE COLOR	1150.0	MX	\$8.25/MX
	FORM 502 INDIVIDUAL RETURN 1989. SINGLE SHEET 8 1/4" X 11", PRINTED TWO SIDES. SAME AS USED IN PACKET.			
03	96612-050203 FLAT FORM 8 1/4 X 11 ONE COLOR	500.0	MX	\$9.37/MX
	FORM 503, INDIVIDUAL RETURN 1989. SINGLE SHEET 8 1/4" X 11", PRINTED TWO SIDES. SAME AS USED IN PACKET.			

INSTRUCTIONS - QUOTATIONS MUST BE SUBMITTED ON THIS FORM UNLESS OTHERWISE INDICATED. EQUIVALENT ITEMS SHALL BE CONSIDERED BUT ONLY IF ACCOMPANIED BY SPECIFICATIONS AND/OR DESCRIPTIVE LITERATURE.

NOTE: IF YOU CANNOT DEL. RETURN THIS FORM STATING REASON

TELEPHONE NUMBER
703/931-3870

THIS QUOTATION IS SUBMITTED WITH THE UNDERSTANDING THAT VENDOR SHALL COMPLY WITH FEDERAL AND STATE OSHA REGULATIONS, THE STATE OF MD PROCUREMENT REGULATIONS IN EFFECT AT THE TIME OF SUBMISSION, AND THE INSTRUCTIONS ON THE REVERSE HEREOF.

PRICES QUOTED MUST BE VALID FOR 90 DAYS UNLESS OTHERWISE PROVIDED IN THE SPECIAL CONDITIONS

DATE
Sales Representative

DATE
7/10/89

RETURN EACH QUOTATION INDIVIDUALLY IN SPECIAL ENVELOPE, ENCLOSED

EXHIBIT
1