

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF SEAWAY)
COATINGS, INC.)
) Docket No. MSBCA 2205
Under Maryland Transportation)
Authority Contract No. HT 190-000-002)
)

November 21, 2000

Responsiveness - The failure of the low bidder to include the complete MTA proposal book with its bid did not make its bid non-responsive where the bid on its face represented an unqualified commitment to perform the requirements of the contract.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Gisele M. Mathews
Assistant Attorney General
Baltimore, Maryland

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals from a final agency decision which denied its bid protest regarding the Maryland Transportation Authority's (MdTA) solicitation for the rehabilitation of the Canton Ventilation Building and repairs to the walls of the Baltimore Harbor Tunnel.

Findings of Fact¹

1. In August 2000, MdTA issued an invitation for bids (IFB) to rehabilitate the Canton Ventilation Building and to make repairs to the walls of the Baltimore Harbor Tunnel.
2. The proposal book, also known as the bid book, was over 400 pages long. The first 384 pages included pre-bid information, notice regarding MBE/DBE goals, the special provisions, the standard special provision inserts, wage rates, the Contractor Affirmative Action Program, and the Minority Business Enterprise Program. These sections all provided information about the terms of the contract; however, the bidder was not required to include any information on these pages. Page 385 and subsequent pages included various forms that bidders were required to fill out, as appropriate. These included the proposal form, the

¹ There was no comment on the Agency Report and neither party requested a hearing. The Findings of Fact are reproduced substantially in the form appearing in the Agency Report.

- schedule of prices, contract time and bonding, the proposal (bid signature) sheet, the "Buy American Steel Act" form, the affirmative action requirements and utilization of MBE's, the bid/proposal affidavit, the form indicating the bidders election whether or not to use an escrow account, the proposal guaranty, the bid guarantee, and the bid bond.
3. A Pre-bid meeting was held on August 14, 2000 which, according to the attendance sheet, Appellant did not attend. The Procurement Officer made some opening remarks in which he stated that bids should consist of one completed proposal book. The minutes of the pre-bid meeting state that the bid "should consist of one completed proposal book."
 4. Bid opening occurred on September 21, 2000.
 5. The apparent low bid was from MJR Enterprises, Inc. (MJR). The next lowest bidder was Haris Design & Construction Co. (Haris) for a total of \$486,815.60. Appellant was the third low bidder with a total of \$648,000.00.
 6. Appellant filed a bid protest by letter dated September 22, 2000. The protest was against award to either MJR or Haris, the apparent low and second low bidders. The protest referred to the minutes of the pre-bid meeting, specifically item number 1, which Appellant argued "clearly states that the complete proposal book is to be submitted." The protest letter states that a representative of Appellant attended the bid opening on September 21, 2000 and that "[d]uring the opening both the apparent low and second bidders did not comply with the contract documents (pre-bid minutes, item no. 1.)", i.e. the entire proposal books of MJR and Haris were not submitted with their bids.
 7. The Procurement Officer issued a final decision, denying Appellant's bid protest by letter dated September 29, 2000. On October 10, 2000, Appellant appealed the denial of its protest to this Board.
 8. Subsequently, MJR submitted a letter to MdTA documenting errors in the calculation of the Schedule of Prices MJR submitted with the bid. The Procurement Officer granted MJR's request to withdraw their bid. Consequently, Haris became the low bidder and Appellant became the second low bidder.

Decision

Appellant's bid protest appears to be based on the argument that MJR and Haris were not responsive bidders because they did not submit the entire proposal book with their bids.

Because the MJR bid was withdrawn, we will focus only on the protest as it relates to the Haris bid. The Procurement Officer determined that Haris was a responsive bidder. Haris submitted addenda acknowledgments, completed schedule of prices, and signed and sealed contract affidavits and bonding requirements. The Procurement Officer concluded that the failure to submit the entire proposal book was a minor irregularity in accordance with GP-2.15(a) of the Maryland Department of Transportation's General Provisions for Construction Contracts (October, 1993). He determined that the alleged deficiency was not material to the bid results and denied Appellant's protest.

GP-2.15 defines 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 above contractual provision parallels language in COMAR 21.06.02.04, which provides further that technicalities or minor irregularities in bids may be waived if the procurement officer determines that it is in the best interest of the state to do so.

The Procurement Officer waived the failure to submit the entire proposal book.

The Procurement Officer did not find that this defect had any significance as to price, quantity, quality, or delivery, and Appellant has not provided any explanation in its bid protest or appeal as to how any such substantive issues would be effected or as to how they have been prejudiced.

Where the integrity of the competitive bidding process is not compromised, it is within the Procurement Officer's discretion to determine that an irregularity may be waived. See Civic Center Cleaning, MSBCA 1357, 2 MSBCA §169 (1988); Orfanos Contractors, MSBCA 1391, 2 MSBCA §188 (1988).

As an alternative to waiver, COMAR 21.06.02.04 and the General Provisions provide for correction of minor irregularities at the discretion of the Procurement Officer if such would be to the advantage of the State. In this case there would have been no advantage to the State to require the bidders to submit the copies of the pages of the bid book that had not been submitted earlier, when the Procurement Officer already had identical copies of those pages from the bid book.

More importantly, we also conclude that the Procurement Officer correctly determined that the Haris bid was responsive.

This appeal presents facts similar to those in Carl Belt, Inc., MSBCA 1743, 4 MSBCA §339 (1993). Therein this Board made the following observations concerning that Procurement Officer's determination that the failure of the apparent low bidder to include the complete proposal book did not make the bid non-responsive.

Although the Appellant's protest is divided into three separate issues, the appeal rises or falls on the single issue of whether the Tyree bid is responsive.

The record does not reveal any basis for the conclusion that a bid must include the entire proposal book in order for the bid to be responsive. State Finance and Procurement Article, §11-101(r) defines a responsive bid submitted under the competitive sealed bidding procedure [as one] that "conforms in all material respects to the invitation for bids." See also COMAR 21.01.02.01(78). A responsive

bid "must constitute a definite and unqualified offer to meet the material terms of the IFB." Long Fence Company, Inc., MSBCA 1259, 2 MSBCA §123 (1986) at p. 6. Tyree's bid included the proposal form, the schedule of prices including unit prices for all line items, the procurement affidavit, all addenda, required bid security, and the signature page signed by an authorized representative of the corporation. It is an unqualified commitment to perform the requirements of the Contract. On its face, the bid presents no basis for a determination of non-responsiveness.

In its protest, Appellant suggests that because Tyree did not submit a complete proposal book "there is no way to know which documents were actually submitted with the bid." Apparently, the protestor is suggesting that the absence of a collated Proposal Book evidences the possibility of a post-bid alteration of the bid. However, there is no basis to conclude from this record that the bid submitted by Tyree is any more or less susceptible to post-bid alteration than any other bid submitted under the competitive sealed bid process. The bids are opened publicly and are available for inspection. The record does not reflect that the Tyree bid was altered and there is no evidence to suggest that it may have been altered.

Based on the record herein, we conclude that the Haris bid was responsive notwithstanding the failure to include all of the proposal book. We also conclude that the failure to include the entire proposal book was properly waived as a minor irregularity.

Accordingly, the appeal is denied.

Wherefore, it is Ordered this 21st day of November 2000 that the appeal is denied.

Dated: November 21, 2000

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 2205, appeal of Seaway Coatings, Inc. under Maryland Transportation Authority Con-tract No. HT 190-000-002.

Dated: November 21, 2000

Mary F. Priscilla
Recorder

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