BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF SIMPLEX GRINNELL LP	)	
	)	Docket No. MSBCA 2344 & 2355
Under Maryland Transit Administration Solicitation for Contract No. T-0844-0140	)	

August 5, 2003

Responsibility - In reaching a conclusion regarding a bidder's responsibility, it is proper to consider information submitted by the bidder after bid opening.

APPEARANCE FOR APPELLANT:	George D. Bogris, Esq. Whitney & Bogris, LLP Towson, Maryland
APPEARANCE FOR RESPONDENT:	Douglas G. Carrey-Beaver Assistant Attorney General Baltimore, Maryland
APPEARANCE FOR INTERESTED PARTY: (Sun Technical Services, Inc.)	Andrew H. Vance, Esq. Hodes, Ulman, Pessin & Katz, P.A. Towson, Maryland

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its protests that Sun Technical Services, Inc. (Sun), the apparent low bidder for the above captioned Contract, (1) was not responsible because Sun was not a licensed sprinkler contractor and thus could not meet the Contract specification to perform 50 percent of the work on this sprinkler replacement contract with its own work force; and (2) the Maryland Transit Administration (MTA) improperly rescinded and issued a revised Procurement Officer's decision in which it continued to conclude that Sun was responsible.

Findings of Fact

1. On or about October 8, 2002, MTA issued a solicitation for bids for the installation of wet pipe sprinkler systems in Buildings 5, 6 and 7 at MTA's Washington Boulevard complex.
2. The work involves the installation of a sprinkler system consisting of piping, valves and electrical components that, together, would function as a fire suppression system.
3. On November 14, 2002, MTA received and opened three bids for this work. Sun, with a bid of $643,000, was the apparent low bidder and Appellant, with a bid of $707,980, was the second low bidder.

4. Shortly after bid opening, MTA received a protest from Appellant dated November 14, 2002.
5. In this protest, Appellant asserted that most of the work under the Contract was to be done by a licensed sprinkler contractor, that Sun was not a licensed sprinkler contractor, and that Sun is not a responsible bidder because Sun cannot meet the specification that requires that the chosen contractor perform 50 percent of the work with its own forces.
6. By letter dated November 20, 2002, the Procurement Officer requested that Appellant submit additional evidence to substantiate its protest, and in a letter dated November 26, 2002, Appellant provided documentation in response to MTA's request.
7. By letter dated November 26, 2002, the Procurement Officer asked Sun to provide documentation concerning how Sun intended to meet the 50 percent Contract goal.
8. In a letter dated December 4, 2002, Sun responded by submitting a breakdown of material that it would purchase and the labor that, at that time, Sun intended to provide with its own work force, as well as Sun's assurance that it would use a licensed sprinkler contractor (as a subcontractor) to install and test the sprinkler systems.
9. In a final agency action dated April 29, 2003, MTA denied Appellant's protest. In its April 29 decision, MTA concluded that a state licensed sprinkler contractor is required for the installation of the sprinkler system, that Sun does not hold such a license but that it intends to subcontract with a licensed sprinkler contractor to install the system, that Sun is capable of doing the electrical work under the direction of a licensed sprinkler contractor, and that Sun's work accounts for more than 50 percent of its bid price when one includes the cost of all material that Sun plans to purchase for the project but that Sun, not being a licensed sprinkler contractor, does not plan to install with its own work force.
10. On May 14, 2003, Appellant filed a timely notice of appeal from the April 29 decision with this Board. In its notice of appeal, Appellant maintained that Sun could not count the cost of materials purchased by it but installed by others (i.e. a licensed sprinkler subcontractor) toward the 50 percent goal.
11. Upon receipt of that notice of appeal, MTA sought further information from Sun regarding Sun's plan to perform the Contract if awarded. By letter dated June 11, 2003, Sun explained how it intends to satisfy the 50 percent goal based on a requirement that only materials purchased by Sun and installed by Sun's own forces could be counted toward meeting the goal.
12. By letter dated June 12, 2003, MTA rescinded its April 29 decision and issued a Procurement Officer's revised decision in which MTA found that Sun's revised plan as outlined in Sun's June 11, 2003 letter met the 50 percent goal based on a requirement that only materials purchased by Sun and installed by Sun's own forces could be counted toward meeting the goal.
13. On June 23, 2003, Appellant timely appealed this revised decision, arguing that its issuance was procedurally improper and that Sun had not, in fact, demonstrated that it met the 50 percent goal.
14. A hearing of both appeals which the Board consolidated was held on July 10, 2003.

Decision

These appeals concern the proper interpretation of several provisions in the Contract's General Provisions and Supplementary General Provisions. Contract Provision GP-8.01 (Subcontracting) states that:

> [e]xcept as may be provided elsewhere in the Contract, the Contractor to whom a Contract is awarded shall perform with his own organization and with the assistance of workmen under his immediate supervision, work of a value of not less than 50 percent of the total original value of the Contract.

Contract Provision SGP-8.02, which augments GP-8.01, states in part that:

> [t]he cost of work performed by skilled and unskilled labor carried on Contractor's own payroll, together with the cost of materials installed, may be included in the specified minimum percentage. If, during progress of the work, Contractor requests a reduction in such percentage, and the Procurement Officer determines that it would be to the Administration's advantage, the percentage of work required to be performed by Contractor may be reduced, provided written approval of such reduction is obtained by the Contractor from the Procurement Officer.

Contract Provision SGP-1.02 (Definitions under General Terms) indirectly augments GP-8.01 by providing a definition of install that means installed by the contractor.

In its May 14, 2003 notice of appeal, Appellant contends that Sun cannot be the responsible low bidder for the design, installation, inspection and testing of sprinkler systems, because most of that work requires a licensed sprinkler contractor, which Sun is not.

Appellant further maintains that Sun, who must subcontract with a licensed sprinkler contractor to do much of that work, cannot count the cost of materials installed by such licensed sprinkler contractor, although such materials are purchased by Sun, toward the 50 percent goal. We agree with Appellant that Sun must obtain the services of a licensed sprinkler subcontractor and that, properly interpreted, the relevant Contract provisions set forth above only allow the cost of materials purchased and installed by Sun to be counted toward meeting the 50 percent goal.

The Fire Prevention Code of the Maryland State Fire Marshall requires a Sprinkler Contractor's license for a contractor that lays out, installs, inspects, tests, repairs, or modifies fire sprinkler systems. Therefore, a state licensed sprinkler contractor is required for installation of the sprinkler systems for this Contract.

It is clear to the Board that a plain reading of the language of the provisions of Contract Provision GP-8.01 set forth above as augmented by SGP-8.02 and SGP-1.02 requires materials

purchased by the contractor to be installed by the contractor's own forces for the cost of such materials to be counted in meeting the 50 percent value or cost of work goal. We also note the observation by Appellant that to permit consideration of the cost of materials that the contractor will purchase but not install with its own forces to reach the minimum 50 percent value or cost of work goal is to transform GP-8.01 "from a work requirement into a financing requirement."

Based on the Board's conclusions regarding the proper interpretation of the 50 percent work goal, the Board would and does hereby sustain Appellant's appeal to the Board dated May 14, 2003, to the extent that the May 14, 2003 appeal challenges MTA's interpretation of the 50 percent work goal. However, were the May 14, 2003 appeal and the April 29 decision from which the May 14 appeal was taken all that was before the Board, the Board would not have recommended award of the Contract to Appellant as requested by Appellant. What the board would have done is sustained the appeal as to Appellant's interpretation of the 50 percent work goal and remanded the matter to MTA with a recommendation that MTA determine if Sun could meet the 50 percent work goal under the proper interpretation of the language of Contract Provision GP-8.01 as augmented by Contract Provisions SGP-8.02 and SGP-1.02. If Sun could not meet the 50 percent work goal as properly interpreted, then award would be made to Appellant as the next low, responsible and responsive bidder.

However, since the submission of its December 4 response to MTA, Sun, by letter dated June 11, 2003, has clarified and further explained how it intends to perform portions of the Contract work with its own work force, and how its intended work plan will satisfy the 50 percent goal.

We believe the determination concerning whether Sun will meet the 50 percent goal involves an assessment of the December 4 response and June 11 update and is primarily a matter of bidder responsibility. In reaching a conclusion regarding a bidder's responsibility, it is proper to consider information submitted by the bidder after bid opening. *See* Aquatel Industries, Inc., MSBCA 1192, 1 MICPEL ¶82 (1984). It also is appropriate after bid opening to request and consider information about a bidder based on challenges set forth in bid protests.

To the extent that the 50 percent work goal may be considered a matter of responsiveness, we note the following. Sun did not qualify its bid at the time of submission by stating that it would meet the 50 percent work goal only if the State considered the cost of materials purchased by Sun but installed by its licensed sprinkler subcontractor. Had Sun so qualified its bid, Sun's bid would not be responsive. After the bid opening, as a result of Appellant's protest, Sun was asked by the Procurement Officer how it would meet the work goal, and Sun responded on December 4, 2002 as it did. However, the Procurement Officer, her supervisor, Mr. Dunne, who also signed the April 29 decision, and agency counsel, who reviewed the April 29 decision, were all apparently of the opinion that the work goal requirements permitted counting purchased materials to reach 50 percent of the cost of work regardless of who installed the materials. When Appellant's appeal was filed with the Board, a copy of the appeal was sent by the Board to MTA pursuant to the Board's docketing procedure. Upon review of the appeal by an attorney with the Contract Litigation Unit in the central office of the Attorney General and the supervisory Procurement Officer, Mr. Dunne, it was determined that, properly interpreted, the cost of

materials could only be counted in meeting the 50 percent goal if installed by Sun, the contractor. Based on this correct assessment of the specifications dealing with the 50 percent work goal requirement of the Invitation for Bids (IFB), Sun was requested to provide information to determine if it would meet the requirements where only materials purchased and installed by Sun could be counted. Such information was provided by Sun on June 11, 2003, and the supervisory Procurement Officer, Mr. Dunne, determined that Sun, in fact, met the 50 percent work goal. The MTA therefore withdrew the April 29 decision which was based on a flawed reading of the 50 percent work goal requirements, and it issued an agency final decision dated June 12, 2003 which found that a matter of responsiveness was involved (which may be, as indicated above, only partially correct), but which more importantly found that Sun met the correct interpretation of the 50 percent work goal requirements.

In the December 4 response, and in Sun's June 11 update, Sun has outlined the costs that it plans to incur with its own work force and the cost of materials that it intends to install with its own work force on the job. In its December 4 response and June 11 update, Sun has identified $215,000 in the costs of its own work force and material that its own work force will install. According to Sun, this work involves cutting, patching, painting, cleaning and miscellaneous site work and the installation of electrical power, controls, fire alarms and detectors. In addition, in its June 11 update, Sun has identified $120,830 in additional work that its own labor forces will perform, consisting of demolition, various mechanical work and unskilled labor. Thus, the cost that Sun anticipates for work done by its own work force, as well as the cost of the material that its own work force will install, totals $335,830. That total cost is more than 50 percent of Sun's bid of $643,000, and based on testimony at the hearing, the Board finds the work that Sun includes in its $335,830 total is work that need not be performed by a licensed sprinkler contractor and will be performed by Sun. Sun's President and Mr. Dunne both testified at the hearing. Sun's President explained satisfactorily how Sun would perform 50 percent of the work with its own forces installing materials purchased by Sun. To the extent contractor responsibility is involved, Mr. Dunne's assessment that Appellant could perform as required using its own forces and materials installed by its own forces is not shown on this record to be arbitrary or capricious.

Sun's bid in terms of its post bid opening December 4, 2002 demonstration concerning how it would meet the 50 percent work goal may be argued to reflect that Sun was not committing itself to perform as required by the correct interpretation of the IFB's work goal requirements. Thus the bid could be said to be not responsive after the fact. However, it is clear that the agency and Sun were responding to a post bid opening protest that Sun was not a licensed sprinkler contractor and thus could not meet the Contract specification requirement to perform 50 percent of the work with its own forces. However, responsiveness must be judged from the face of the bid itself, and we decline to read Sun's post bid opening December 4, 2002 response into its bid as submitted on November 14, 2002. In so declining (to read Sun's December 4 response into its bid) we observe that the nuance pointed out by Appellant in its May 14 appeal that material purchased by Sun but installed by others could not be counted, notwithstanding the language of SGP-8.02 regarding inclusion of cost of materials installed, was not appreciated by MTA until the time of Appellant's appeal and further review by Mr. Dunne and legal counsel in the Attorney General's central office.

We also reject Appellant's argument advanced in its June 23 appeal in MSBCA 2355 that, by comparison to the court system, once Appellant appealed the April 29 decision to this Board (docketed as MSBCA 2344), MTA was bound by the April 29 decision and could not legally change it without violating Appellant's procedural administrative rights or substantive due process rights. Regardless of what the Maryland Courts may or may not do after an appeal from the particular court is taken, this Board and MTA are administrative agencies, not courts. We find no due process violation, procedural or substantive, in permitting MTA to apply the correct standard before final resolution of the appeal by this Board where the action by this Board, had there been no correction, would have been to remand the matter for a determination if Sun could meet the correct standard. It has been demonstrated, after a hearing, that Sun can meet the correct standard.

Wherefore it is Ordered this 5th day of August, 2003 that the appeal is MSBCA 2344 is sustained to the extent that only materials purchased and installed by Sun may be counted toward the 50 percent cost or value of work goal requirement and otherwise denied, and the appeal in MSBCA 2355 that the Procurement Officer acted without authority or jurisdiction in issuing the June 12 decision and in violation of Appellant's right to procedural due process is denied.

Dated: August 5, 2003

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
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:

(a) the date of the order or action of which review is sought;
(b) 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
(c) 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 2344 and 2355, appeals of Simplex Grinnell LP under Maryland Transit Administration Solicitation for Contract No. T-0844-0140.

Dated: August 25, 2003

_____
Michael L. Carnahan
Deputy Recorder