

BEFORE THE

MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of TECHLAWN)
INTERNATIONAL, INC.)
Under SHA Contract No.) Docket No. MSBCA 1848
M 721-501-324)

January 24, 1995

Mistakes in Bids Discovered Before Award- Correction of an alleged mistake pursuant to COMAR 21.05.02.12C (1) will only be permitted if the mistake and the bidders asserted correction thereof are clearly evident on the face of the bid document. In this appeal, the Procurement Officer properly denied Appellant's request for correction of an obvious discrepancy between a unit price and its extension because the intended correct bid was not clearly evident on the face of the bid documents. Neither application of the order of precedence clause set forth in the IFB nor the Appellant's asserted correction resulted in a bid that was consistent with the other bids submitted and common sense and experience relative to the bid item in question. Accordingly, the correction was properly denied and Appellant's bid was deemed to be nonresponsive.

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APPEARANCE FOR RESPONDENT: Edward S. Harris
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APPEARANCE FOR INTERESTED
PARTY (Custom Exterior
Design, Inc.): T. Bruce Hanley, Esq.
Towson, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the final decision of the State Highway Administration (SHA) procurement officer that its bid was properly rejected.

FINDINGS OF FACT¹

1. On or about June 30, 1994, Maryland Department of Transportation, State Highway Administration (SHA) advertised an Invitation for Bids on SHA Contract No. M 721-501-324 ("Contract") for landscape planting on the median along Maryland Route 182 (Layhill Road) in Montgomery County.
2. On or about July 26, 1994, SHA opened all bids on the Contract.
3. Techlawn submitted a bid on the contract in the amount of \$47,319.56. The following Unit Price and Extended Price for Item 7003 were included in Techlawn's schedule of prices:

<u>Item No.</u>	<u>Approximate Quantities</u>	<u>Description of Items</u>	<u>Unit Price</u>	<u>Amount</u>
7003	1,150	Square yards of mulching material 3" thick	13.80	\$966.00

4. Custom Exterior Design, Inc. ("Custom Exterior") submitted the next lowest bid in the amount of \$47,505.79.
5. SHA performed a mathematical audit on all the bids for the Contract. The audit of Techlawn's bid revealed the following discrepancy: the \$13.80 unit price for Item 7003 does not generate a total of \$966.00 when multiplied by the approximate quantity of 1.150 square yards.
6. On or about July 26, 1994, Mr. Gene R. Boyd, SHA, Chief of Construction Contracts Section contacted Techlawn by telephone to discuss the discrepancy in their bid. During this conversation, Mr. Boyd was informed that the \$13.80 unit price for Item 7003 was the "cubic yard" unit price and that the intended "square yard" unit price was \$0.84. The Techlawn representative further explained that this square yard unit price could be derived by simply dividing the extended price of \$966.00 by the approximate quantity 1,150 square yards. Following this conversation, Mr. Boyd made a notation on the original bid document indicating that Techlawn's intended square yard unit price was \$0.84.

¹ The Findings of Fact are taken from a Statement of Agreed Facts submitted by the Parties which the Board adopts as representing the material facts necessary to resolution of the Appeal. See Board Ex. 1. References to the record are deleted from this transposition of the Statement of Agreed Facts.

7. SHA produced a computerized tabulation of all bids submitted on SHA Contract No. M 721-501-324. This tabulation indicates that Techlawn's unit price for Item 7003 was \$0.84.
8. By letter dated July 26, 1994, Mr. Boyd informed Techlawn that their bid was apparently the lowest competitive bid submitted and that the contract could be awarded to Techlawn subject to verification and a favorable determination of responsiveness and responsibility.
9. By letter dated July 29, 1994, Custom Exterior informed SHA of a discrepancy in Techlawn's bid and requested that Techlawn's bid be rejected. Custom Exterior was the second lowest bidder and would be awarded the contract if Techlawn's bid was rejected.
10. SHA reviewed the prices submitted by other bidders relative to this procurement for Item 7003. Custom Exterior submitted a unit price of \$2.20 and an extended price of \$2,530.00. Unit prices submitted by other bidders were as follows: \$2.40, \$2.50 (two bids), \$2.80, \$2.85, and \$3.46.
11. Sha informed Techlawn by letter dated August 19, 1994, that Item 7003 in their bid was ambiguous and that the intended correct bid could not be discerned from the face of the bid document and its bid was being rejected as non-responsive pursuant to GP 2.17(b)(1).
12. By letter dated August 26, 1994, Techlawn protested SHA's rejection of their bid and confirmed that the extended price for Item 7003 (\$966.00) and the total amount of the bid (\$47,319) were accurate and that no correction to those figures was required. Techlawn further explained that the unit price of \$13.80 was merely an internal (cubic yard) figure submitted unintentionally and was not used in calculating either the extended price or the total amount of their bid.
13. On October 5, 1994, Charles R. Olsen, SHA Chief Engineer and Procurement Officer, issued a final decision denying Techlawn's protest and rejecting its bid as non-responsive. Based upon his review of Techlawn's bid and those prices submitted by other bidders, Mr. Olsen concluded that Techlawn's bid was ambiguous and that the intended correct bid could not be determined from the face of the bid document.
14. On October 19, 1994, Techlawn appealed the procurement officer's final decision and filed a timely Notice of Appeal with the Maryland State Board of Contract Appeals.

Decision

SHA performed a mathematical audit of all the bids on the contract and determined a discrepancy in Appellant's bid regarding the unit price (\$13.80) and its extension (\$966.00) for Item 7003. When such a discrepancy is revealed, SHA first applies the formulae set forth in GP-2.19 to derive a bid price.² See The Driggs Corporation, MSBCA 1243, 1 MSBCA ¶106(1985) and Denison Landscaping, Inc., MSBCA 1538, 3 MSBCA ¶258(1990) (discussing language similar to that found in GP-2.19 herein for determining resolution of price discrepancies). According to the provisions of GP-2.19, when there is a discrepancy between the unit price and its extension, the unit price prevails. However, this provision should not be applied with "blindness" so as to enforce an inequitable or

²GP-2.19(b) states:

Determination of Lowest Bidder. Bids shall be evaluated to determine which bidder offers the lowest cost to the State in accordance with the evaluation criteria set forth in the Invitation for Bids.

Except as otherwise provided under GP-2.14 Mistakes in Bids:

- (1) The unit price will govern in the event of a discrepancy between the unit price bid and the extended price (product of unit price multiplied by the quantity).
- (2) The sum of the extended prices will govern in the even of a discrepancy between the total lump sum bid and the extended prices.
- (3) The written words will govern in the event of a discrepancy between the prices written in words and the prices written in figures.
- (4) If a unit price has been omitted, the unit price will be determined by dividing the extended price by the quantity.

The Administration reserves the right to make the award by item, or groups of items, or total bid if it is in the best interest of the State to do so unless the bidder specifies in his bid that a particular or progressive award is not acceptable.

unconscionable result where the bidder alleges error. Richard F. Kline, Inc., MSBCA 1116, 1 MSBCA ¶39(1983).

Following the procedure set forth in GP-2.19(b) supra, the Procurement Officer applied the provisions of COMAR 21.05.02.12 (set forth substantially in GP-2.14) because when such a discrepancy exists, there obviously must be a mistake. COMAR 21.05.02.12(C) states in pertinent part:

"Confirmation of Bid. When the procurement officer knows or has reason to conclude that a mistake had been made, the bidder may be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected. . . if any of the following conditions are met:

(1) If the mistake and the intended correction are clearly evident on the face of the document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the fact of the bid document are ... errors in extending unit prices..."

When SHA asked Appellant for verification of its bid pursuant to COMAR 21.05.02.12, Appellant asserted that it had made an inadvertent mistake when it submitted the unit price of \$13.80 for Item 7003, as opposed to \$0.84. Appellant requested SHA to make a correction of this mistake in its bid.

In order for a bid price mistake to be corrected, both the mistake and the intended bid price must be evident on the face of the bid documents. COMAR 21.05.02.12(C). In determining whether the intended bid price is evident on the face of the bid documents, the procurement officer necessarily must rely on his experience and common sense. Richard F. Kline, Inc., supra at page 4. While the procurement officer, in deciding whether or not to permit correction, may not examine any bid estimates, backup data or quotes received by the bidder, he may review the prices submitted by other bidders relative to the procurement at hand. Id., at pages 4 - 5. See P. Flanigan and Sons, Inc., MSBCA 1068, 1 MSBCA ¶54(1983).

While Appellant's mistake in the unit price and its extension is clearly evident, the intended correction is not clearly evident on the face of the bid. It cannot be readily determined from the bid that the intended unit price should have been \$0.84, \$13.80, \$1.38 or even some other price. SHA did review the prices submitted by the other bidders for this procurement. A review of the other bids for this item does not help resolve the ambiguity.

The lowest unit price and extended price for Item No. 7003 was submitted by Custom Exterior, \$2.20 and \$2,530.00, respectively. The unit prices submitted by the other six bidders ranged from \$2.40 to \$3.46. Thus, while Appellant's \$13.80 price falls outside of the unit prices submitted by the other bidders, so does the \$0.84 figure. The Appellant argues that the \$0.84 unit price, while much lower than the other unit prices, should still be accepted because item No. 7003 is an "approximate" or estimated quantity item. The Board disagrees. Where the item in question is an approximate or estimated quantity item the objective analysis undertaken to determine the correction of a mistake pursuant to GP 2.19 and COMAR 21.05.02.12 requires the procurement officer to assume that the approximate quantity is correct and that all bids are based on such assumption.

The facts of this appeal are clearly distinguishable from the facts in Kline, supra. The Kline decision involved a discrepancy between the unit price written in words and the corresponding unit price written in figures. In that case, the SHA Procurement Officer noted a discrepancy in the Kline bid between the unit price written in words, "Twenty Dollars" and the unit price written in figures "0.20". Applying language setting forth an order of precedence for discrepancies similar to GP-2.19, the Procurement Officer concluded that the price written in words governed and recalculated the Kline bid using twenty dollars. Under this recalculation Kline's bid was no longer the low bid. Kline protested and appealed asserting it intended to bid twenty cents not twenty dollars. The Board noted that the range of the other

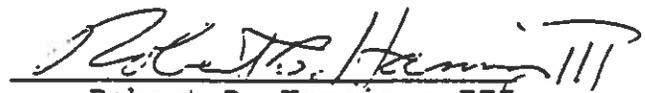
bidders' unit prices for the item in question reflected a unit price close to \$0.20. The Board also noted that the numerical amount of \$0.20 was used in extending Kline's unit price. The Board further noted that there was a similarity between twenty dollars and twenty cents stating that: "All that would be required to transform one into the other is a clerical error in filling out the bid document." Appellant's error, on the other hand, is not so clearly evident.

As we have noted, the error in this case does not lend itself to only one reasonable interpretation from the face of the bid documents, from comparison with the other bids, or from other objectively measurable criteria ascertainable from the bid documents. The intended bid should be ascertainable without an explanation from the bidder of what was intended or resort to extrinsic evidence. See Denison Landscaping, Inc. supra. The Procurement Officer acted reasonably in determining that Appellant's bid was ambiguous and, therefore, rejecting the bid as being non-responsive. To conclude otherwise would permit a bidder to have an unfair advantage over other bidders by allowing bidder discretion, after prices are revealed, to choose between a bid price which results in award and a price which does not. The preservation of fairness in the competitive bidding system precludes a bidder from having "two bites at the apple" by allowing it to choose between two different prices after the bids are open and competitors' prices are exposed.

For the foregoing reasons, the appeal is denied.

Therefore, it is ORDERED this 24th day of January, 1995 that the appeal is denied.

Dated: January 24, 1995


Robert B. Harrison III
Chairman

I concur:


Candida S. Steel
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 1848, appeal of Techlawn International, Inc. under SHA Contract No. M 721-501-324.

Dated: 1/24/95

Mary T. Priscilla
Mary T. Priscilla
Recorder