

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of THE HARDAWAY
COMPANY

Under SHA Contract No. B 977-
502-472

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Docket No. MSBCA 1932

January 29, 1996

Bids - Mistake in Bids - An omission may constitute a "mistake" within the context of COMAR 21.05.02.12 dealing with mistakes in bids. A bid may be corrected to the intended correct bid where the omission and its apparent correction are clearly evident on the face of the bid document.

APPEARANCE FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

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APPEARANCE FOR INTERESTED PARTY:
(Dick Enterprises)

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the State Highway Administration's (SHA) denial of its protest that the bid of the interested party was not responsive for failure to set forth the number of days of performance it proposed to utilize to complete its work.

Findings of Fact

1. The contract is for the resurfacing and widening of Interstate 695 from Maryland Route 140 to Maryland Route 139 in Baltimore County. This sealed bid procurement used a procedure known as A + B bidding. The A + B procedure allows competition among bidders on both price and the number of calendar days needed to complete the project.
2. Bids for the project were opened by SHA on October 19, 1995. Seven bids were received. Dick Enterprises submitted the apparent low base bid of \$47,915,140.75 and the apparent low bid

adjusted for time of \$55,075,140.75. Appellant submitted the second lowest base bid and adjusted bid time of \$47,969,548.35 and \$56,659,548.35 respectively.

3. The "A" portion of the bid is the total dollar amount for the work to be performed under the solicitation, i.e. the aggregate amount of the extended unit prices. The "B" portion of the bid reflects the number of calendar days proposed by the bidder to provide a complete usable facility. To calculate the bid amount adjusted for time, the number of calendar days proposed by the bidder to provide a complete usable facility is multiplied by \$10,000, a figure reflecting the average daily road user benefit. The sum of $A + (B \times \$10,000)$ is the amount used for comparison in establishing the successful bidder.

4. The IFB states that the total number of calendar days to provide a complete usable facility shall not exceed 1002 days and liquidated damages are to be charged in the event that all contract work is not completed by the calendar completion date (as derived from the number of calendar days proposed by the bidder to provide a complete usable facility).

5. Dick Enterprises' bid indicates in the right column box above " $(B \times \$10,000 =)$ ", \$7,160,000.00 as the product of the calendar days times the average daily road benefit of \$10,000.00. This amount was added to the base bid amount of \$47,915,140.75 for a total bid amount adjusted for time of \$55,075,140.75. Dick Enterprises did not expressly write on its Schedule of Prices the number of calendar days for the "B" portion of the bid. The "B" portion of the Dick Enterprises' bid is attached hereto as Exhibit A.

6. Appellant wrote " $B = 869$ " in the center column of its Schedule of Prices. Appellant multiplied the 869 calendar days by the \$10,000.00 road user benefit to arrive at a $(B \times \$10,000.00 =)$ amount of \$8,690,000.00. This amount was added to Appellant's base bid amount of \$47,969,548.35 for a total bid amount adjusted for time of \$56,695,548.35. The "B" portion of Appellant's bid is attached hereto as Exhibit B.

7. Appellant filed a timely bid protest on October 26, 1995 asserting that Dick Enterprises' bid was not responsive for two reasons. Appellant claimed that Dick Enterprises' bid was non-responsive because of its failure to complete and return the entire bid book as part of its submission and Appellant claimed that Dick Enterprises' failure to specifically insert the number of calendar days for the "B" portion of its bid on the Schedule of Prices also made its bid non-responsive.

8. Appellant's subsequent appeal of the SHA's final decision makes no specific mention of the grounds for protest that Dick Enterprises' bid was non-responsive for failure to include the entire bid book. Therefore, the Board will not address this issue.

9. During the verification process, the SHA Procurement Officer examined Dick Enterprises' Schedule of Prices and also compared it with Appellant's Schedule of Prices. The Procurement Officer determined that Dick Enterprises' bid contained either a minor irregularity or a mistake and proceeded with his analysis of this protest as if the bid contained a mistake within the context of COMAR 21.05.02.12.

10. COMAR 21.05.02.12 provides in part relevant to the issues raised by the parties herein as follows:

.12 Mistakes in Bids.

A. General. Technicalities or minor irregularities in bids, as defined in COMAR 21.06.02.04, may be waived if the procurement officer determines that it shall be in the State's best interest. The procurement officer may either give a bidder an opportunity to cure any deficiency resulting from a technicality or minor irregularity in its bid, or waive the deficiency if it is to the State's advantage to do so.

B. Mistakes Discovered Before Opening. A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in Regulation .09.

C. Confirmation of Bid. If the procurement officer knows or has reason to conclude that a mistake has 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 or withdrawn upon the written approval of the Office of the Attorney General if any of the following conditions are met:

(1) If the mistake and the intended correction are clearly evident on the face of the bid 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 face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

(2) A bidder may be permitted to withdraw a low bid if:

(a) A mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or

(b) The bidder submits proof of evidential value which clearly and convincingly demonstrates that a mistake was made.

11. Pursuant to COMAR 21.05.02.12, SHA requested confirmation from Dick Enterprises of the intended calendar days for the "B" portion of the bid on November 6, 1995. That same day, Dick Enterprises confirmed its intent to perform the work on the project in 716 calendar days.

12. The Procurement Officer determined that Dick Enterprises' bid was susceptible to only one reasonable interpretation concluding that the mistake and the intended correction are clearly evident on the face of the bid document.

The mathematical equation for determining the "B" portion was stated in the Schedule of Prices as " $(B \times \$10,000.00 =)$ ". Dick Enterprises placed the amount of \$7,160,000.00 in the right column box above the mathematical equation. By dividing the \$7,160,000.00 product by the road user benefit, \$10,000.00, the number of calendar days for the "B" portion of Dick Enterprises' bid is 716 days.

13. The Procurement Officer found that the sum of the "B" portion, \$7,160,000.00, evidenced a clear intention on the part of Dick Enterprises to bid 716 days. The Board finds, and as set forth in the Agency final decision, from the face of the bid itself the bid was not susceptible to any other reasonable interpretation.

Decision

Appellant makes the following assertions in its appeal.

"The subject procurement is what is known as "A + B" procurement. In this type of procurement, the A portion of the bid is the total dollar amount for all work to be performed under the Solicitation. The B portion requires the bidder to identify the total number of calendar days proposed to provide a complete usable facility. The bidder is then required to multiply that number of days by \$10,000 to calculate the B portion of the bid. The low bid was to be determined by adding the A and B numbers for an overall bid price. It is undisputed that Dick Enterprises, in its bid, did not include or identify in any manner the number of days of performance it proposed to utilize. This omission is not a mistake in bid, as discussed further below, but rather is a material omission in as much as the Solicitation specifically required that "the number of calendar days proposed by the contractor shall be entered on the last page of the Schedule of Prices in the proposal form of the Invitation for Bids." By not indicating the number of days of performance, Dick Enterprises has not contractually committed to complete the work in any specific time frame. Without a firm commitment by Dick Enterprises with regard to time of performance, there is no way to determine Dick Enterprises allowable contract time per the Terms and Conditions, Paragraph IV,

Contract Time (Special Provisions, at page 2 of 3). Without an indication of the number of days of performance, there is no way to determine when liquidated damages are to be imposed for failure to perform in a timely manner. Liquidated damages (Special Provisions, Paragraph VI) specifically ties completion to the calendar completion date which was the omitted portion of the Dick Enterprises' bid.

The Procurement Officer's Final Decision is in error in two regards. First, the Procurement Officer contend at the second full paragraph on page 2 that there is no clear area designated for providing the number of calendar days on the bid form. All one has to do is examine the bid form (page 645), and it can be seen that all a bidder needed to do was insert a number over the "B" portion of the equation in order to do the mathematics. In the case of the Hardaway bid, Hardaway wrote in the center column "B = 869. Dick Enterprises, however, left the number of days of performance completely silent. Further, the IFB specifically required that the number of calendar days proposed by the contractor "shall be entered on the last page of the Schedule of Prices...."

Secondly, the Procurement Officer argues that the situation can be treated as a mistake in bid and the bid can be corrected after the fact. The mistake in bid requirements of COMAR 21.05.02.12 only allow correction if the mistake and the intended correction are clearly evident on the face of the bid document. Examination of Dick Enterprises' bid must lead one to the conclusion that the number of days of performance is not clearly evident on the face of the bid. We are not dealing with a typographical error, an error in extension, a transposition error or an arithmetical error. The case at hand is a clear omission of pertinent information. The subject situation falls more squarely under COMAR 21.05.02.12C(2)(a) which allows a bid to be withdrawn as opposed to corrected where a mistake is clearly evident on the face of the bid document but the missing information is not similarly evident.

The omitted information is not simply the product of reversing a mathematical equation but is pertinent information regarding the period of performance and potential imposition of liquidated damages."

The Board finds that an omission may constitute a "mistake" within the context of COMAR 21.05.02.12.

A responsive bid "must constitute a definite and unqualified offer to meet the material terms of the IFB." Long Fence Company, Incorporated, MSBCA 1259, 2 MSBCA ¶123 (1986) at p. 6. After examining Dick Enterprises' bid, the Procurement Officer determined that the bid submitted by Dick Enterprises, on its face, constituted a definite and unqualified commitment to perform the requirements of the contract. Thus, there is no basis for a determination of non-responsiveness, notwithstanding an "omission" in that Dick Enterprises did not insert a number over the "B"

portion of the equation in order to do the mathematics or otherwise write down the number of days of performance on the bid form.

The law mandates this conclusion. If a bid contains a mistake (whether one of omission or observable written error) and the apparent correction is clearly evident on the face of the bid document, COMAR 21.05.02.12 mandates that the bid shall be corrected to the intended correct bid. Here, the failure to include the number of calendar days and the intended number of calendar days are both clearly evident on the face of the bid document. The number of calendar days intended to be bid by Dick Enterprises can be ascertained by dividing the road user benefit of \$10,000.00 a constant figure prescribed on the pre-printed bid form into the figure specified by Dick Enterprises as the total for the "B" portion of the bid, \$7,160,000.00. Dick Enterprises specified a total of \$7,160,000.00 which evidences a clear intention on the part of the apparent low bidder to bid 716 days. The bid does not appear to be susceptible to any other reasonably possible interpretation or alternative. Where the mistake and correction are clearly evident on the face of the bid document the bid shall be corrected to the intended correct bid. COMAR 21.05.02.12(1).

As contemplated by COMAR 21.05.02.12, SHA requested Dick Enterprises to confirm the intended number of calendar days for the "B" portion of the bid. Dick Enterprises promptly responded and confirmed its "intent as the basis of its bid to perform the work for the above subject project in 716 calendar days."

Counsel have not directed the Board's attention to a procurement decision specifically dealing with an omission of a number of calendar days in an A + B procurement. The most closely analogous cases appear to deal with situations in which a bid did not contain unit prices as required by the solicitation. However, we are of the opinion that the Procurement Officer's analysis of the issue was correct.

In its appeal, Appellant cites the case of New World Technology, B-237158, 90-1 CPD ¶77 (January 19, 1990) for the proposition that failure of a bidder to submit certain unit price information, notwithstanding having provided extended or total prices, renders a bid non-responsive because without these unit price calculations, potential payment deductions for unsatisfactory performance could not be made by the agency. New World Technology, however, is distinguishable from the instant case because the intended unit price was not apparent from the face of the New World Technology bid. The IFB Schedule in New World Technology, listed eight

specific line items and 240 specific subline items. For each subline item, a specific task, quantity, and unit were listed. Bidders were to enter the unit price and then multiply the unit price by the quantity to arrive at the extended price for each subline item. Bidders were then to add together the amount for the subline items to arrive at a total line amount. Finally, bidders were to list the aggregate amount for all eight line items. The IFB in New World Technology, also contained a penalty provision for unsatisfactory performance by the successful contractor. The amount of money to be deducted was based on a payment deduction formula set forth in the IFB in which a percentage of the unit price, as submitted by the contractor in its bid was to be deducted for each unsatisfactorily performed contract task.

New World Technology, who had submitted the apparent low bid, did not submit unit prices for any of the subline items: it simply inserted total prices for the eight individual line items and the aggregated amount for all eight line items. Because the low bidder did not submit any unit prices in its bid, the agency could not calculate, pursuant to the formula set forth in the IFB, the amount of payment deductions it would make if New World Technology were awarded the contract and did not satisfactorily perform each of the contract tasks. The Comptroller General, in that situation, upheld the Department of the Army's rejection of New World Technology's bid as non-responsive.

The Procurement Officer herein reviewed the New World Technology decision in the Agency final decision and determined that the situation in the New World Technology case was not similar to the protest at issue. The intended unit price was not apparent on the face of the bid document in New World Technology. The Comptroller General has consistently held that a bid that omits a unit price is not rendered non-responsive where the bid included the total price for the item(s) See, GEM Engineering Company, Incorporated, B-231605.2, 88-2 CPD ¶252 (September 16, 1988); Aqua Marine Constructors, B-212790, 83-2 CPD ¶471 (October 20, 1983); Worldwide Services, Incorporated, B-187600, 77-1 CPD ¶12 (January 6, 1977). The rationale explained for these holdings is that the unit price that the bidder committed to is obtainable by simple mathematics, i.e. dividing the estimated quantity into the total price for the item(s).

In these Comptroller General decisions, the omitted unit price was determined to be a minor irregularity because it was clear that the intended correct bid can be discerned from the face of the bid document. Thus, the Comptroller General held there is no doubt that the bid commits the

contractor to perform the exact work required at a fixed price. Similarly, this Board has held that a failure to provide a total bid number provided at the bottom of the last page of the bid sheets was a waivable minor informality where prices have been provided for all items in a bidding schedule and the mere mechanical exercise of addition shows the total bid intended. Calvert General Contractors, Corporation, MSBCA 1314, 2 MSBCA ¶140 (1986) at p. 13 (citing TCL Limited, B-220578, 85-2 CPD ¶433).

The situation in this appeal is analogous to the federal cases regarding omitted unit prices and this Board's decision in Calvert General Contractors, Corporation involving an omitted total price, in that the omitted number of calendar days can be determined from the face of Dick Enterprises' bid. Dick Enterprises is committed to perform the project in 716 days. A failure to complete the project within 716 days will allow SHA to impose liquidated damages, notwithstanding the omission of a written "716 days" on the bid form.

In its appeal, Appellant also alleges that Dick Enterprises was given two bites at the apple because "the Procurement Office argues that the situation can be treated as a mistake in bid and the bid can be corrected after the fact." The Board disagrees. The procurement regulations compel the correction of Dick Enterprises' mistake and do not permit a withdrawal of the bid unless the intended correction is not evident on the face of the bid and "the bidder submits proof of evidential value which clearly and convincingly demonstrates that a mistake was made." COMAR 21.05.02.12C(2)(b). To the extent a withdrawal of a bid under the regulations might conceptually be viewed as a second bite of the apple, Dick Enterprises in fact gets no second bite for two reasons: 1) the mistake and the intended correct bid are apparent on the face of the bid document; and, 2) there is no evidence of record that Dick Enterprises intended anything other than 716 calendar days.

The failure of Dick Enterprises to write down 716 calendar days on the "B" portion of the bid was thus properly waived as a minor irregularity under COMAR 21.06.02.04.

Appellant finally argues, citing Cedar Valley Corporation, B-256556,94-2 CPD ¶7 (July 5, 1994), that Dick Enterprises is not a responsible bidder because Dick Enterprises may not reasonably be expected to complete the work in 716 calendar days. This contention was raised for the first time in Appellant's comments on the Agency Report. The Board, therefore, lacks

jurisdiction to consider this contention because it was not raised timely. See Chesapeake Bus and Equipment Company, MSBCA 1347, 2 MSBCA ¶163 (1987) at p. 5.

For the foregoing reasons, the appeal is denied.

Therefore, it is Ordered this 29th day of January, 1996 that the appeal is denied.

Dated: January 29, 1996

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 1932, appeal of The Hardaway Company under SHA Contract No. B977-502-472.

Dated: January 29, 1996

Mary F. Priscilla
Recorder