

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Transportation and)
Transit Associates, Inc.)
) Docket No. MSBCA 1717
Under MTA Contract No.)
MTA-90-49-3)

May 28, 1993

Amendments - Acknowledgement

Amendments to IFB's (Addendum) are required to be acknowledged by bidders. Failure to acknowledge an Addendum which materially changes or affects an IFB may not be waived.

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OPINION BY MR. PRESS

Appellant timely appeals the denial of its bid protest by the Department of Transportation, Mass Transit Administration (MTA) in awarding a contract to the apparent low bidder.

Findings of Fact

1. By notice dated December 15, 1992 (MTA) issued an Invitation for Bids (IFB) for complete design, remanufacture, delivery, qualification, acceptance testing and warranty of ten push-pull rail passenger coaches for the Maryland Rail Commuter System (MARC).
2. A pre-bid meeting was held on December 22, 1992. Both Appellant and the Canadian National Railway Company, AMF Division (AMF) were represented. Among the questions asked were clarification of the delivery schedule and payment schedule.

3. MTA issued Addendum No. 1 to the IFB on January 7, 1993. The addendum made two specific changes to the Special Provisions of the contract: (a) in Article 13(D) of the Special Provisions, page SP 6 of 13 (SP13) the first sentence of the delivery schedule, it changed "210" for "280"; and (b) it substituted a new page SP 10 of 13, to provide a modified and accelerated schedule of progress payments to the contractor.
4. Bids were opened on February 2, 1993, and the results were as follows:

AMF	\$3,599,000.00
Appellant	\$3,887,400.00

- AMF failed to file a written acknowledgement to Addendum No. 1 on its bid form and Appellant did acknowledge the Addendum.
5. Appellant filed its protest February 12, 1993, protesting the award of the contract to AMF. TTA alleged that AMF's bid was not responsive, on four different grounds.² One of those points of protest was that AMF's failure to acknowledge the Addendum rendered its bid non-responsive, because (a) the Addendum "requires additional MTA retainage"; and (b) that the change in the delivery schedule required accelerated delivery, thus increasing the cost of performance.
 6. The Procurement Officer denied the protest by letter dated March 19, 1993. The Procurement Officer waived the failure to acknowledge Addendum No. 1 asserting that the Addendum did not increase the retainage and in fact made the payment schedule more favorable to the contractor and the change in the delivery schedule was made to correct a typographical error

¹ Various documents notified bidders to acknowledge addenda: ie., the Bid Form, the Special Provisions, the Pre-Bid Meeting minutes and Addendum No. 1. Such acknowledgement is required by COMAR 21.05.02.08A.

² The grounds alleged were AMF's failure to sign the proper Buy America Certificate, failure of AMF to submit a bid bond in its own name, and AMF's failure to complete the required certifications and failure to acknowledge Addendum No. 1.

and make the IFB internally consistent.³

7. From a denial of its protest TTA appealed to this Board on March 19, 1993. Appellant's appeal repeats its allegations that the change in the delivery schedule in Addendum No. 1 was material. Appellant further stated the change in progress payments in the Addendum was also material and abandoned the other points addressed in its protest.

8. Article 13 of the Special Provisions (SP13) established a

³ Specifically, the Procurement Officer's decision provides as follows on the issue of failure to acknowledge the Addendum:

The bid form states that the failure to acknowledge receipt of all addenda may cause the bid to be considered non-responsive. However, failure to acknowledge an addendum that makes no material changes, has a trivial impact on performance, or that decreases the cost of performance, does not automatically render a bid non-responsive.

You claim that the addendum changed the delivery and the progress payment schedules which increased contract costs. You assert two grounds for this contention.

First, you assert that the addendum results in increased retainage. That is incorrect. Addendum No. 1 makes no change in the retainage. Furthermore, by eliminating the 5% final payment and increasing the amount paid to the contractor on delivery of each car from 7% to 7.5%, the addendum made the payment schedule more favorable to the contractor. Failure to acknowledge an addendum which makes the contract terms more favorable to the contractor does not require rejection of the bid as non-responsive. Liberty Roofing Company, Inc., MSBCA 1184, 1 MSBCA (MICPEL) ¶ 77, (July 6, 1984).

Second, you claim that the addendum reduced the delivery schedule from 280 days to 210 days. But this change was merely a clarification of an ambiguous figure inserted during the typing of the original IFB. Special Provision 13.D of the original IFB has a milestone of 210 days for the last four (4) coaches, and this was not changed by the addendum. The 280-day figure in the original IFB made the specification ambiguous. The addendum eliminated the 280-day figure to make the specification consistent.

sequence of events for delivery and acceptance. The contractor is obligated to take possession of each coach and remove it to its repair facility for overhaul. After overhaul MTA will inspect the coaches before shipment. When a coach has passed the inspections,⁴ it is conditionally accepted by MTA and the contractor is required to deliver the coaches to the operating facility. After delivery to the operating facility the coaches are required to pass another review and certain material is to be furnished as follows:

- . Ride Quality Test
- . Operating Test
- . Final Defect Correction
- . As-Built Drawings and Aperture Cards
- . Photographs
- . Car History Books
- . Demonstration of Coach Set-up and Maintenance Procedures

The foregoing items are required to achieve completion of work for final payment and final acceptance for warranty purposes.

9. The delivery schedule as originally described in SP 13 specifically provided in relevant part as follows:

Delivery or Completion Date in Days from Notice to Proceed is 280 days, delivery as follows:

<u>MILESTONE (DAYS*)</u>	<u>COACHES ACCEPTED BY MTA</u>
150	2
180	4
210	4

* Milestone Days are calculated in calendar days from Notice-To-Proceed.

E. COACH INSPECTION

Coach inspection shall occur at the contractor's facility.

The MTA's Quality Assurance Team may conduct three (3) inspections. One when the coach is received at the

⁴ Special Provision 13E provides: "The MTA's Quality Assurance Team may conduct three (3) inspections...."

contractor's facility. A second inspection during reconstruction to ensure compliance with the specifications. A third inspection will be required, prior to shipment.

F. OPERATING AGENCY

Once final inspection and conditional acceptance has occurred, the coach shall be delivered directly to the operating agency facility.

The operating agency for these coaches is:

The National Railroad Passenger Corp.
Attn: General Foreman John Lewis
Washington Terminal
Washington, DC
(202) 906-2874

Upon delivery, the contractor shall conduct a complete demonstration, including set-up of the coach and its subsystems, including maintenance procedures with representatives of MTA and the operating agency. Placing of the coach in operation by the agency shall constitute final acceptance of the coach for warranty purposes.

G. CERTIFICATE OF ORIGIN

All certificates of origin and invoice shall be sent to B. A. Black, Project Manager, Maryland Rail Commuter Service, Mass Transit Administration, P.O. Box 8718, B.W.I. Airport, MD 21240-8718.

H. DRAWINGS

Delivery of the specified number of drawings and documentation required by the specifications shall be made with the last coach.

10. Addendum No. 1 changed SP 13. The time of 280 days for "Delivery or Completion" is changed to 210, a date coinciding with the milestone for acceptance of the last four coaches and the contractor thus no longer would have 210 days to obtain "final inspection and conditional acceptance" plus another 70 days for delivery or completion. The contractor must compress both acceptance and delivery into a shorter period. Addendum No. 1 constituted a unilateral change and this change affected the price materially.

11. A reasonable bidder reviewing the original bid document would have interpreted the original 210 day milestone to be a date for conditional acceptance and reasonably would conclude he had an additional 70 days for completion of all work; i.e. a total of 280 days to achieve final acceptance. Furthermore, a reasonable bidder would have projected the labor burden in man hours over the total period of time for project completion in bidding his price. The Board finds that the shortening of the time to complete the work directly affects labor costs.
12. The Board finds the original SP 13 specification to be clear and unambiguous. The only reasonable reading of the original specification is that a contractor has 210 days for conditional acceptance of the last four coaches and 280 days for final acceptance. This interpretation we find to comport with the standard expectation of bidders for overhaul of these types of coaches. Nothing in the bid documents would alert a reasonable bidder to inquire pertaining to the 280 versus 210 day periods set forth in the original specification. MTA's argument that the 210 days set forth in the original specification should be interpreted to constitute the final acceptance date is not a reasonable interpretation of the bid documents.
13. At the hearing, Appellant demonstrated that the change brought about by Addendum No. 1 which compressed completion of all work into a 210 day time period would require a contractor to have to increase its peak work force, thus employing a certain number of less experienced workers, resulting in increased learning curves and a higher total labor burden per coach. Appellant was able to estimate increased costs of \$330,000 arising out of the change from 280 to 210 days which is an amount greater than the differential between the two bids. Under the shorter 210 day completion schedule in the Addendum liquidated damages would be applied after 210 rather than 280 days. Therefore, the Addendum made material changes.

14. The Progress Payment Schedule in the original IFB was as follows:

<u>MILESTONE</u>	<u>PERCENTAGE</u>
1) Certified placement of orders for major components	25%
2) Per car upon conditional acceptance	7%
3) Upon completion of the contract	5%

The Schedule further provided that all of these payments were subject to 5% retainage.

15. Addendum No. 1 substituted the following schedule:

<u>MILESTONE</u>	<u>PERCENTAGE</u>
1) Certified placement of orders for major components of the systems listed: Seats, Flooring, Truck Material, Electrical Material, Glazing Material	Up to 25%
2) Per car upon conditional acceptance (10% of remaining amount per car)	7.5%

16. The provision for 5% retainage remained the same, even though not listed as a "3" in the addenda. The Addendum specified the major components which would have to be ordered to achieve the first installment and provided that up to 25% could be paid. Addendum No. 1 changed the payment upon conditional acceptance of each coach from 7% to 7.5% or more, corresponding to 10% of the remaining amount of the contract per coach. Neither party asserts the Addendum No. 1 Progress Payment Schedule is ambiguous.

17. Addendum No. 1 Progress Payment Schedule, the Board finds, would cause a reasonable bidder to conclude that MTA payments would be less in increments as the work progressed. Therefore, the impact is material for a bidder would have the use of MTA incremental funds for its internal purposes at an earlier period under the original Progress Payment Schedule.

Decision

As this Board has previously found, Maryland law requires

rejection of a bid that does not conform in all material respects to the solicitation requirements. COMAR 21.01.02.01 (78). A material deviation from an IFB's requirements occurs when the price, quantity or quality of the goods or services is affected. Excelsior Truck Leasing Co., Inc., 1 MSBCA 1102, 1 MICPEL 50 (1983). Further, in Oaklawn Development Corp., 2 MSBCA 1360, 2 MICPEL 138 (1986) this Board held that the failure to acknowledge a material amendment to a solicitation renders a bid non-responsive. In that case, Appellant's bid on a landscape planting project was found to be non-responsive for failure to acknowledge an addendum to the IFB containing additional specifications relative to tree well construction and safety requirements for work around an operational rail facility. The Board observed:

"We have noted that the materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. Vertiflite Air service, Inc., supra. Addendum No. 1 as issued on July 18, 1986 added new legal obligations regarding (1) construction of tree wells in accordance with the specifications included in addendum, and (2) requirements pertaining to attendance and completion of a safety course and daily safety briefings. Thus, assuming arguendo, as argued by Appellant during the hearing of its appeal, that these additional requirements would have little or no effect on its bid price or the work to be performed, the procurement officer nevertheless reasonably determined that its bid was non-responsive and unacceptable. Whenever a bidder, as here, does not acknowledge an amendment imposing new legal obligations it may be viewed as attempting (whether in fact it so intends or not) to reserve to itself an election after bid opening to speak up and agree to perform the added requirements or stand silent and let its bid be rejected as non-responsive. This is the classic "two bites at the apple" circumstance which requires rejection of Appellant's bid as non-responsive. See Liberty Roofing, supra, 1 MSBCA ¶77, at pp. 7-

8. We therefore will not disturb the finding of the procurement officer that Appellant's bid was non-responsive for failing to acknowledge the tree well specifications and safety requirements as contained in Addendum No. 1. ..."

In the instant appeal the Procurement Officer found that the failure by AMF to acknowledge Addendum No. 1 was not prejudicial to any other bidder.⁵ AMF's failure to acknowledge or incorporate Addendum No. 1 into its bid this Board finds is prejudicial to Appellant. The addendum was material and it affected both Appellant's price and delivery schedule resulting in a competitive advantage to AMF. In this case the deviation by AMF goes to the substance of the bid affecting price and delivery and is prejudicial to the rights of other bidders. The deviation thus cannot be waived as a minor irregularity. Solon Automated Services, Inc., 1 MSBCA 1046, 1 MICPEL 10, (1982). Further, the government must have an unqualified right to performance in strict accordance based on the form of the bid at the time of bid opening. For the MTA to accept AMF's bid this Board finds would not legally obligate AMF to meet the MTA's needs as identified in Addendum No. 1. Oaklawn Development Corp., supra.

MTA acknowledges these legal principles. However, MTA waived AMF's failure to acknowledge the Addendum on grounds it did not materially change the contract, since in issuing the addendum MTA asserts it was only attempting to clarify an obvious typographical error as to days to complete and also affect more favorable payment terms. The Procurement Officer thus believed it was within his discretion to waive the failure to acknowledge as a minor irregularity. A minor irregularity is defined in COMAR 21.06.02.04 as one which is merely a matter of form and not substance or pertains to some immaterial or inconsequential defect or variation in a bid

⁵ AMF did acknowledge the Addendum at the request of MTA sometime after bid opening. However, the responsiveness of a bid must be measured at the time of bid opening from the face of the bid.

or proposal from the exact requirements of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors. Liberty Roofing Company, Inc., 1 MSBCA 1184, 1 MICPEL 77 (1984).

The record in this case demonstrates that the failure of AMF to acknowledge Addendum No. 1 is not a minor irregularity that can be cured, for Addendum No. 1 materially changed the delivery schedule and Progress Payment Schedule. We find the Procurement Officer's discretion is misplaced in concluding there has been a trivial impact on performance or decreases in the cost of performance. Under the delivery schedule set forth in Addendum No. 1 a contractor becomes liable for liquidated damages after 210 days rather than 280 days and the cost of total performance is compressed into a time frame that is 210 days rather than 280 days. Written acknowledgement of the Addendum is thus required.

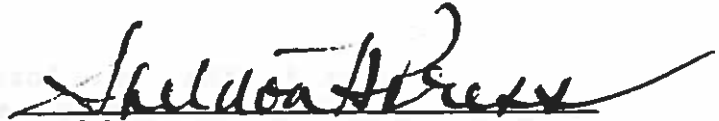
The plain reading of the original Progress Payment Schedule in comparison with the Addendum No. 1 Progress Payment Schedule, this Board finds, provides a financial advantage as outlined on Appellant's Exhibit No. 2. Advance of the payments as outlined in Addendum No. 1 would lead a bidder to conclude he would have the use of MTA funds later in the project than would have been earlier available in the original Progress Payment Schedule. A bidder by failing to acknowledge the Addendum No. 1 Progress Payment Schedule could be viewed as attempting to retain the financial advantage of the original Progress Payment Schedule as offered by MTA. The Board finds under the IFB as originally issued a bidder would have the use of approximately up to \$500,000 in incremental payment amounts earlier in the work to be performed, rather than at a later time under Addendum No. 1. This elimination of earlier use of MTA funds materially affects a reasonable bidder's cost and requires written acknowledgement of Addendum No. 1.

Therefore, the appeal is sustained.

Wherefore, it is this 28th day of May, 1993 ORDERED that the Board finds that the bid of AMF is non-responsive and the matter is

remanded to MTA for appropriate action.

Dated: May 28, 1993


Sheldon H. Press
Board Member

I concur:


Neal E. Malone
Board Member


Robert B. Harrison, III
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 B4 Time for Filing

a. Within Thirty Days

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that where the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent, or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date of the receipt of such notice.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1717, appeal of Transportation and Transit Associates, Inc. under MTA Contract No. MTA-90-49-3.

Dated: *May 28, 1993*

Mary F. Priscilla
Mary F. Priscilla
Recorder