BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF WEST END SERVICE, INC.	)	
	)	Docket No. MSBCA 2236
Under DGS Invitation to Bid No. 001IT812630	)	

September 26, 2001

Bid Protest - Burden of Proof - An Appellant has the burden of proving that its protest has merit.

APPEARANCE FOR APPELLANT:	Preston A. Pairo III, Esq. Pairo & Pairo, LLC Ellicott City, MD
APPEARANCE FOR RESPONDENT:	John H. Thornton Assistant Attorney General Baltimore, MD
APPEARANCE FOR INTERESTED PARTY Beltway International Trucks, Inc.	None

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its bid protest that it be awarded a contract for Line Item #2 of the Invitation to Bid.

Findings of Fact

1. On April 19, 2001, The Department of General Services (DGS) issued Invitation to Bid No. 001IT812630 (ITB) for the procurement of Navistar International Truck parts for four geographic regions of the State. The ITB required bidders to bid a percentage discount from the latest price list of the manufacturer and provided that awards would be made by region to the bidder who offered the most favorable discount in each region. This protest and appeal deals only with Region B, the Central Region (Frederick, Montgomery, Carroll, Howard, Baltimore, Anne Arundel, Harford, and Cecil Counties and Baltimore City). Bids for Region B were to be stated in Line Item #2 of each bid on page 04.
2. Bids were due by 2:00 p.m. on May 22, 2001. Prior to the deadline for receipt of bids, five bids were received, including bids from Appellant and the Interested Party (Beltway). The bids were submitted on copies of the ITB.

3. Bids were opened in the office of Bid/Proposal Administration (BPA) of DGS (part of the DGS Office of Procurement and Contracting). Present at bid opening were DGS employees, Mr. Terry Ames and Ms. Francis Wheeler. Mr. Ames' job was to read the bids out loud while Mrs. Wheeler's job was to record each bid on a form called a Record of Bid. Also present at bid opening were two representatives of Appellant, Mr. Klein and Mr. Lastner.
4. Mr. Ames read the bids while Ms. Wheeler recorded each of them on a Record of Bid (one for each bidder). Ms. Wheeler recorded the bid of Beltway for Region B as a discount of -3%. Mr. Ames read the bid as -3%. Appellant's bid for Region B was a discount of -21%.
5. As noted Mr. Klein and Mr. Lastner, representatives of Appellant, were present at the time the bids were read aloud and recorded. Both representatives witnessed Mr. Ames read the bid of Beltway for Region B and announce the same as a discount of three percent (3%). After the Beltway bid for Region B was announced, Mr. Lastner requested that the Beltway bid for Region B be read again. Mr. Ames and Ms. Wheeler looked at Beltway's bid and confirmed Beltway's bid as being a discount of three percent (3%).
A review of the Agency Report, Exhibit B, Invitation to Bid of Beltway, page 04, Line Item #2, reveals bid entries clearly marked in two separate areas for Region B, both noting in numerals a discount of twenty-three percent (23%). The actual size of the numerals makes it unlikely that Mr. Ames and Ms. Wheeler would have misread the bid as three percent (3%) and not twenty-three percent (23%).
6. DGS's standard practice is that after bids are opened and read at BPA they are sent to Procurement Administration and Support (part of the Office of Procurement and Contracting) for the purpose of confirming that the file contains a bid for every bidder identified on a Record of Bid as having submitted a bid. In this case, after bids were read and recorded by Mr. Ames and Ms. Wheeler, they were delivered by Mr. Ames to Jeanette Harris of Procurement Administration and Support. Ms. Harris confirmed that DGS had a bid from every bidder listed on each Record of Bid prepared by Ms. Wheeler.
7. Ms. Harris delivered the bids to Ms. Janet Dotson the Buyer's Clerk for the Procurement Officer herein, Mr. Walter Johnson. Ms. Dotson's job was to enter (tab in) the bids into ADPICS, the State's automated accounting system. Under DGS procedures, it was Ms. Dotson's responsibility to enter the numbers into ADPICS using the bid amounts stated in the bids themselves and not from the bid amounts shown in each Record of Bid. From such entries ADPICS generates the official tabulation of bids. Ms. Dotson entered the bid of Beltway for Region B as a discount of -3%.
8. Ms. Dotson entered the bids into ADPICS on May 25, 2001. That same day, she took the bids, in accordance with DGS standard procedure, to the Procurement Officer, Mr. Johnson. Mr. Johnson was out of the office on Friday, May 25 and Monday, May 28, 2001 (Memorial Day). Because Mr. Johnson was out the bids may have been left in Mr. Johnson's in-box. Mr. Johnson testified that he did not keep his door locked such that his office is accessible to cleaning personnel and others. On Tuesday, May 29, 2001, Mr. Johnson reviewed the bids in detail and prepared his own informal tabulation of bids. Mr. Johnson saw that the Beltway bid for Region B reflected a discount of -23%, not -3%, and he recorded the bid on his informal tabulation as -23%.
9. On either June 1 or June 4, 2001, a representative of Appellant called Mr. Johnson and asked for the results of the bidding. Mr. Johnson told the Appellant's representative at

that time that he, Mr. Johnson, needed to review the bids further before giving any information. After reviewing bids again, Mr. Johnson called Appellant and told them it appeared that Beltway would receive the award for Region B.

10. On June 5, 2001, two representatives of Appellant came to DGS and reviewed the bids. The following day, June 6, 2001, Appellant filed a protest with Mr. Johnson asserting that Appellant had in fact submitted the lowest bid on Region B and should be awarded the contract.

11. After the protest was received, DGS investigated the circumstances underlying the protest and denied the protest by letter dated July 6, 2001 as follows:

> This letter is in response to your protest dated June 6, 2001, in which you state that an error had occurred during the public opening and recording of the bids held on May 22, 2001, at 2:00 p.m. for the above-mentioned solicitation. The bids were opened publicly at the time, date, and place designated in the Invitation to Bid. The Bid Security personnel read the name of each bidder, the bid percentage, aloud and a bid abstract sheet was completed. Upon investigation of the bid opening process by this department it was found that the documents appear to be original documents, and that the page in question does not appear to have been altered. This agency holds the security of all bids in the highest regard. After bid opening steps are taken to secure all bids, even when we have made bids available for public inspection. It is the procurement officer's responsibility to examine all bids thoroughly and decide from the actual bid document, the award. Due to the lack of evidence to support irregularities other than human error in recording of the bid price, we therefore must deny your protest.

12. Appellant timely appealed and a hearing was held on September 20, 2001. DGS has submitted that a number of possibilities exist to explain what happened: Beltway's bid said -23% when it was submitted, but either Mr. Ames misread it as -3% and Ms. Wheeler recorded it as -3% without checking the bid herself, or Mr. Ames correctly read it as -23% but Ms. Wheeler recorded it as -3% without checking the bid herself; Ms. Dotson then, in entering the bids into ADPICS, entered the numbers shown on each Record of Bid rather than the numbers shown on the bids themselves, contrary to required procedure; Mr. Johnson subsequently checked the bids and discovered that Beltway's bid was actually -23% rather than -3%. However, the testimony of Mr. Ames and Ms. Wheeler and Ms. Dotson while acknowledging that they could have made a mistake was that they did not and what they respectively read out, saw and recorded was -3%. Ms. Wheeler testified that she looked at the number on the bid itself and Ms. Dotson testified that she also looked at the number (percentage) on the bid itself.

Decision

Appellant has the burden of proving that its protest has merit. See for example: Astro Painting & Carpentry, Inc., MSBCA 1777, 4 MSBCA ¶355 (1994); Beckmann Instruments, Inc., MSBCA 1412, 3 MSBCA ¶204 (1989). The record reflects that Mr. Ames twice read Beltway's

bid as -3%; Ms. Wheeler saw and recorded Beltway's bid as -3%; Ms. Dotson entered the bid into ADPICS as -3%; and the bid in DGS's file says -23%. Based on the testimony of Mr. Ames, Ms. Wheeler, Ms. Dotson, Mr. Klein and Mr. Lastner, the Board finds that Beltway's bid actually said -3% when it was submitted. Therefore, Appellant has met its burden to prove that its protest had merit.

Accordingly, the Board sustains the appeal.

Wherefore, it is Ordered this 26 day of September 2001, that the appeal is sustained and the matter is remanded to DGS for appropriate action.

Dated: September 26, 2001

Robert B. Harrison III
Board Member

I concur:

Anne T. MacKinnon
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 2236, appeal of West End Service, Inc. under DGS Invitation to Bid No. 001IT812630.

Dated: September 26, 2001

Mary F. Priscilla
Recorder