



## OPINION BY MR. KETCHEN

This appeal arises from a Department of General Services (DGS) procurement officer's final determination denying Appellant's protest of a contract award based on the solicitation of revised bids for construction of the Northwest District Court and Multi-Service Center in Baltimore, MD. Appellant alleges that it improperly was required to prepare its bid without clarification as to conflicting solicitation provisions regarding unforeseen subsurface conditions and that the negotiated procurement process utilized by DGS was not permitted by law. DGS affirmatively contends that Appellant's protest was untimely, and further that it properly resolicited bids according to statutory and regulatory procedures. Cirelli Joint Venture (Cirelli), the awardee and thus an interested party to these proceedings, contends that this appeal should be denied because Appellant was not prejudiced by any ambiguity created between the mandatory differing site conditions clause and the specifications clause regarding unforeseen subsurface conditions.

### Findings of Fact

1. On April 15, 1983, DGS issued an invitation for bids (IFB) for the construction of the Northwest District Court and Multi-Service Center in Baltimore, MD. Under this IFB, bids were to be submitted by May 19, 1983.

2. The IFB contained a "Standard Form of Proposal" requiring bids to be submitted in lump sum form. However, in order to increase competition and perhaps generate lower bid prices, the proposal form and the solicitation requested that the project work be bid assuming two distinct methods of foundation construction. Base bid "A" thus was to be computed using pressure injected footings (PIF) as the primary support for the foundation. Base bid "B" was to be premised upon the caisson method of subsurface support. Additionally, eight alternates were to be priced, in lump sum form, covering such specialty items as the installation of acoustic wood paneling, landscaping, terrazzo flooring, terrazzo benches, etc. Contract award was to be made on the basis of the lowest bid received for the base work, regardless of subsurface method, and the alternates selected by DGS on the basis of available funding.

3. On May 12, 1983, DGS issued Addendum No. 3 to the IFB<sup>1</sup> deleting the General Conditions "Differing Site Conditions" (DSC) clause. This clause provided, in part, as follows:

#### 3.03 DIFFERING SITE CONDITIONS:

A. The contractor shall promptly, and before such conditions are disturbed, notify the procurement officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site,

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<sup>1</sup>Addenda 1 and 2 to the IFB are not pertinent to this appeal.

of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract. The procurement officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

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The DSC clause was deleted because of its conflict with Specification Section 02370, para. 3.3, entitled "Caisson Excavation," (Tr 84; Exh. 26) providing, in part, as follows:

F. Obstructions : If rock, boulders, or other unforeseen obstructions are encountered which cannot be removed by standard caisson excavation methods, then removal of such obstructions will be performed by the Contractor at no additional cost to the Owner.

1. Remove such obstructions by hand labor using air-powered tools, or by other safe methods recognized in the construction industry. Standard caisson excavation methods include the use of core barrels with caisson drilling equipment.

2. The work of this section includes demolition and removal of rock, boulders, concrete, masonry and other subsurface obstructions.

4. Of the sixteen bids received by DGS, the following are pertinent to this appeal:

TABLE 1

<u>Bidder</u>	<u>Base Bid "A"</u>	<u>Base Bid "B"</u>
Huarte y Cia S.A. (Huarte)	\$4,809,000	\$4,999,000
William F. Wilke, Inc. (Wilke)	4,939,000	5,111,000
Cirelli	4,977,900	5,143,000

TABLE 2

	<u>Base Bid "A" plus Alts. 1 thru 6</u>	<u>Base Bid "B" plus Alts. 1 thru 6</u>
Huarte	\$5,073,000	\$5,263,000
Wilke	5,183,000	5,355,000
Cirelli	5,239,600	5,404,700

5. After recommending award of the contract to Huarte as the apparent low bidder for Base Bid A (PIF) plus alternates 1-6, the DGS procurement officer concluded that any contract awarded without the DSC clause would be void

under Maryland law. In lieu of rejecting all bids and cancelling the IFB, however, the procurement officer further determined that it would be in the State's best interest and permissible to proceed by soliciting revised bids pursuant to Art. 21, Md. Ann. Code, §3-204 as implemented by COMAR 21.05.04, "Procurement By Negotiated Award after Unsatisfactory Competitive Sealed Bidding." (Exhs. 7, 19).<sup>2</sup> The revised bids were to be based upon the original IFB as amended to include the DSC clause.

6. By letter dated June 27, 1983, DGS issued Addendum No. 4 to the IFB reinserting the DSC clause and soliciting revised bids for Base Bid "A", Base Bid "B", Add Alternate 2 (Landscaping) and Add Alternate 3 (Parking Area). (Exh. 19). Addendum No. 4 was sent to all bidders who had submitted bids on May 19, 1983. Revised bids were due by 2:30 p.m. on July 7, 1983. Addendum 4 provided that the bid prices for Add Alternates 1, 4, 5, 6, 7 and 8, received on May 19, 1983, were not to be changed by those submitting revised bids.<sup>3</sup> Bidders further were apprised that competitive negotiations would not be conducted prior to award except for compelling reasons.

7. Addendum 4, in pertinent part, also stated as follows:

4-5 Data concerning subsurface materials or conditions which are based upon soundings, test pits or test borings, have been obtained by the Architect for his own use in designing the project. Test boring data and soils report [sic] are available for review by bidding contractors in the Architect's office. Neither the Architect or the State assumes any responsibility for any conclusions or interpretations made by the Contractor on the basis of the information made available.

8. By letter dated July 7, 1983 and hand delivered to DGS prior to the time set for the opening of revised bids, Appellant filed a protest alleging a conflict between the DSC clause and Specification Section 02370, para. 3.3(F) regarding responsibility for excavation of unforeseen subsurface conditions using the Caisson Method (Base Bid "B"). According to Appellant, under the DSC clause, DGS assumed responsibility for unforeseen subsurface conditions. Specifications Section 02370, para. 3.3 (F), on the other hand, when read with the disclaimer contained in Addendum 4, para. 4-5, placed the responsibility for removing rock, boulders, or other unforeseen obstructions that could not be removed by standard caisson excavation methods on the contractor. This

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<sup>2</sup>DGS, at first, started to readvertise the entire procurement by placing a notice in the Maryland Register on June 24, 1983. However, this course of action was subsequently abandoned when DGS decided to solicit revised bids. (Tr. 86-87).

<sup>3</sup>By letter dated June 29, 1983 Huarte protested the failure to award it a contract as the apparent low bidder. It subsequently withdrew its protest after DGS issued Addendum No. 5 requiring those submitting revised bids to certify that their revised bids were limited solely to the revisions directed by Addendum 4.

protest was submitted only after Appellant had sought clarification of this apparent conflict from the DGS procurement officer prior to the time Appellant was required to submit its revised bid. (Tr. 17).

9. Revised bids nevertheless were received on July 7, 1983 with the following results:

TABLE 3

	<u>Price Bid</u> <u>May 19, 1983</u>	<u>Price Adjustment</u> <u>Due to Addendum 4;</u> <u>Insert DSC Clause</u>	<u>Revised</u> <u>Base Bid</u>
<u>Huarte:</u>			
Base Bid "A"	\$4,809,000	0.00	\$4,809,000
Base Bid "B"	4,999,000	0.00	4,999,000
Alternate 2	32,000	0.00	32,000
Alternate 3	108,000	0.00	108,000
<u>Wilke:</u>			
Base Bid "A"	\$4,939,000	(-139,000)	\$4,800,000
Base Bid "B"	5,111,000	(-131,000)	4,980,000
Alternate 2	25,000	0.00	25,000
Alternate 3	107,000	0.00	107,000
<u>Cirelli:</u>			
Base Bid "A"	\$4,977,900	(-189,000)	\$4,788,900
Base Bid "B"	5,143,000	(-189,000)	4,954,000
Alternate 2	25,300	0.00	25,300
Alternate 3	102,000	0.00	102,000

10. Total revised bids, for the PIF Method and Add Alternates 1-8 are shown below:

TABLE 4 (PIF Method)

	<u>Revised Base Bid "A"</u>	<u>Alternates 1-8</u>	<u>Revised Price "A"</u>
Cirelli	\$4,788,900	\$335,700	\$5,124,600
Wilke	4,800,000	352,000	5,152,000
Huarte	4,809,000	320,000 (N.C.)	5,129,000 (N.C.)

TABLE 5 (Caission Method)

	<u>Revised Base Bid "B"</u>	<u>Alternates 1-8</u>	<u>Revised Price "B"</u>
Cirelli	\$4,954,000	\$335,700	\$5,289,700
Wilke	4,980,000	352,000	5,332,000
Huarte	4,999,000	320,000	5,319,000

11. Appellant's witnesses testified that their bid would have been reduced by an additional \$181,500 had the conflict identified in its protest been clarified prior to bid opening. (Tr. 38, 44). However, such an adjustment to Appellant's bid still would not have affected the order of bids as seen below:

TABLE 6

	Revised Price "A" ( <u>Add Alts. 1-8</u> )	Revised Price "B" ( <u>Add Alts. 1-8</u> )
Cirelli	\$5,124,600	\$5,289,700
Wilke	<u>5,152,000</u>	<u>5,150,500</u>
Huarte	5,129,000	5,319,000

12. By final decision dated August 2, 1983, the DGS procurement officer denied Appellant's protest finding that the DSC clause and Specification Section 02370 (Caisson Method) were consistent since the "encountering of 'rock, boulders, or other unforeseen obstructions' in the course of caisson installation would not constitute a differing site condition under these criteria."

13. On August 12, 1983, Appellant filed a timely appeal.

14. By letter dated August 17, 1983, DGS advised the Board that the Maryland Board of Public Works had awarded a contract to Cirelli.

Decision

I. Timeliness

Initially, DGS contends that Appellant's protest is untimely since it knew of the grounds for protest earlier than the date and time set for submission of revised bids and yet failed to protest until moments before bid opening. The resolution of this issue is dependent upon COMAR 21.10.02.03 as follows:

**Time for Filing.**

A. Protests based upon alleged improprieties in any type of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated in it shall be protested not later than the next closing date for receipt of proposals following the incorporation.

B. In cases other than those covered in §A, bid protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier. (Underscore added).

Appellant's protest was filed on July 7, 1983 prior to the time set for receipt and opening of revised bids. Accordingly, Appellant plainly complied with the timeliness requirements of COMAR 21.10.02.03.4

The argument of DGS more precisely is an affirmative defense addressing its duty to issue a clarification which was not requested until immediately prior to bid opening. The method of obtaining a clarification and the requirements imposed on a bidder were discussed in the IFB instructions to bidders as follows:

**DISCREPANCIES:**

A. Should a bidder find discrepancies in the plans and/or specifications or should he be in doubt as to the meaning of [sic] intent of any part thereof, he must, not later than seven (7) days (Saturdays and Sundays excluded) prior to the bid opening, request clarification from the Architect, who will issue a written addendum. Failure to request such clarification is a waiver to any claim by the bidder for expense made necessary by reason of later interpretation of the contract documents by the architect.

B. Explanations desired by a prospective bidder regarding the Contract Drawings, Specifications, and other Bid Documents shall be requested in writing from the Department no later than ten days prior to the bid opening. Requests shall include the contract number and name and shall be directed to the address indicated in the Notice to Contractors.

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Thus, a bidder clearly was required to request a clarification as to a discrepancy at least 7 days prior to bid opening in order to permit DGS an opportunity to issue a written addendum to all prospective bidders. Notwithstanding this provision, however, we conclude that Appellant's request was reasonable and should have been considered prior to bid opening. Here Addendum Number 4 was received by Appellant nine days (6 working days) prior to bid opening. Oral inquiry as to the discrepancy was made several days later as soon as the problem was recognized. (Tr. 17). When DGS failed to respond, Appellant had no choice but to file a protest in order to preserve its competitive position. Given the expedited nature of this procurement, Appellant acted reasonably and was entitled to a clarification even if it resulted in a delay to the bid opening.

**II. Specification Ambiguity**

We see no need to decide whether an ambiguity existed in the specifications concerning the risk of encountering unforeseen subsurface conditions. Assuming, arguendo, that an ambiguity did exist, this did not make the solicitation or the resulting contract invalid. As is evident from the

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<sup>4</sup>Sunoptic, Inc., Comp. Gen. Dec. B-194722, 79-1 CPD ¶ 351, cited by DGS, is inapposite. There notice of an alleged specification impropriety was placed in the bid and thus was not received by the procurement officer until bids were opened. Here the protest was received prior to bid opening.

countless number of cases in this State and throughout the country concerning contract interpretation, ambiguities are common in contracts and are resolvable under well recognized principles.

The concern triggered by the perceived conflict in this bid protest appeal is the possible effect it had on Appellant's competitive position. Compare 52 Comp. Gen. 88 (1972). In other words, is it possible that Appellant would have submitted the lowest bid price had it been aware of DGS' intent in drafting the contract? By Appellant's own admission, its bid price for alternate "B" would have been reduced by only \$181,500 had it understood that the DSC clause applied to the caisson excavation process. Appellant did not contend that its price for alternate "A" would have been affected at all by the clarification. Accordingly, Cirelli's bid of \$5,124,600 for alternate "A" still would have been low even had Appellant received its requested clarification prior to bid.

The primary purpose of the State's bid protest procedures is to assure that all bidders are given an equal opportunity to compete. Compare Delmarva Drilling Company, MSBCA 1096, January 26, 1983. Here although the requested clarification might have enabled Appellant to submit a lower bid, it was not established that Appellant's competitive position was affected by the ambiguity recognized in the bidding process. For this reason Appellant was not prejudiced and cannot prevail on this ground.

### III. Revised Bids After Unsatisfactory Competitive Sealed Bidding

COMAR 21.05.04.01<sup>5</sup> provides that:

A. A negotiated award may be made under this chapter if all bids submitted under COMAR 21.05.02 result in bid prices in excess of the funds available for the purchase or if the procurement officer, with the approval of the agency head or designee, determines that all prices received are unreasonable as to one or more of the requirements and:

(1) That there are no additional funds available to permit an award to the lowest responsive and responsible bidder;<sup>6</sup> or

(2) That any delay resulting from a resolicitation under revised specifications or quantities under competitive sealed bidding as provided in COMAR 21.05.02 would be fiscally disadvantageous or would not otherwise be in the best interest of this State.

B. If there is more than one bidder, negotiations shall be conducted with all responsive and responsible bidders. These negotiations shall be conducted under the following restrictions:

(1) If negotiations about changing the specifications or quantities are held with any bidder, all other bidders shall be allowed to take part in the negotiation.

<sup>5</sup>See Art. 21, Md. Ann. Code, §3-204 (1981 Repl. Vol., 1982 Supp.)

<sup>6</sup>Lack of funds is not an issue in this appeal.



(2) An invitation for revised bids based on revised specifications or quantities shall be issued as promptly as possible, and shall provide for a prompt response to the revised requirements. An award shall be made upon the basis of the lowest bid price or lowest evaluated bid price submitted by any responsive and responsible bidder. Negotiations may not be conducted with bidders after revised bids have been submitted unless the procurement officer determines that there is a compelling reason. If the award is to be made without competitive negotiations, the invitation for revised bids shall so state.

C. If, after competitive sealed bidding, it is determined that there is only one responsive and responsible bidder, a non-competitive negotiated award may be made with that bidder under COMAR 21.05.05 or COMAR 21.05.06. (Underscoring added).

While Appellant recognizes that a procurement officer, pursuant to this regulation, may competitively negotiate with bidders where he reasonably concludes that all prices received were unreasonable and there is insufficient time to resolicit pursuant to the requirements for competitive sealed bidding, it questions whether this procedure may be followed where the original solicitation was defective. We conclude that it can and that the DGS procurement officer reasonably interpreted the regulations to permit the action taken.

Although it is the public policy of this State that competitive sealed bidding shall be the preferred method for awarding State procurement contracts, it is clear that other methods of procurement may be followed where it reasonably is determined that an emergency exists which leaves insufficient time to employ competitive sealed bid principles. COMAR 21.05.01.02. The procedure outlined in COMAR 21.05.04.01 is premised upon this type of emergency. It is irrelevant in this regard that the prior solicitation was defective. All that matters is that there is a procurement need which cannot await the formalities of the competitive sealed bid process and that an emergency procedure is chosen which is calculated to achieve as much competition as is practicable.<sup>7</sup> COMAR 21.05.04.01 achieves this goal and offers a practical procedure for utilization where bids previously were solicited by formally advertising.

Appellant next notes that DGS readvertised the procurement in the Maryland Register on June 24, 1983 and thereby announced its intention to procure by competitive sealed bids. Bid opening was to occur on July 26, 1983 pursuant to this notice. DGS, in the interim, decided to procure pursuant to COMAR 21.05.04.01 and solicited its revised bids on July 7, 1983.

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<sup>7</sup>Compare COMAR 21.05.05 which outlines procedures for emergency procurements, i.e., those where there has not been a previous attempt to secure bids under a solicitation and where there is insufficient time to follow competitive sealed bid requirements.

Thus, only 19 days were saved by reprocurring pursuant to COMAR 21.05.04.01. Appellant contends that it was unreasonable and arbitrary to utilize a negotiated procurement and limit competition in order to save 19 days in the award process. This bare assertion, however, is unsupported by any evidence of record. It is clear that the DGS Secretary was advised early on that COMAR 21.05.04.01 could be used only if ". . . a delay is likely to lead to expected higher construction costs . . ." (Exh. 7). The record further establishes that some thought was given to the matter before a decision to proceed under a negotiated procedure was made. (Tr. 86). While the basis for this decision was never addressed by the parties at the hearing, we cannot say that the decision to negotiate was made without consideration of the procurement laws or otherwise was unreasonable.

In order to employ COMAR 21.05.04.01, it also must be demonstrated that the prices received were unreasonable. Here, by including Specifications Section 02370, para. 3.3(F) in the IFB, DGS expressly disclaimed liability for the cost of removal of rock, boulders or other unforeseen obstructions by other than standard caisson excavation methods. The deletion of the DSC clause from the original IFB by Addendum No. 3 reinforced this language by removing any doubt as to where the risk of unforeseen subsurface conditions was being placed under the contract. In reviewing bids received under the original solicitation the DGS procurement officer thus presumed that each contractor had included contingency funds in their respective bids to protect against the effects of unforeseen subsurface conditions in the performance and scheduling of the contract work. The inclusion of these contingency funds was determined to make all bid prices unreasonable and warrant resolicitation. This was a reasonable conclusion to draw as was borne out later during the resolicitation process wherein substantial price reductions were made when the DSC clause was reinserted in the contract. Compare Foster Construction Co. v. United States, 193 Ct.Ct. 587, 435 F.2d 873 (1970).

In summary, the Maryland procurement law gives procurement officers substantial discretion to determine whether it is in the State's best interest to reject all bids and, if so, whether and how to resolicit. UMBC v. Solon Automated Services, Inc., Misc. Law No. 82-M-38, 82-M-42 (Balto. Co. Cir. Ct., Oct. 13, 1982). This Board only may review the exercise of such discretion to ascertain whether it was fraudulent or so arbitrary as to constitute a breach of trust. See Biddison v. Whitman, 183 Md. 620, 624, 625, 39 A.2d 800, 802 (1944); Hanna v. Board of Education of Wicomico Co., 200 Md. 49, 51, 87 A.2d 846, 847 (1952). Here Appellant has failed to demonstrate that the DGS procurement officer's decision to procure pursuant to COMAR 21.05.04.01 was fraudulent, illegal or so arbitrary as to constitute a breach of trust. See Xerox Corporation, MSBCA 1111, April 25, 1983, p. 7. Accordingly, we see no basis to act.

For all of the foregoing reasons, the appeal is denied.