

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of WOLFE BROTHERS INC.)
)
Under State Highway Administration) Docket No. MSBCA 1141
)
IFB No. F-522-044/504/063-770)

June 3, 1983

Timeliness - A contractor could not have learned that the low bid of its competitor contained uninitialed corrections until SHA completed its mathematical audit of bids received and made said bids available to the public for review. A protest filed within seven days of the date these bids were made available to the public was considered timely.

Minor Informalities - The procurement officer, under State regulations, is given discretion to determine whether an irregularity is minor or substantive. Here the SHA procurement officer reasonably determined that the failure to initial bid alterations was a minor informality which was waivable in the State's best interest.

Bids - Correction - Initialing Requirement - Failure to initial two bid corrections made with liquid "wite-out" or similar commercial product where there was no doubt as to the intended bid price was deemed to be a minor irregularity (informality).

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OPINION BY CHAIRMAN BAKER

This appeal concerns a competitive sealed bid procurement conducted by the Maryland State Highway Administration (SHA) for the construction of a second roadway along existing U.S. Route 15 in Frederick, MD. Appellant,

the second low bidder under this procurement, initially filed a protest with the SHA procurement officer contending that it should be awarded the contract because the low bid submitted by Haverhill Contracting Company, Inc. (Haverhill) was non-responsive. The SHA procurement officer disagreed and, after denying Appellant's protest, awarded a contract to Haverhill on April 19, 1983. Appellant now seeks a declaration that the aforesaid contract is void and that it is entitled to the contract award.

Findings of Fact

1. On March 22, 1983 competitive sealed bids publicly were opened by SHA pursuant to the captioned invitation for bids (IFB). A total of seven bids were received as follows:

Haverhill	12,877,097.87
Wolfe Brothers, Inc.	12,892,409.40
Green Construction Company	13,301,534.25
Richard F. Kline	13,508,019.07
Hempt Bros., Inc.	14,020,601.55
S.J. Groves & Sons Company	14,717,369.25
J.F. Allen Company	17,771,888.75

No irregularities in the Haverhill bid were identified by SHA officials at the bid opening.

2. Contract General Provision GP-3.01 is entitled Consideration of Proposals and provides that:

After proposals have been publicly opened and read, they will be audited for mathematical accuracy and reviewed to determine that there are no irregularities as outlined in GP-2.14 and GP-2.26. Upon completion of the aforementioned audit and review, the results will be made available to the public. In the event of a discrepancy between the bid total shown on the bid form and the total determined by mathematical audit of the amounts, lump sum and extensions, that are bid for each item in the price schedule, the amount determined by mathematical audit shall govern. In the case of discrepancy between prices written in words and those written in figures, written words will govern. In the event that the unit price is not included, the unit price shall be the extended price divided by the quantity. (Underscoring added).

3. During the audit of Haverhill's bid, a discrepancy was found between the total bid price and the sum of the extended unit prices. When the unit bid prices, properly extended, were added, the SHA auditors determined Haverhill's total bid to be \$1,000.40 higher than the sum appearing on the bid documents. Pursuant to GP-3.01, Haverhill's bid price was adjusted, in accordance with this mathematical audit, to \$12,878,098.27.

4. Mr. Lawrence W. Wolfe, Appellant's President, learned of this mathematical error on March 23, 1983 and promptly retained counsel. In view of the closeness of the bids, Mr. Wolfe asked his attorney to arrange for him to review the Haverhill bid documents and the alleged error.

5. The SHA audit and review was completed on March 28, 1983 and Appellant was given access to the Haverhill documents on that date. Appellant's estimator reviewed the documents and confirmed that a \$1,000.40 mathematical error had been made. Further, he noted that bid items number 439 and 608 had been altered by use of liquid "wite-out". No initials had been placed next to the altered prices.

6. Contract General Provision GP-2.06 is entitled "Preparation of Bid" and reads as follows:

A. The bidder shall submit his bid upon the blank form(s) furnished by the Administration. The bidder shall specify a price in dollars and cents for each pay item given, and shall show the products of the respective unit prices and quantities written in figures in the column provided for that purpose, together with the total amount of the bid obtained by adding the amounts of the several items.

B. The bid form(s) shall be filled out legibly in ink or typed. The bid, if submitted by an individual, shall be signed by such member or members of the partnership as have authority to bind the partnership [sic]; if submitted by a corporation, the same shall be signed by an officer, and attested by the corporate secretary or an assistant corporate secretary. If not signed by an officer, as aforesaid, there must be attached a copy of that portion of the Bylaws or a copy of a Board resolution, duly certified by the corporate secretary, showing the authority of the person so signing on behalf of the corporation. In lieu thereof, the corporation may file such evidence with the Administration, duly certified by the corporate secretary, together with a list of the names of those officers having authority to execute documents on behalf of the corporation, duly certified by the corporate secretary, which listing shall remain in full force and effect until such time as the Administration is advised in writing to the contrary. In any case where a bid is signed by an Attorney in Fact, the same must be accompanied by a copy of the appointing document, duly certified. All bids shall be signed in ink. All erasures or alterations shall be initialed by the signer in ink. (Underscoring added).

7. By letter dated April 4, 1983, Appellant filed a bid protest with the SHA procurement officer alleging the following:

Based upon our review of Haverhill's bid, there are several gross irregularities. If the Haverhill bid were to be accepted, such action would seriously subvert the integrity of the bidding process. The undisputed irregularities in question are as follows:

1. Bid item no. 439 has been altered, but not initialed in violation of said regulation.
2. Bid item no. 608 has been altered, but not initialed in violation of said regulation.

3. The bid items do not add up to equal the Aggregate Amount set forth on page 54 [of the Schedule of Prices.]

8. Bid item 439 appears on page 28 of the IFB Schedule of Prices. This item requests a unit price for "10 square yards of contingent retaining wall at station 571+." The unit price, i.e. price per square yard, was required to be written in words and numbers and extended to reflect a total price for the 10 square yards. In completing the Schedule of Prices, Haverhill apparently erred or had a change of heart concerning the unit price for bid item 439. The price originally written in ink for this item thus was obliterated by use of "wite-out" or some similar commercial product. The intended bid price of three hundred dollars per square yard was entered in words and numbers and extended to reflect a total amount of \$3000. These corrected entries, submitted with the bid documents, are clear and unambiguous.

9. Bid item 608 was for 7,119 tons of concrete shoulders to be constructed using bituminous concrete and slag. The IFB gave bidders the option however, to bid the job based on the use either of bituminous concrete (alternate A) or bituminous concrete/slag (alternate B). A bidder, such as Haverhill, who chose alternate A thus was not to bid on item 608. In completing the IFB Schedule of Prices, Appellant apparently erred and began to enter a price for item 608. This error was corrected by the use of "wite-out" to obliterate the unintended bid price. The words "no-bid" thereafter were entered in a legible manner.

10. Although Haverhill did not initial the alterations to its bid prices for items 439 and 608, it did initial apparent corrections to bid items 705 and 821.

11. By final decision dated April 14, 1983, the SHA procurement officer denied Appellant's bid protest on the grounds that: (1) the failure to initial alterations to the bid constituted a minor informality; and (2) the error in adding the extended unit prices was correctable pursuant to GP-2.14.¹

12. During the hearing in this appeal, Appellant withdrew that portion of its appeal concerning the error made in adding the extended unit prices. (Tr. 95). Haverhill, however, asked this Board to consider whether the remaining issues were raised in a timely manner with the procurement officer.

¹GP-2.14 provides, in pertinent part, that:

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.

Decision

Although Haverhill contends that Appellant's protest was not filed timely with the procurement officer, we disagree. Appellant could not have learned of the bid corrections made by Haverhill until it had an opportunity to review the bidding documents. These documents were not available until March 28, 1983 at which time Appellant's representatives travelled to SHA's offices to review them. A bid protest thereafter was filed on April 4, 1983, seven days after Appellant learned of the alleged irregularity. This comports with the requirements of COMAR 21.10.02.03B² concerning the permissible time period for filing a protest.

The sole substantive issue raised in this appeal is whether the failure to initial a bid correction is a minor irregularity which may be waived by a State procurement officer. Contract General Provision GP-2.14 defines a minor irregularity as:

. . . one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors. The defect or variation in the bid or proposal is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured and the intent and meaning of the entire bid or proposal is clear. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State.

See also, COMAR 21.06.02.03. As is apparent from this language, the procurement officer is given discretion to determine whether an irregularity either is waivable or fatal to the consideration of a bid or proposal. This Board cannot disturb the procurement officer's discretionary decision unless it finds that it was fraudulent or so arbitrary as to constitute a breach of trust. Hanna v. Board of Education of Wicomico Co., 200 Md. 49, 87 A.2d 846 (1952); University of Maryland, Baltimore County Campus v. Solon Automated Services, Misc. Law No. 82-M-38 and 82-M-42 (Circ. Ct. for Balto. Co., Oct. 13, 1982); compare Excavation Construction, Inc. v. United States, 204 Ct.Cl. 299, 494 F.2d 1289 (1974).

²COMAR 21.10.02.03B provides that "[i]n cases other than those covered in SA, 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."

Appellant's initial argument is that contract General Provision GP-2.06B and COMAR 21.05.02.03B.(3) provide a mandatory requirement that all erasures or alterations be initialed in ink by the signer of the bid. Failure to initial a bid alteration, by law, thus is said to be fatal to the responsiveness of a bid and no discretion remains with a State procurement officer to determine otherwise.

When statutory or regulatory language permits, a requirement may be held to be directory and not mandatory. Carr v. Hyattsville, 115 Md. 545, 549-550, 81 A. 8 (1911). As further stated by the Maryland Court of Appeals:

If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. * * * In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had, or had not so vital an influence * * * as probably prevented a free and full expression of the popular will.

Hammond v. Love, 187 Md. 138, 145, 49 A.2d 75 (1946).

Here, GP-2.14 apprised all bidders that the failure to prepare a bid as directed by GP-2.06 would result only in the bid being considered irregular and that said bid then would be referred to the procurement officer for consideration and appropriate action.³ There is no express language in the

³GP-2.14 provides in pertinent part, as follows:

GP-2.14 Mistakes in Bids

A. General. Technicalities or minor irregularities in bids, as defined below, 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 his bid, or waive the deficiency where it is to the State's advantage to do so.

When at any public opening of bids, a bid appears to be irregular, as herein specified, this fact may be announced when read. Said bid shall be read as other bids and then referred to the procurement officer for consideration and appropriate action thereon in accordance with these General Provisions.

Pending a determination by the procurement officer any Bid having one or more of the following faults will be considered irregular:

- (1) If the bid form furnished by the Administration is not used or is altered.
- (2) If not prepared as directed in GP-2.06.
- (3) If there is an omission of a necessary word(s) or numeral(s) required to make a price unmistakably clear, as well as any

regulations or the IFB, however, which required the SHA procurement officer to reject Haverhill's bid for failure to initial erasures or alterations. Accordingly, we find that the SHA procurement officer properly had discretion to consider the irregularity involved here and concomitantly that the regulatory language requiring bid corrections to be initialed was directory only.

Appellant next argues that Maryland's procurement law is required to be applied in such a manner as to preserve the integrity of the competitive bid system. In this regard, Appellant states that there is no certainty that the person who signed the bid on behalf of Haverhill was aware of the changes made. We assume from this argument that Appellant is concerned that such a bid potentially could be repudiated after opening thereby giving the bidder "two bites at the apple" and an advantage over its competitors.

Where a bidder fails to initial an erasure or alteration in its bid price, but the erasure and correction leave no doubt as to what the intended price is, such a bidder has made a legally binding offer, acceptance of which would consummate a valid contract which the bidder would be obliged to perform at the offered price. See 49 Comp. Gen. 541 (1970). Further, where it is evident that the erasures or alterations were made prior to the submittal of bids, the bidder is presumed to have knowledge of the changes and is held responsible for the contents of its bid. United States v. Sabin Metal Corp., 151 F. Supp. 683, 688 (S.D.N.Y. 1957), aff. 253 F.2d 956 (2nd Cir. 1958).

Here the alterations made by Haverhill did not result in any ambiguity. The price bid for item 439 was a clearly legible \$300 per square yard. It further was evident that no bid was intended for item 608 since Haverhill legibly wrote "no bid" on the Schedule of Prices and because this item was not to be priced under the "alternate A" bid submitted. While a discrepancy

other omission; or addition of item(s) not called for.

- (4) If the bid form does not include a price for each item in the unit price schedule.
- (5) If there are additions, conditions or unauthorized alternate bids, unless prior to the date set for the opening of said bids, the Administration notifies in writing, all bidders to whom such bid documents have been issued, that such changes will be permitted.
- (6) If the bidder adds any provisions reserving the right to accept or reject the award. (Underscoring added).

did exist between the total bid price quoted and the sum of the extended unit prices for all items, this mathematical error was not traceable to either of the bid items where uninitialed alterations had been made. Further, as previously found, the foregoing discrepancy as to bid prices was resolvable on the face of the bid documents pursuant to the express terms of the IFB. Accordingly, the SHA procurement officer reasonably concluded that Haverhill had submitted a valid and binding bid.

Appellant further expressed concern that the acceptance of bids with uninitialed erasures ultimately would invite tampering and result in prejudice to honest bidders. Whether this may occur in the future, we cannot say. We are satisfied, however, that the uninitialed alterations here were made prior to bid. Further, given that all bids publicly were opened and announced in Appellant's presence, Appellant cannot argue that its competitive position unfairly was affected by the subsequent discovery that Haverhill had made uninitialed alterations to its bid.

For all of the preceding reasons, we conclude that the SHA procurement officer reasonably determined that Haverhill's failure to initial bid alterations was a matter of form and, hence, a minor irregularity. Such irregularities properly may be waived as was done here. Compare Durden & Fulton, Inc., Comp. Gen. Dec. B-192203, 78-2 CPD ¶172; Corbin Sales Corporation, Comp. Gen. Dec. B-182978, 75-1 CPD ¶347; 49 Comp. Gen. 541 (1970); Burns Electronic Security Services, Inc., Comp. Gen. Dec. B-191312, 79-1 CPD ¶1 (1978).

The appeal, therefore, is denied.