

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	)	
	)	
ABSOLUTE RESTORATION, INC	)	Docket No. MSBCA 2088
	)	
Under DHMH Invitation to Bid	)	
Project No. 08-99-08-06	)	

December 30, 1998

Bid Evaluation - In the context of an invitation to bid, where a review of the bid documents reveals a latent ambiguity concerning how the low bid is to be determined, there is no assurance that bidders were bidding on an equal footing, and a rebid is appropriate notwithstanding that prices have been exposed.

APPEARANCE FOR APPELLANT	None
APPEARANCE FOR RESPONDENT	Jeston Hamer, Jr., Staff Attorney Joel Tornari, Assistant Attorney General Baltimore, MD

OPINION BY BOARD MEMBER STEEL

This matter comes before this Board on the bid protest appeal of Absolute Restoration, Inc. (Absolute) of a decision by the Springfield Hospital Center (SHC) that its bid was non-responsive and therefore must be rejected.<sup>1</sup> For the reasons set forth below, the Board remands the appeal to SHC for rebid.

Findings of Fact

1. SHC issued an invitation for bid ("IFB"), Department of Health and Mental Hygiene (DHMH) No. 08-99-08-06, for the removal and replacement of roof shingles and other related roof repair work on the roof of the Muncie Barn at SHC.

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<sup>1</sup> The review of this appeal has been considerably delayed by the following course of events. By letter dated September 12, 1998 from the SHC Procurement Officer the Appellant was told that his low bid was non-responsive. The Appellant was also told that his initial bid protest must be filed with this Board rather than the Procurement Officer. Thus, when the Board received the appeal on September 15, the Procurement Officer had not issued a final decision. However, it was clear from the appeal filed with this Board that also on September 15, a copy of the "protest" appeal was received by the Procurement Officer. The protest, thus, appears to be timely. See COMAR 21.10.02.03. The final decision of the Procurement Officer was issued on this protest/appeal on October 30, 1998 and on November 5, the Appellant filed a letter with this Board appealing that final decision of the Procurement Officer. In the interest of time, the Board received this appeal in the instant docket rather than assigning a new docket number to the November 5, 1998 appeal. Following a pre-hearing conference, an Agency Report was filed on December 4, 1998, and a hearing was scheduled for December 21, 1998. Appellant failed to appear at the hearing, and thus the Board reviews this appeal based on the record to date.

2. The first page of the IFB sets forth the project title and summary of work, bid date and time, and name of the Procurement Officer. Pages 2- 4 appear to be those pages of the bid documents which the Procuring Agency expects to receive as the bid submission. There are several blanks on the pages, which the bidders are expected to fill in, such as the date, name of the contractor, dates of commencement and completion of the project, signature lines, contract price, and MBE certification.
3. Of particular concern is the line for the Contract Price which provides:

Article 3 B The Contract Price B The Owner shall pay the Contractor (subject to additions and deductions specified herein) as follows:

\_\_\_\_\_  
(Insert lump sum price, alternates, unit prices, incremental payments, or as the case may require.

4. Section I of the IFB sets forth terms and condition clauses regarding parties, scope of work<sup>2</sup> changes, payments, contract award<sup>3</sup>, and in paragraphs 7 - 43, there appears language covering such matters as non-discrimination, choice of law, financial disclosure, contingent fees, duration of contract, bribery and debarment, termination for default, arrearage, termination for convenience, tax exemption, and EPA & OSHA compliance.
5. Section II, starting at page 16, sets forth those provisions which appear to be directly related to the work under this IFB. For example, under the caption "Detailed Specifications", appears

1. SCOPE OF WORK

- a. The work under this contract consists of but is not limited to the removal of the existing roof shingles and installing a new shingle roof on the Muncie Barn.
- b. It is the intent of this contract to provide for the removal of the existing roofing system down to the structural roof deck for the main roof, dormer roofs and side walls, the two vent roofs and the two silo roofs -furnish and install approximately one hundred (100)square of twenty-five (25) year asphalt/fiberglass shingles, underlayment felt, aluminum drip edge and aluminum flashing. Lead stock vent flashing shall be replaced only if deemed necessary by a Springfield Hospital Center Representative.
- c. Remove the copper caps from silo roofs. Install new roofsystems and reattach copper cap. Remove lightning rod system and reattach to

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<sup>2</sup> 2. Scope of Work states in totality the following: "The contractor shall furnish all labor, materials, equipment, vehicles, and services in order to complete the total work in accordance with the specifications, drawings, applicable codes and Federal and State laws and regulations". This scope of work is apparently intended to be expanded by the Specifications attached to the IFB.

<sup>3</sup> 6. Contract Award states, "Award of this contract will be based on the most favorable bid price or evaluated bid price, or most advantageous offer, as specified in the Solicitation."

original after installing new roof system.

- d. Install all flashing using approved methods to adequately protect against any leaks for the twenty-five (25) year warranty period.
- e. The methods of installation shall be in strict accordance with the latest editions of the NRCA'S (National Roofing Contractors Association) Roofing and Waterproofing Manual the SMACNA (Sheet Metal/Air Condition Contractors Association) Architectural Sheet Metal Manual and the Asphalt Roofing Manufacturers Association guidelines on asphalt/fiberglass shingle roofing.

6. Under Detailed Specifications, 11. APPLICATION, (b) states

- (1) If deemed necessary flash vent pipes with 4# lead flange and sleeve-type flanges that extend a minimum 12" from the pipe, set flanges in plastic roof cement and strip edges with asphalt-saturated fabric.

7. Section III of the IFB is captioned **ALTERNATES AND/OR UNIT PRICES**. In its entirety, this section states:

1. Unit Price # 1:

- a. The Contractor shall provide a price per square foot to remove bad sections of sheathing, supply and install new 1"x6" #2 southern pine tongue and groove pine sheathing.

2. Unit Price #2:

- A. The Contractor shall provide a unit price to remove and install vent stack flashing using 4# lead to existing dimensions.

- 8. On August 31, 1998, a pre-bid conference was held which was not attended by a representative of Appellant<sup>4</sup>. There was no record of a discussion of unit pricing, and no amendment to the IFB was sent following the pre-bid conference.
- 9. Nine bids were received and opened on September 3, 1998.<sup>5</sup> In review of the bid submitted by Appellant, the Procurement Officer noted that Appellant provided a base bid (as apparent low bidder), but did not include unit prices as required by Section III of the IFB. In total, three of the nine bidders failed to include unit prices with their bids. Appellant was notified that the Procurement Officer considered its bid non-responsive, and subject to the vagaries set forth in footnote 1 above, this appeal followed.

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<sup>4</sup> Nor was it attended by the other two bidders who did not submit unit price bids.

<sup>5</sup> See Agency Report Exhibit C attached hereto and incorporated herein.

## Decision

In response to the Procurement Officer's finding that the bid was non-responsive Appellant argues that

the bid-tabulation sheet was misleading. There was no space provided to give any unit price(s). I would say at least 1/3 of the bids received that day also did not include unit prices due to the confusing bid tabulation sheet. All other projects that I have bid on their bid sheets have spaces provided for all prices including base, unit, or alternates. Unit prices do not determine whether or not a contractor is low bidder. Unit prices can be an add item as well as a deduct item. A contractor is awarded a project by base price.

Respondent counters with an accurate statement of the law regarding non-responsiveness, stating that in order to be responsive a bid must conform in all material respects to the requirements contained in the invitation for bids. State Fin. & Proc. Art. § 11-101(s)(2), COMAR 21.01.02.01(78). The Respondent further notes that this Board has held that a bidder has a duty to seek clarification of any ambiguity that it detects in the specifications prior to bid opening. Martin G. Imbach, Inc. MSBCA 1020, 1 MSBCA ¶52 (1983); Dominion Contractor's, Inc., MSBCA 1041, 1 MSBCA ¶69 (1984); Concrete General, Inc., MSBCA 1062, 1 MSBCA ¶87 (1984), Bernie's Vending Service, Inc., MSBCA 1420, 3 MSBCA ¶207 (1989).

This Board agrees that where a patent ambiguity exists, vendors must inquire prior to bid submission. This requirement protects all bidders by ensuring that they bid on the same specification; and aids the administration of government contracts by requiring ambiguities to be clarified before bidding, thus avoiding costly litigation after the fact. George E. Newsome v. United States, 230 Ct. Cl. 301, 676 F.2d 647 (1982). The Respondent argues that a reasonable bidder should have understood that the IFB sought a lump sum to do the basic removal and installation of roofing tiles, and a unit price for additional work if it were directed by the engineer. Notwithstanding the correct statement of the law regarding non-responsive bids and ambiguity in a bid solicitation, a review of the IFB and the bids submitted shows that there was apparent confusion as to what the bidder's price was intended to cover. It appears that six of the nine bidders believed that the State intended that unit price bids be shown for sheathing removal and installation and removal and installation of vent flashing and that three did not.

We are also concerned that it is not apparent from the face of the bid document how the low bid was to be determined. Did Respondent intend to determine the low bid by looking at the base bid, or the base bid as well as unit prices, or on some other basis? It may be that the Agency intended to select the bidder on base price alone, since we don't know how the agency would determine the low bid if unit prices were to be considered in such determination, and it could not be known in advance how much unit price work would be required. If the unit price was intended to be evaluated, the evaluation factors must have been set forth in the specifications. No evaluation factors are set forth as required by COMAR 21.05.02.13. See also COMAR 21.05.02.21.

The Board concludes that the Respondent was in fact asking for a base bid and unit prices for work that might be expected to be directed by the engineer as the work progresses. However, a

surface reading of the IFB Section III and the scope of work, combined with the absence in the bid document of a separate line for the base bid and separate lines for unit prices in the bid price section of the document engenders sufficient confusion that all of the bidders may not have been on an equal footing. We find this is a latent ambiguity. No bidder made any pre-bid inquiry concerning what SHC intended the bid price to be based upon. It is apparent that Appellant, as well as all other bidders, were unaware that an ambiguity existed when they bid on this project.

We are concerned that prices have been exposed. However, based on the record, it cannot be concluded that bidders were bidding on an equal footing since there is apparent confusion as to what the bid price was intended by the agency to encompass. We are confronted with a situation that is confusing enough that remedial action through a rebid is warranted. Therefore, while we do not find that Appellant's appeal should be sustained for the reasons stated in the protest and the contract be awarded to it, we shall sustain the protest in part and remand the matter to Respondent for remedial action for the reasons stated above. So Ordered, this 30<sup>th</sup> day of December, 1998.

Dated: December 30, 1998

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Candida S. Steel  
Board Member

I concur:

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Robert B. Harrison III  
Chairman

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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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2088, appeal of Absolute Restoration, Inc., Under DHMH Invitation to Bid Project No. 08-99-08-06.

Dated: December 30, 1998

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Mary F. Priscilla  
Recorder