

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of KELLER BROTHERS, INC./)	
ACCUBID EXCAVATION, INC.)	
JOINT VENTURE)	Docket No. MSBCA 1946
)	
Under Department of General)	
Services Contract)	
No. TA-000-941-036)	

May 3, 1996

Responsiveness - Bid Bond Defect - Where a bid bond submitted by the low bidder did not provide for automatic extension of the surety's obligation for up to 90 additional days without consent of the surety, the bid was properly determined to be nonresponsive pursuant to COMAR 21.06.07.02B.

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OPINION BY CHAIRMAN HARRISON AND BOARD MEMBER STEEL

Appellant timely appeals the final decision of the Department of General Services (DGS) that the bid bond submitted with its bid caused its bid to be non-responsive.

Findings of Fact

1. In January of 1996, DGS issued Invitation for Bids No. TA-000-941-036 for construction of the Law Enforcement Driver Training Facility at the Maryland Public Safety Training Center located in Sykesville, Maryland. The Invitation for Bids (IFB) included specifications, drawings,

the bid form, a bid envelope, affidavits, Minority Business Enterprise documents, and DGS's standard Bid Bond form.

2. The IFB required that all bids over \$100,000 must be accompanied by a bid bond. This requirement for a bid bond was included in the IFB pursuant to the State Finance & Procurement Article (Article) §13-207(b) and COMAR 21.06.07.02A . COMAR 21.06.07.03C (1) requires that a bid bond "shall be in the form specified by the Attorney General." Failure of a bidder to comply with bid bond requirements dictates that the Procurement Officer reject the bid as nonresponsive. Article §13-208(a); COMAR 21.06.07.01D ; COMAR 21.06.07.02B .

3. The Bid Bond form issued with the IFB was in the form approved by the Office of the Attorney General at DGS on June 6, 1995 and November 7, 1995, and was drafted from that form previously appearing in COMAR 21.06.07.03C from 1981 through 1989.

4. At the prebid meeting for the subject procurement, DGS informed bidders that they must use DGS's Bid Bond form. This statement was written into the minutes of the prebid meeting as follows:

For Bid Security, a Bid Bond of an amount not less than five percent (5%) of the base bid must be furnished with the Bid. Certified Checks and Cash are acceptable but not preferred alternatives. Forms provided in the Bid Documents must be utilized.

The minutes of the prebid meeting were attached to Addendum No. 1 to the IFB issued on February 20, 1996.

5. Bids were opened on March 7, 1996. The apparent low bidder, submitting a bid of \$6,775,884, was Appellant, Keller Brothers, Inc./ AccuBid Excavation, Inc. Joint Venture (Keller). The second low bidder submitting a bid of \$6,789,911 was Bryn Awel Corporation (Bryn Awel).

6. Keller submitted a bid bond with its bid, but Keller's bid bond was on an American Institute of Architects (AIA) form rather than on the Department of General Services' approved form. The DGS Bid Bond form provides that the State may request and the contractor (without securing approval of the surety) may agree to extend the time for acceptance of bids for up to ninety additional days. Keller's AIA bid bond form contains no such provision.

DGS's required Bid Bond form states that the bond is enforceable unless "the Principal shall pay the State for any cost of procuring the work which exceeds the amount of its bid." However, the AIA bid bond form submitted by Keller says the bond is enforceable unless "the principal shall pay the Obligee [the State] the difference . . . between the amount specified in said bid and such larger amount for which the Obligee may in good faith contract with another party to perform the work. . . ."

7. Prior to bidding, Keller did not ask the Procurement Officer whether or not the AIA bid bond form was acceptable to the State.

8. No pre-bid opening protest concerning the terms, conditions, and requirements of the DGS Bid Bond form was filed by Keller or anyone else.

9. By letter dated March 12, 1996, the Procurement Officer rejected Keller's bid as nonresponsive because its AIA bid bond form did not authorize the Contractor, at the request of the State, to extend the ninety day period for acceptance of the bid without consent of the surety, and secure payment of all costs of reprourement. By letter dated March 13, 1996, DGS received a timely protest from Keller contesting the rejection of its bid. By final decision dated March 21, 1996, DGS denied Keller's protest and sustained the protest of Bryn Awel as it related to use by Keller of the AIA bid bond form. This appeal followed.

10. During the hearing of the appeal, counsel for Appellant conceded that the provision in the DGS Bid Bond form reciting that the State may request an extension of the time for acceptance of bids for up to an additional ninety days and the contractor may agree thereto without securing approval of the surety was a substantive provision, the absence of which could not be waived by the Procurement Officer.

Decision

Appellant challenges the insistence upon the submission of the DGS Bid Bond form, contending that the Appellant's AIA bid bond in fact satisfies the DGS Bid Bond form, that neither DGS nor its counsel have the authority to require provisions in bid bonds that are not specifically provided for in the General Procurement Law or COMAR, and that the IFB properly read does not require the DGS Bid Bond form. In view of our determination that the failure of Appellant's AIA bid bond to include the ninety day extension provision required rejection of Appellant's bid on

responsiveness grounds, we shall not discuss the effect of the difference in language in the bonds regarding liability for re-procurement costs.

The contention that the AIA Bid Bond form complies with the IFB's bid bond requirements is inconsistent with the concession set forth in Finding of Fact No. 10 above that the 90 day extension provision in the DGS Bid Bond form is a substantive requirement, the omission of which could not be waived by the Procurement Officer. We agree that the 90-day extension provision constitutes a substantive requirement that may not be waived, and the absence of which thus requires that the bid be rejected. *Madigan Construction Company, Inc.*, MSBCA 1350, 2 MSBCA ¶162 (1987), dealt with a bid bond which only granted a 60-day extension period rather than the required 90-day extension period set forth in the State's Bid Bond form and naming the U.S. Postal Service rather than the State as obligee. The Board stated, at page 5,

To permit a waiver of a bid bond requirement provided for in the solicitation would tend to compromise the integrity of the competitive bid system. A surety could pick and choose those occasions when it would request a waiver after assessing its potential liability in light of the other competitive bids. Such a procedure would give the low bidder "two bites at the apple", a practice we do not endorse, and an advantage over its competitors. *H.A. Harris, Inc.*, MSBCA 1109, 1 MICPEL ¶38 (February 4, 1983). We hold, therefore that the . . . mistakes in the bonds cannot be waived as minor informalities.

We specifically find that the AIA bid bond form that accompanied Appellant's bid did not provide for the ninety-day extension period required in the DGS Bid Bond form and thus Appellant's bid was required to be rejected pursuant to COMAR 21.06.07.02B .

Proceeding seriatim to the next ground, that neither DGS nor its counsel have authority to promulgate the requirement in the DGS Bid Bond Form regarding the 90-day extension, we recognize that there was no pre-bid opening protest filed by any person challenging this requirement of the DGS Bid Bond form. Thus this Board lacks jurisdiction to consider such a contention at this stage. See COMAR 21.10.02.03A , *National Elevator Company*, MSBCA 1251, 2 MSBCA ¶115 (1985) at p.6; *Packard Instrument Company*, MSBCA 1272, 2 MSBCA ¶125 (1986) at p.8.

Notwithstanding that Appellant's contention may not now be considered, we observe that while the General Procurement Law and COMAR only affirmatively state that State construction contracts shall require the submission of bid security in an amount equal to at least 5% of the bid or price proposal, such affirmative declaration does not preclude the State from incorporating other reasonable requirements in its IFB designed to protect the State from financial loss. In any event, the absence of pre-bid protest precludes consideration of Appellant's argument.

Appellant's final contention is that the IFB properly interpreted does not require use of the DGS Bid Bond form. The DGS Bid Bond form was included with the IFB as part of the bid documents and the minutes of the pre-bid conference attached to Addendum No. 1 state that forms "provided in the Bid Documents must be utilized." We find that a bidder should have reasonably understood that use of the DGS Bid Bond form was required. Appellant points out that the language in the Instructions to Bidders included in the IFB only states that "each bidder must furnish a bid bond issued by a surety company approved by the State with his construction bid . . . in an amount not less than five percent (5%) of the amount of the total bid," and does not contain language concerning the 90-day extension. Appellant thus argues that use of the AIA bid bond without the 90-day extension provision was consistent with the IFB bid bond requirements. However, the Instructions to Bidders cannot be read in isolation, and the inclusion in the IFB of the DGS Bid Bond form and the language of the minutes included as an attachment to IFB Addendum No. 1 make clear that use of the DGS Bid Bond form or one identical in all material respect thereto is required.

Accordingly, the appeal is denied.

Therefore, it is Ordered this 3rd day of May, 1996 that the appeal is denied.

Dated: May 3, 1996

Robert B. Harrison III
Chairman

Candida S. Steel
Board Member

I concur:

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.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1946, appeal of Keller Brothers, Inc./Accubid Excavation, Inc. Joint Venture under DGS Contract No. TA-000-941-036.

Dated: May 3, 1996

Mary F. Priscilla
Recorder