

**STATE OF MARYLAND  
BOARD OF CONTRACT APPEALS  
6 St. Paul Street  
Suite 601  
Baltimore, Maryland 21202-1608  
Telephone: (410) 767-8228  
Toll Free Telephone: 1-800-827-1135**

**SUMMARY ABSTRACT  
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

Docket No. 2550	Date of Decision: 09/12/06
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under SHA Contract No. XX8095177	
Appellant/Respondent: David A. Bramble, Inc. State Highway Administration	

Decision Summary:

Bid Responsiveness - Minor Irregularities - When bid requirements prescribe that the invitation for bid (IFB) must be attached with a responsive bid, the failure of a low bidder to do so renders such a bid irregular but not unresponsive. Particularly where it appears that the low bidder acknowledges full understanding of contract obligations and binds itself to an enforceable offer, the bid is responsive because the bid defect constitutes only a minor irregularity.

THESE HEADNOTES ARE PRODUCED FOR ADMINISTRATIVE REFERENCE AND OPERATIONAL USE ONLY AND SHOULD NOT BE CONSIDERED "OFFICIAL TEXT" OF THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS, NOR SHOULD IT BE REFERENCED OR GIVEN ANY LEGAL STATUS. A COPY OF THE FULL AND COMPLETE DECISION SHOULD BE CONSULTED AND REFERENCED. FOR FURTHER INFORMATION, CONTACT THE BOARD OF CONTRACT APPEALS.

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of David A.                    )  
Bramble, Inc.                                    )  
  ) Docket No. MSBCA 2550  
  )  
Under SHA Contract No.                    )  
XX8095177                                        )

APPEARANCE FOR APPELLANT:                Scott A. Livingston, Esq.  
  Rifkin, Livingston, Levitan  
  & Silver, LLC  
  Greenbelt, Maryland

APPEARANCE FOR RESPONDENT:                Scot D. Morrell  
  Assistant Attorney General  
  Baltimore, MD

APPEARANCE FOR INTERESTED PARTY:        Dan Friedman, Esq.  
(Pennsy Supply, Inc.)                        W. Damon Dennis  
  Saul Ewing, LLP  
  Baltimore, MD

OPINION BY BOARD MEMBER DEMBROW

Appellant notes a timely appeal to the denial of its bid protest by the State Highway Administration (SHA) that the bid of the apparent low bidder, Interested Party Pennsy Supply, Inc., was nonresponsive and therefore not susceptible to award. A hearing on the merits was conducted by the Board on August 24, 2006 with all counsel present with witnesses. Based upon the stipulations set forth on the record as well as the sworn testimony taken at the hearing, the Board hereby renders the following.

Findings of Fact

1. On or about March 27, 2006, SHA issued a certain Invitation for Bids (IFB) known as Contract No. XX8095177 for the purpose of making specified highway repairs in the nature of

milling, grinding, patching and surfacing roadways on the eastern shore.

2. The IFB was amended on or about April 19, 2006 by means of a document known as Addendum No. 1, according to which liquidated damages for failure to complete the construction work in timely fashion were doubled from \$500 to \$1,000 per day and title to the millings resulting from the work were transferred from the State to the contractor.
3. On or about April 26, 2006 SHA contacted the Interested Party, Pennsy Supply, Inc. (Pennsy), as a potential bidder for the purpose of being certain that Pennsy had received notice of Addendum No. 1 and also to secure Pennsy's written acknowledgement of receipt of said Addendum as required by COMAR 21.05.02.08.
4. Pennsy acknowledged to SHA receipt of Addendum No. 1 first by telephone and thereafter by returning by fax the SHA proscribed written confirmation of receipt of addendum, such confirmation being executed by one Wes Paxton, an authorized agent and employee of Pennsy for the purpose of collecting and acknowledging receipt of bid documentation.
5. Subsequent to SHA's receipt of Pennsy's confirmation of receipt of Addendum No. 1, Pennsy submitted a bid to perform the work specified by the aforesaid contract, such bid being executed by one John Conlin, an authorized agent and employee of Pennsy for the purpose of bid submission.
6. Bids were opened on April 27, 2006.
7. At a total cost of \$2,321,426, Pennsy's stated charge for performing the subject work was the low bid received for the job.
8. Another bid was submitted by interested party David Bramble, Inc. (Bramble), which offered to perform the subject work at a cost of \$2,406,404, or \$84,978 more than the low bid stated by Pennsy.
9. SHA deemed Pennsy's bid responsive but "irregular" because Pennsy's bid did not include the entirety of the IFB which

SHA instructed bidders to submit with their bids, including in particular pages 49 and 50 of the IFB on which pages bidders were also instructed to interlineate the changes set forth in Addendum No. 1, and also because Pennsy's bid did not have attached to it a copy of the addendum that bidders were instructed by SHA to attach to their bids.

10. The failure of attaching an IFB to a bid when bidders are instructed to do so has previously been determined by this Board not to render a bid nonresponsive. See Corcon, Inc., MSBCA 1804, 4 MSBCA ¶ 358 (1994) and Carl Belt, Inc., MSBCA 1743, 4 MSBCA ¶ 339 (1993).
11. SHA denied Bramble's protest on the basis that Pennsy submitted the low bid for the job and the irregularities of the Pennsy bid did not rise to a level of defect severity sufficient to render the Pennsy bid nonresponsive.
12. Bramble noted timely objection to the award of the contract to Pennsy on the basis of the irregularities more fully set forth above.
13. On or about June 29, 2006, Bramble, by and through counsel, noted timely appeal to this Board for which this Board conducted a hearing on August 24, 2006.

### **Decision**

It is not disputed that the Pennsy bid was defective in two (2) respects, namely, Pennsy failed to attach the entire copy of the IFB to its bid, as a result of which the requested pen and ink interlineations of material changes to the initially advertised contract obligations were not provided by Pennsy to SHA as required. In addition, Pennsy failed to attach a copy of Addendum No. 1 to its bid, as bidders were also instructed to do. According to the final sentence set forth in Addendum No. 1, notice of the consequence of such defects was provided to bidders by SHA as follows: "Failure to comply with these instructions

may result in your bid being declared *irregular.*" (Emphasis supplied.)

COMAR 21.06.02.04 identifies 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 in 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."

This Board finds quite persuasive the argument of counsel for Bramble that the defects in the Pennsy bid may fairly be characterized as more than trivial irregularities. When SHA instructs potential bidders to confirm receipt of an addendum by marking up the IFB, attaching the addendum to the IFB and returning the IFB and the attachment to SHA as a part of its bid, that is precisely what bidders should do. The evident reason for such requirements is to assure that each bidder has unequivocally committed to perform all aspects of contract compliance, including modifications. It also serves to assure that all bidders are on equal footing when estimates are completed and bids are submitted.

While recognizing the importance of requiring strict compliance with bid submission instructions, however, this Board is also bound by prior precedent and the important principle, *stare decisis et non quieta movere* (to adhere to precedents and not to unsettle things which are established). The cases of Corcon, Inc., MSBCA 1804, 4 MSBCA ¶ 358 (1994) and Carl Belt, Inc., MSBCA 1743, 4 MSBCA ¶ 339 (1993) are directly apposite and instructive to the case at hand. For more than a decade they have established the rule that even when a state agency has required the return of an IFB along with a bid, the failure of the bidder to do so does not constitute nonresponsiveness. The *Corcon* rule has evidently been incorporated into current custom deemed commonly acceptable by bidders and state agencies. The testimony in the instant case of the team leader for SHA's Office

of Construction indicated that it frequently occurs that the IFB is not resubmitted with bids and that such bids are nonetheless accepted and evaluated. They are merely marked and announced as irregular, not nonresponsive.

This Board does not elect to upset this longstanding precedent, rule and custom by ruling in favor of Bramble in the instant appeal. Pennsy had the right to rely upon Corcon, *supra* when it submitted its bid. Indeed, counsel for SHA in these proceedings served in the same capacity in the 1994 *Corcon* appeal and was specifically called upon in the instant procurement to provide legal advice to SHA's Office of Construction on whether Pennsy's irregular bid was sufficiently responsive to be susceptible to award. His advice that Pennsy's bid was irregular but responsive was in accordance with directly applicable precedent.

In addition, this Board finds compelling the argument of counsel for Pennsy that in the event of a contract award to Pennsy under the circumstances presented, and assuming Pennsy's subsequent nonperformance by objecting to the contract modifications set forth in Addendum No. 1, it is unlikely that Pennsy's breach would be tolerated by any court reviewing the situation. Pennsy knew of the contract modifications. Pennsy accepted and acknowledged receipt of Addendum No. 1. It did so prior to submitting its bid. Its bid was formulated with actual and constructive knowledge of all of the requirements of the contract, including the contract amendments. Pennsy would be and upon award will be bound by all of SHA's stated terms of contract performance, including the provisions of Addendum No. 1.

The cause of the relatively modest difference in the prices bid by Pennsy and Bramble was simply that Bramble added costs as a result of the contract modifications while Pennsy diminished its charges by the value it placed on ownership of recycled asphalt products (RAP) allowed by Addendum No. 1. Bramble may have added charges sufficient to cover the risk of being assessed

liquidated damages for late performance, while Pennsy estimated the job on the assumption that it would perform on time.

This Board acknowledges that the format of Bramble's bid was plainly superior to Pennsy's in that Bramble complied with all of the terms of bid submission imposed by SHA, while Pennsy's bid submission was irregular. But under the circumstances it would be highly disruptive to existing precedent for this Board to deem Pennsy's bid defects nonresponsive.

For all of these reasons, this appeal must be denied.

Wherefore, it is Ordered this                    day of September, 2006 that the above-captioned appeal is denied.

Dated:

\_\_\_\_\_  
Dana Lee Dembrow  
Board Member

I Concur:

\_\_\_\_\_  
Michael W. Burns  
Chairman

\_\_\_\_\_  
Michael J. Collins  
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 2550, appeal of David A Bramble, Inc. under SHA Contract No. XX8095177.

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Clerk