

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anchor Fire Protection Company, :
Petitioner :
v. : No. 1744 C.D. 2009
Department of General Services, : Submitted: February 5, 2010
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: April 14, 2010

Anchor Fire Protection Company (Anchor) petitions for review of the August 24, 2009, decision of the Department of General Services (DGS) to deny Anchor's bid protest, which challenged DGS' rejection of Anchor's bid for the installation of a fire protection system at the Drake Well Museum located in Titusville, Pennsylvania. We affirm.

Anchor is a fire protection-hazmat contractor. On June 22, 2009, DGS issued a Notice and Instructions to Bidders (Bid Notice) for contract number DGS 970-5.5 (the Fire Protection project), which involves the installation of new domestic water services, hydraulically designed wet and dry sprinkler systems, and a clean-agent fire suppression system. (R.R. at 114.)¹ The Fire Protection project

¹ We note that Anchor's reproduced record does not include the lower case "a" following the page number as required by Pa. R.A.P. 2173.

is to be completed concurrently with contract number DGS 970-6/7 (the Building/Site Work project), which involves additions to entrances as well as renovations to collection, storage, education, and administrative spaces.² *Id.*

The Bid Notice did not include a form for bid proposals for these projects. Instead, DGS mailed the proposal form for the Fire Protection and Building/Site Work projects separately. This proposal form included a section called “Unit Prices,” which, in bold letters, directs bidders to Section 01025 of the Specifications for an explanation of unit costs.³ However, below that instruction, the proposal form also included a chart indicating that unit price additions and deductions are “N/A” with respect to four specified items.⁴ (R.R. at 96.)

In addition to the Bid Notice, DGS issued a series of bulletins that became part of the contracts. Bulletin No. 2, issued on July 21, 2009, clarified that

² This case involves three distinct construction projects, to be completed concurrently, which are numbered 970-5, 970-6, and 970-7. Each project is assigned a number that identifies the using agency, the individual project, and the prime contractor involved: the number 970 identifies the using agency as the Pennsylvania Historical and Museum Commission; the numbers “-5,” “-6,” and “-7” identify the individual projects; and a point system is used to identify the prime contractors for each project as follows:

- .1 – General Contractor
- .2 – HVAC Contractor
- .3 – Plumbing Contractor
- .4 – Electrical Contractor
- .5 – Fire Protection/HAZMAT Contractor
- .6 – Miscellaneous Contractor

Anchor is the Fire Protection/Hazmat contractor for project 5 with the Pennsylvania Historical Museum Commission.

(DGS’s brief at 5.)

³ The specifications are included in the record as part of the Bid Notice. (R.R. at 300.)

⁴ The chart refers to contaminated water and soil, clean extra backfill and lab sample analyses. (R.R. at 96.)

there is one combined proposal form for contract numbers D.G.S. 970-5.4 and D.G.S. 970-6,7.4. (R.R. at 75.) Bulletin No. 4, issued on July 27, 2009, changed the bid date and provided the following proposal clarification:

CONTRACTS D.G.S. 970-5.4 & D.G.S. 970-6,7.4 –
BULLETIN NO. 1 CLARIFICATION

ATTACHED TO THIS BULLETIN IS A NEW PAGE 2
FOR THE POINT 1 CONTRACT OF THE PROPOSAL
WHICH REPLACES PAGE 2 OF THE ORIGINAL
PROPOSAL ISSUED.

(R.R. at 71) (emphasis added).

On July 27, 2009, Anchor submitted a bid proposal for the Fire Protection project, contract number D.G.S. 970-5.5, using the new page two provided by DGS for the Point 1 contract in Bulletin No. 4. (R.R. at 7.) Unlike page two of the original proposal form, the revised page two provided in Bulletin No. 4 does not include a section designated for unit prices. Accordingly, Anchor did not include unit prices in its bid.

On August 18, 2009, DGS rejected Anchor's bid as unresponsive; DGS indicated that Anchor's bid should have been submitted on the original proposal form, which requires unit prices by its reference to Specification 01025, Section 1.3.⁵ In response, Anchor submitted a Notice of Protest asserting that it

⁵ DGS' letter rejecting Anchor's bid states the following:

Section A.4 of instruction to Bidders states that 'all bids must be submitted on forms prepared by the department' the base bid page submitted by bidder does not contain the unit costs as

properly submitted its bid proposal on the revised form provided in Bulletin No. 4. Anchor also maintained that neither the original proposal form nor the revised proposal form provided in Bulletin No. 4 required unit prices. Anchor specifically observed that the revised page two provided in Bulletin No. 4 did not include a section designated to unit prices, and page two of the original proposal indicated that unit prices are non-applicable.⁶

DGS denied Anchor's bid protest on August 24, 2009, stating that "Bulletin No. 4 ... replaced Page 2 of the original proposal issued for the Point 1 contract," not the original proposal issued for the Point 5 contract. (R.R. at 1)

outlined by spec 01025 section 1.3 therefore, the bid is non-responsive.

(R.R. at 5.)

⁶ Anchor stated the following in its bid protest:

We submitted our bid on the bid form which was provided with Bulletin No. 4 on July 27 (Exhibit "C"). This form was used because Bulletin No. 2 (Exhibit "D") clearly states "Bulletin No. 1 included separate Bid Proposal envelopes for D.G.S. 970-5.4 and D.G.S. 970-6, 7.4. However, there is one combined proposal form.

It was clear to us from this language that there was one and only one proposal form to be used and it was the one which was supplied as part of Bulletin No. 4. Bulletin No. 2 makes specific reference to the use of a combined proposal form for 970-5 (i.e. the one which was later provided with Bulletin No. 4).

Unit costs are irrelevant to the 970-5 Contract (See Page 2 of the original Bid Proposal Form contained in the project manual attached hereto as Exhibit "E"). This provides that as to 970-5.5, unit prices are N/A. Since unit prices are N/A to our work, the failure to submit a bid referencing unit costs is completely irrelevant to the bid.

(R.R. at 3.)

(emphasis in original.)⁷ Thus, DGS concluded that Anchor should have submitted its bid on the original proposal form, which requires unit prices by reference to Specification 01025, Section 1.3.

Anchor now petitions this Court for review of that decision, arguing that DGS' decision to deny Anchor's bid protest was arbitrary and capricious and constitutes an abuse of discretion.⁸ We disagree.

Section 512(g) of the Commonwealth Procurement Code (Code), 62 Pa. C.S. §512(g), provides that, within sixty days of the bid opening, the purchasing agency shall award the contract to the lowest responsible bidder. Section 103 of the Code defines "responsible bidder" as a bidder that has submitted a responsive bid and that possesses the capability to fully perform the contract requirements in all respects as well as the integrity and reliability to assure good

⁷ DGS' letter denying Anchor's bid protest states as follows:

Section A.4 of the Instruction to Bidders states that 'All bids must be submitted on forms prepared by the Department.' Page 2 of your bid proposal did not contain the unit costs as outlined by Specification 01025, Section 1.3. Your protest letter states that you submitted your bid on the bid form provided with Bulletin No. 4 dated July 27, 2009. Bulletin No. 4, in addition to changing the bid date, replaced Page 2 of the original proposal issued for the Point 1 contract. Inasmuch as your bid was for the Point 5 contract, that portion of Bulletin No. 4 did not pertain to your bid.

(R.R. at 1.)

⁸ Pursuant to section 1711.1(i) of the Commonwealth Procurement Code, this Court "shall affirm the determination of the purchasing agency unless it finds from the record that the determination is arbitrary and capricious, an abuse of discretion or is contrary to law." 62 Pa. C.S. §1711.1(i).

faith performance. 62 Pa. C.S. §103. This same section defines “responsive bid” as a bid which conforms in all material respects to the requirements and criteria in the invitation for bids. *Id.*

This Court has repeatedly held that requirements set forth in a bidding document are mandatory and must be strictly adhered to in order for a bid to be valid. *Fedorko Properties, Inc. v. Millcreek Township School District*, 755 A.2d 118 (Pa. Cmwlth. 2000); *Kimmel v. Lower Paxton Township*, 633 A.2d 1271 (Pa. Cmwlth. 1993). The requirements in a bidding document are mandatory in order to “to invite competition and to guard against favoritism, improvidence, extravagance, fraud and corruption in the award of municipal contracts.” *Dunbar v. Downingtown Area School District*, 901 A.2d 1120, 1126-27 (Pa. Cmwlth. 2006) (citation omitted).

However, an ambiguous provision in the bidding instructions, as with an ambiguous provision in a contract, must be interpreted against the drafter of the document. *Jay Township Authority v. Cummins*, 773 A.2d 828, 832 (Pa. Cmwlth. 2001).⁹ An ambiguity exists when a provision in the bidding instructions is reasonably susceptible of different constructions and is capable of being understood in more than one sense. *Department of General Services v. Pittsburgh Building Company*, 920 A.2d 973 (Pa. Cmwlth. 2007). Whether an ambiguity exists is a question of law. *Id.*

Here, contrary to Anchor’s assertions, the original bid proposal form unambiguously required unit price additions. Although Anchor correctly observes that page two of the original proposal includes a chart which indicates that unit

⁹ “[A]mbiguous language in a contract is construed against the drafter and in favor of the other party if the latter's interpretation is reasonable.” *Sun Company Inc. v. Pennsylvania Turnpike Commission*, 708 A.2d 875, 878-79 (Pa. Cmwlth. 1998).

price additions and deductions are non-applicable, and the revised proposal provided in Bulletin No. 4 does not include a section designated to unit prices, the original proposal form clearly directs the bidder to Section 01025 of the Specifications, which states that “[t]he Lead (Fire Protection) Contractor shall provide unit pricing for added costs.” (R.R. at 301) (emphasis added). The language of Section 01025 of the Specifications specifically addresses the requirements of the Fire Protection project, and it also includes a chart indicating that unit price additions are required while unit price deductions are not. Thus, we conclude that the provision of the original proposal form requiring unit price additions is not reasonably susceptible to different constructions and, therefore, is not ambiguous.

Pursuant to section A.17 of the Instructions to Bidders, DGS may deny a bid if it “shows any omission.” (R.R. at 203.) Because Anchor’s bid did not include unit price additions as required by the bidding instructions, DGS did not abuse its discretion when it denied Anchor’s bid protest.

More important, even if an ambiguity did exist with regard to unit prices, it is clear that Anchor improperly submitted its bid on the proposal form provided in Bulletin No. 4. The original bid proposal form provided by DGS is specifically designated for the Fire Protection and Construction/Site Work projects. Bulletin No. 2 clarified that there is one combined proposal form for the electrical projects, contract numbers D.G.S. 970-5.4 and D.G.S. 970-6,7.4, not the Fire Protection project, contract number D.G.S. 970-5.5. And, Bulletin No. 4 provided a new page two expressly designated for the Point 1 contract, not the Point 5 contract.

Section A.17 allows DGS to reject a bid with “any irregularities.” (R.R. at 203.) Section A.4 of the Instructions to Bidders states that “[a]ll bids must be submitted on forms prepared by [DGS].” (R.R. at 200.) Pursuant to the bid instructions, Anchor should have submitted its bid on the original proposal form, and its failure to do so rendered the bid invalid. For this reason as well, DGS did not abuse its discretion when it denied Anchor’s bid protest.

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

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	:	
Department of General Services,	:	
Respondent	:	

ORDER

AND NOW, this 14th day of April, 2010, the decision of the Department of General Services, dated August 24, 2009, is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge