

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

6611 Kenilworth Avenue • Riverdale, Maryland 20737

MEMORANDUM

DATE: April 3, 2007

RE: Appeal of the Bid Protest By Lighting Maintenance, Inc.
IFB No. B25-196, Olney Manor Recreational Park,
Ballfield Lighting Improvements – Fields 2-5

Decision of Executive Director

This matter is before me on an appeal from the decision of the Purchasing Manager on the captioned bid protest (the “Protest”) filed by Lighting Maintenance, Inc. (“LMI”). The apparent low bidder in this procurement action is Dalton Electrical Services, Inc. (“DESI”). I have reviewed the Administrative Record attached to the proposed findings of fact and conclusions of law previously served and subsequent submissions from counsel and heard oral argument from each side on February 23, 2007.

I. Procedural History.

- Invitation for Bid B25-196 (“IFB”) “Olney Manor Recreation Park Installation of a New and Complete Replacement Athletic Field Lighting System for Fields 2 thru 5” was issued on June 1, 2005.
- Addendum #1, issued on July 20, 2005, listed approved lighting manufacturers. A non-mandatory pre-bid meeting was held July 26, 2005
- Addendum #2, issued on July 28, 2005, clarified the IFB
- Addendum #3, issued August 4, 2005, addressed questions raised at the pre-bid meeting. Addendum #4, issued August 8, 2005, postponed the date of the bid opening
- Addendum #5 clarified the IFB and set a new bid opening date of August 24, 2005
- Bid opening for IFB B25-196 was held on August 24, 2005
- Lighting Maintenance, Inc. filed a bid protest and Public Information Act request on August 30, 2005
- Bid protest denied by M-NCPPC Purchasing Manager on September 20, 2005
- Appeal of decision of Purchasing Manager, September 30, 2005
- Decision to stay the procurement until the protest is resolved, September 30, 2005

II. LMI’s Protest.

A summary of the various allegations made by LMI to support the Protest is provided as follows:

Allegation 1: DESI's bid does not conform to the applicable bid specifications because neither DESI, nor its equipment manufacturer (MUSCO), provided on a timely basis the submittals required under: (a) the Project Technical Specifications, at Part I, Item B.3 (Computer Analysis); (b) the Project Technical Specifications, at Part I, Item B.4 (Photometric reports); and/or (c) the Special Conditions at Item 11 (Remote Power Switching Capability w/Manual Override).

Allegation 1 Findings of Fact and Conclusions of Law: LMI alleges that submittals made before the expiration of the approval period on June 24, 2005 were incomplete and, therefore, did not conform to the IFB. The M-NCPPC staff response, Mike Riley memorandum of August 3, 2006, states that DESI submitted the required documents on the dates specified in the IFB. In their rebuttal of September 1, 2006, LMI contends that DESI failed to submit photometric reports for maintained light levels and that neither DESI nor MUSCO submitted spill light calculations for all fields.

The relevant sections of the IFB referenced by DESI are Part I of the Project Technical Specifications, items B.3 Computer Analysis and B.4 Photometric Reports. Item B.3 requires the submission of two (2) computer generated point-by-point models of field light values. One model is to indicate the initial horizontal footcandle quantity and the second is to indicate maintained light levels, which should be 80% of the initial light levels. Furthermore, item B.3 requires the submittal of spill/glare computer models depicting field test stations as being on a line 100 feet from the boundary of the playing fields. Models for initial horizontal footcandles and maximum footcandles are required. No models were supplied for field #s 3, 4 or 5.

DESI appears to contend that the "Illumination Summary" that states "Musco's Light-Structure Green includes Smart Lamp technology, which provides constant illumination levels that will be present when the system is initially turned on, and throughout the 5000-hour useful life of the lamp" somehow satisfies the requirement to provide computer models and further attempts to minimize the submission requirements as performance specifications and minor informalities. If this representation is accurate, a proper response would have been to separately identify initial and maintained light levels with the same "constant" value. However, the documents provided refer to an average value which would seem to at odds with truly invariable illumination.¹

With respect to the light spill models, DESI offers that it believes "that this information was provided at the time of the initial submittal", but can offer no documentary support. Unfortunately for DESI, no evidence has been provided sufficient to persuade me that light spill models were provided at the time of submittal.

Finally, DESI contends in its rebuttal of February 21, 2006, that the protest on these grounds is untimely because it was not filed within ten days of issuance of an

¹ Whether the Purchasing Manager could waive this variation in response is an issue that will not be remanded for decision since the bid is clearly non-responsive for other reasons. LMI also complains that the IFB required two light levels to be provided. Although this issue does not appear to have been protested timely, the concern is inextricably intertwined with this issue and would factor in the decision of the Purchasing Manager on any remand for a waiver decision.

Addendum to the effect that “MUSCO was as an approved manufacturer and that its lighting system was an approved lighting system.”

Taking the threshold timeliness issue first, I find that the protest with respect to Allegation 1 was not required to be filed prior to bid opening and I cannot conclude that the identified Addendum placed LMI on constructive notice of the basis for a protest predicated upon inadequate submissions. Nor would the policy underlying protest limitation periods otherwise compel the construction and application urged by DESI under the circumstances in this matter.

The submission of computer and photometric models was an explicit requirement of the IFB that was not met because computer models of maintained light levels were not provided and spill/glare models were not provided for field #s 3, 4 and 5. The record indicates that the required two-part model was provided for baseball field #2 only. The fact that a two-part model was submitted for field #2 only serves to reinforce the clarity of the requirement and omission. Therefore, DESI’s bid was not responsive to the submittal requirements of IFB No. B25-196 because computer models of maintained light levels were not provided and spill/glare models were not provided for field #s 3, 4 or 5.

Allegation 2: Perhaps because neither DESI nor its equipment manufacturer (MUSCO Control Link) provided the submittals necessary to evaluate the lighting control panel within the deadline required under the applicable bid conditions, no technical evaluation of the MUSCO Control Link equipment was actually conducted in connection with the bid.

Allegation 2 Findings of Fact and Conclusions of Law: The M-NCPPC staff response, Mike Riley memorandum of August 3, 2006, states that DESI submitted the MUSCO Control-Link system as part of their submittal of the MUSCO Lighting system and that the submittal was reviewed on or about July 14, 2005 by Commission staff and the lighting design and engineering consultant, Charles Ford & Associates. The Commission approved the MUSCO Lighting system by letter dated July 19, 2005 to DESI and by Addendum #1 to all bidders, dated July 20, 2005. It is implied that approval of Control-Link was included in the approval of the lighting system. In their rebuttal of September 1, 2006, Q&S on behalf of LMI states that *lighting system* is a defined term and that “...the *lighting system* submittal is intended to review only the lighting system and poles.” LMI further argues that the defined system included a specific product, i.e. Skylogix ARC-10. Any substitution of Skylogix ARC-10 required submission of an alternate component for separate review and approval.

The features and functionalities of Skylogix ARC-10 were included in the IFB “for performance criteria only” as stated in item #11 of the Special Conditions pertaining to Remote Power Switching Capability w/Manual Over-ride. DESI made a timely submission of the “descriptive literature, data and cost” for MUSCO Control-Link as part of their system submittal, dated June 23, 2005. DESI’s system submittal clearly lists Control-Link as an alternate bid item pursuant to the un-numbered instruction on page 4 of the IFB, labeled Catalogue Cuts and Shop Drawings:

Include with your submission package the catalogue cuts and/or shop drawings for the proposed lighting remote control system and dual level lighting feature. See Paragraph #11, Alternate Bid Items for further information.

In conclusion, I find that the features and functionalities of Skylogix ARC-10 were included in the IFB “for performance criteria only” as stated in item #11 of the Special Conditions pertaining to Remote Power Switching Capability w/Manual Override; therefore, DESI made a timely submission of the “descriptive literature, data and cost” for MUSCO Control-Link as part of their system submittal, dated June 23, 2005. Moreover, apart from bald assertions that “all bidders were entitled to notice of the relaxed requirement(s)” , LMI has not asserted that it would have otherwise used MUSCO Control-Link or that a more discrete and specific approval of MUSCO Control-Link would have advantaged its bid in any way.

Allegation 3: The lighting equipment and systems proposed under DESI’s bid do not conform to the applicable bid specifications in the following respects:

- (a) DESI’s “initial light levels” do not meet the requirements expressed in the Project Technical Specifications, at Part I, Item # A(1)(c).
- (b) DESI’s “target or maintained light levels” are not computed using a recoverable light loss factor of 0.80, and/or do not otherwise comply with the “average target light levels” required under the Project Technical Specifications, at Part I, Item # A(1)(d).
- (c) As indicated above for the purpose of Allegation 1, DESI failed to demonstrate in the submittal or bid process that its proposed equipment is capable of achieving the photometric performance required according to the Project Technical Specifications, at Part I, Item # A(4)(b).
- (d) As indicated above for the purpose of Allegation 1, DESI failed to demonstrate in the submittal or bid process that its proposed equipment is capable of achieving the light spill and glare performance characteristics required according to the Project Technical Specifications, at Part I, Item # B(2).
- (e) The “lamps” proposed under DESI’s bid are not “obtainable at competitive pricing” [as otherwise required by the Project Technical Specifications, at Part I, Item # E(3)] because those lamps are of a proprietary design – that is, offered only by the equipment manufacturer (MUSCO) at a cost that far exceeds the pricing for lamps generally available for non-proprietary lamps offered by area distributors.
- (f) The “capacitors” proposed by DESI for use in connection with the “electrical component enclosure” do not comply with the requirements set forth in the Project Technical Specifications, at Part I, Item # G(8).
- (g) The lighting “poles” proposed by DESI do not meet the requirements set forth in the Project Technical Specifications, at Part I, Item # H(1), because they are not AASHTO compliant.

- (h) The “remote control and monitoring system” proposed by DESI does not comply with the applicable specifications expressed under the Special Conditions at Item #11 because that system does not include a keypad control at each field location required.

Allegation 3 Findings of Fact: LMI argues that in eight (8) instances the DESI submittal did not meet specific provisions of the IFB Project Technical Specifications for Lighting (Project Technical Specifications, Part I – Athletic Field Lighting, A. – Lighting Performance. These contentions overlap to an extent those contained in Allegations 1 and 2 above. Given my findings on Allegations 1 regarding DESI’s failure to provide required submissions that relate to some of these contentions and my finding in Allegation 4 regarding responsibility, no finding on this Allegation is necessary.

Allegation 4: LMI argues that the Commission should consider DESI a non-responsible bidder, and advances a number of grounds on this score. Specifically, LMI alleges the following:

- (a) That the Commission awarded DESI a contract to complete the installation of similar lighting equipment for Olney Field #1 within 180 days, but that DESI required 314 days to complete that job.
- (b) That DESI requested approval of Change Order #1 for its contract to perform the work on Olney Field #1, and that the so-called “additional work” was actually covered under the obligations established under its “base” bid (and resulting contract) or otherwise unnecessary. For example, although DESI requested the change order to upgrade the panel to 400 amps, LMI avers that the request was bogus because the wiring installed by DESI to service the upgraded panel was limited to 225 amps.
- (c) That, after approval by Commission staff of its request for Change Order #1 at an additional cost of about \$20,800, DESI billed and received payment for certain work required under that change order, even though that work was not actually performed. For example, LMI avers that DESI did not install one-half of the 4-inch conduit specified under the relevant change order.

Allegation 4 Findings of Fact: LMI alleges that conduct by DESI in prosecuting the work for IFB B24-115, Olney Manor Recreational Park Field #1, should render DESI a non-responsible bidder on IFB No. B25-196. Although not specifically requested, it is implied that DESI should have been disbarred from bidding on the IFB No. B25-196A. A *responsible bidder* as defined by the M-NCPPC Purchasing Manual, Section 9-300 is:

Responsible Bidder or Offeror. A vendor who has submitted a bid or proposal and has the capability, in all respects, to perform fully the Contract requirements and the moral and business integrity and reliability that will assure good faith performance and who has been prequalified, if required.

In response to allegation 4(a), the record does not provide evidence that the length of time DESI took to complete the work was the result of any lack of capability or any absence of moral and business integrity or reliability. To the contrary, M-NCPPC's staff response, Mike Riley memorandum of August 3, 2006, and DESI's collective responses indicate that all work was completed in a timely manner.

Allegation 4(b) is an assertion that DESI submitted a fraudulent request for a change order for work already covered in the base bid. The record is inconclusive, but the weight of evidence from the responses from DESI and M-NCPPC indicate that the request itself involved a genuine entailed, at least in part, an expansion in the scope of work at the request of M-NCPPC.

Allegation 4(c) pertains to payments made to DESI for work not performed, specifically that DESI installed only one-half of the 4-inch conduit for which it was paid. Furthermore, field investigation of hand-boxes by LMI indicates that a smaller size of wire was used than the 250 MCM wire that was specified and that 4-inch conduit was not installed to every pole.

Meeting notes from March 3 indicate "all conduits are installed," without an indication of 100% complete. M-NCPPC's staff response indicates that, "based on memory of staff," DESI used a "more costly installation method" involving boring underneath the field that reduced the amount of conduit that was needed. LMI countered in its rebuttal of September 1, 2006, that "directional drilling is actually a cheaper method of installation than trenching," which should have been recorded as a cost savings. M-NCPPC stated that as-built drawings and other records might be able to provide additional information, but that such drawings and records were not available.

M-NCPPC Purchasing Manual, Section 17-560 (a), Documenting Vendor Performance, states:

It is important to record and retain in writing any deviations from specification encountered during the monitoring process and to do the same with any justifications for such deviations. Only by such meticulous record keeping can the performance "track record" of a

Contractor be established as a factual matter, not as opinion, and used for corrective action.

A review of the reviewed and approved signature set of drawings for Olney Manor Park Ballfield No. 1 – Lighting Improvements, dated July 7, 2003, show that drawing E-1 “Baseball Field site Plan, Symbols, Abbreviations and Notes” shows the following general note:

The routing of all conduit shown in these drawings are a schematic representation and final routing shall be determined and coordinated with Commission staff prior to start of any work. The contractor shall give the Commission 72 hours advance notice before starting any trenching operations across any portion of the playing field. Conduits shall be installed within the field area approx. 10' – 15' away from the fence line. Coordinate all work with park staff.

The State of Maryland, Office of the State Prosecutor, conducted an investigation of this issue. The investigation included interviews with several Commission employees. The final report of that investigation, dated September 9, 2006, states:

We have completed our investigation into the activities of Dalton Electric as a contractor to the Commission. While we do not intend to pursue criminal charges in this matter, there is substantial evidence indicating that the Commission paid for full performance but did not receive everything to which it was entitled in connection with work done by Dalton on Ball Field One at Olney Park. Most significantly, upgrades in conduit and wiring size, provided for by change order at an additional cost to the Commission of \$7,840, do not appear to have been installed.

M-NCPPC Purchasing Manual, Section 2-400, Definitions, defines *Fraud* as:

Any act, omission, fraudulent statement/report or concealment involving the intentional breach of a legal or equitable duty or the violation of federal, state, local laws or Commission policies which results in damage to the Commission in any way, including without limitation the misappropriation of any Commission Property/Resources, including cash. Fraud includes, without limitation, false financial reporting.

DESI does not appear to take issue with the basic facts, or even that the boring was generally less expensive. Instead DESI seeks to frame this matter as a mere documentation miscue and, alternatively, fixes blame on Commission staff for going along with the modification. Even if one were to accept that the substitution of the less

expensive boring for trenching was knowingly accepted by Commission staff, there should have been a commensurate reduction due to the lesser cost or, at a minimum, documentation of a reasoned decision to make this concession as part of the overall transaction. It is uncontested this modification was not properly documented.

The State Prosecutor investigated the matter and reached the conclusion that “there is substantial evidence indicating that the Commission paid for full performance but did not receive everything to which it was entitled in connection with work done by Dalton on Ball Field One at Olney Park. Most significantly, upgrades in conduit and wiring size, provided for by change order at an additional cost to the Commission of \$7,840, do not appear to have been installed.” LMI cites Matter of Energy Management Corp., Comp. Gen. Dec. B-234727 as support for the proposition that this investigative conclusion, standing alone, is sufficient to warrant disqualification on grounds of non-responsibility for this project. I agree.²

Nevertheless, even if one were to accept DESI’s characterization of the trenching/boring matter as an issue of failed documentation, which I do not, the same rationale would not apply to the upgrade for conduit and wiring size. There is simply no persuasive evidence that Commission staff (after approving a change order for an upgrade in conduit and wiring size) were ever aware of the modification, let alone had approved it. Nor is there any persuasive evidence they were asked to approve the change. Under the circumstances, DESI’s failure cannot fairly be understood as being limited to a documentation issue. LMI also notes that DESI submitted a sworn notarized payment application certifying that the work was completed in accordance with the contract. The Application for Payment was documentation upon which the Commission was entitled to rely and DESI plainly sought and acquired payment for work and materials it did not provide.

Accordingly, the record demonstrates an intentional failure by DESI to document work performed and false financial reporting that resulted in DESI being paid for work that it did not perform. Based on the entire record herein and for the reasons described herein, DESI is not a responsible bidder within the meaning of M-NCPPC Purchasing Manual, Section 9-300 for the identified procurement.

² At oral argument DESI assailed the State Prosecutor for not talking to DESI representatives during the investigation. Upon being questioned about whether the State Prosecutor ever attempted to speak with DESI in the course of its investigation, counsel stated, “What we did, and I will tell you this, there was a discussion about meeting with the State Prosecutor. But at the time we had no information as to what was going on or what they were investigating. In those circumstances, since it was a criminal investigation, we were not going to let our client talk to the State prosecutor. They had the Constitutional right not to do that and, so, we exercised that right.” Oral Argument Transcript at 83. For the reasons stated herein, the same conclusion on this allegation would have been reached on the administrative record herein, even apart from the State Prosecutor’s findings.

Allegation 5: Although LMI characterizes the applicable bid conditions and specifications as being “pretty fair” when taken “as a whole,” the disappointed bidder, nevertheless, asserts that Commission staff has shown favoritism or bias in its evaluation of DESI’s bid and submittals tendered in response. This allegation is essentially an inference that LMI reaches based on a number of factual averments as follows:

- (a) On or before April 4, 2005, Commission staff arranged for DESI to collect spill light measurements for the existing lighting on Olney Field 1, and that DESI reported those test results to appropriate Commission staff. By contrast, in Addendum 3, the Commission staff indicates that measurement of spill light values are not possible due to an “inadequate” power supply for the Field 1 lights. For these reasons, LMI believes that DESI was given an unfair advantage in the bidding process, and that the Commission response in Addendum 3 was either inaccurate or not candid.
- (b) As indicated above in Allegation 1, LMI alleges that DESI (and/or MUSCO) failed to provide certain submittals to approve “equals” on or before the applicable deadline of June 24, 2005. Nevertheless, according to LMI, the Commission staff effectively extended that deadline until August 2, 2005, changing course in the midst of holding the formal pre-bid conference on July 26, 2005.
- (c) As indicated above in Allegation 2, LMI alleges that the MUSCO Control Link was never evaluated by Commission staff or consultants.
- (d) As indicated above, in Allegation 4(a), LMI alleges that DESI failed to complete installation of the lighting system on Olney Field #1 within 180 days, but that Commission staff did not assess liquidated damages for the delay.
- (e) As indicated above, in Allegations 4(b) and (c), LMI alleges that DESI did not complete all of the work required under Change Order #1 and completed certain work that was unnecessary.

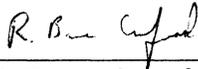
Allegation 5 Findings of Fact: LMI infers, based upon five (5) factual averments, that M-NCPPC showed a bias in favor of DESI in the evaluation of bids in response to IFB No. B25-196. Allegation 5(a) LMI asserts that the Commission arranged for DESI to collect spill light measurements, on or before April 4, 2005, for Olney Recreational Park Field #1, while indicating in Addendum #3 that measurement of spill light values are not possible due to an “inadequate” power supply for the Field #1 lights:

Due to inadequate power supply to field #1 at this time, design FC readings are not available. However, at the completion of this project, ample power will be available to all fields and design values will be addressed at that time.

The M-NCPPC staff response states that the testing was done primarily to confirm that the system was in working order and further asserts that “final testing to ensure that all design criteria are met cannot be completed until the upgraded incoming electrical service is provided.” The failure to make bidders aware that DESI had conducted a measurement of spill light values could be perceived to be a bias in favor of DESI, despite DESI being under contract to perform work on field #1. This conclusion is distinct from the question of whether there was actual bias or any prejudice as a result. Given the other findings herein I do not reach those issues.³

IV. Disposition of Protest.

Based on the record herein and for the reasons stated above, the decision of the Purchasing Manager is reversed and the protest is sustained. At this time, this decision will be forwarded to of the Director of the Department of Parks and Purchasing Manager for comment within 10 days on whether it is in the Commission’s interest to award the subject contract to the second-low bidder or instead to cancel the solicitation and rebid in light of the time elapsed and current operating conditions and requirements that relate to the contract.



R. Bruce Crawford
Executive Director

³ LMI also asserts as evidence of bias the matters asserted in Allegations 1, 2 and 4. Given my findings and conclusions, there will be no further discussion of the facts related to those allegations in this section, although it is worthy of note that perceived acceptance of non-conformity can lead to the perception of bias.