

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION AND  
PUBLIC FACILITIES**

CONSTRUCTION MACHINERY )  
INDUSTRIAL, LLC, )  
 )  
v. )  
 )  
DEPARTMENT OF TRANSPORTATION )  
AND PUBLIC FACILITIES ) OAH No. 10-0258-PRO  
\_\_\_\_\_ ) ITB No. SEF-1500

**DECISION**

**I. Introduction**

The Department of Transportation and Public Facilities issued Invitation to Bid (ITB) No. SEF-1500, consisting of three lots. Four bidders responded. All four submitted bids on Lots 1 and 2 (which were combined for purposes of the contract award); only two submitted bids on Lot 3. Construction Machinery Industrial, LLC (CMI) submitted bids on all three lots and was the apparent low bidder on Lots 1 and 2 (combined) and on Lot 3, but its bid was deemed non-responsive on Lots 1 and 2 (combined) and on Lot 3. The department issued a notice of intent to award the contract to the next lowest bidder, which was NC Machinery on both Lots 1 and 2 (combined) and Lot 3.

CMI filed a protest, which was denied, and it has appealed. The parties agreed to submit the matter for decision on the written record. CMI's bid on Lots 1 and 2 (combined) was not responsive and may not be corrected. As to Lot 3, CMI has not shown that its failure to meet the horsepower specification is immaterial. Accordingly, the procurement officer's decision is sustained.

**II. Facts**

The Department of Transportation and Public Facilities issued ITB No. SEF-1500 on February 10, 2010. The ITB requested bids to supply motor graders to the State Equipment Fleet (SEF) over a three-year period (an initial one year contract term with

two one-year renewal options), anticipating a need for 15 graders in the initial year and 5 in the renewal years.

The primary anticipated use of the graders was for snow removal purposes, with general purpose grading as the secondary use. The ITB included three lots, each for a different size grader. Lot 1 and Lot 2, the smaller graders, were to be priced separately but evaluated at their combined price. Lot 3 was for the largest grader. The ITB as originally issued included separate detailed draft specifications for each lot.

The draft specifications for Lot 3 largely reflect the published manufacturer's specifications for the Caterpillar Model 14M;<sup>1</sup> they expressly identified Caterpillar Model 14M, John Deere Model 872, and Volvo Model 990 as typical units, providing the draft specifications were met.<sup>2</sup> The draft specifications called for a grader with at least eight forward gears and a standard rating of at least 274 HP in gear 4 and up, and with variable ratings increasing by 5 HP through gear 8 (294 HP),<sup>3</sup> which is exactly what the Caterpillar Model 14M provides when equipped with the VHP Plus engine.

A mandatory pre-bid conference was conducted on February 24, 2010. Representatives of CMI and the other prospective bidders attended. The purpose of the pre-bid conference was to review the ITB and the draft specifications in order to provide clarification of the terms of the ITB. At the pre-bid conference, CMI informed the department that the grader it intended to offer for Lot 3, the Volvo 990, did not meet the draft specifications in several respects, including engine displacement, peak torque, and horsepower.<sup>4</sup> With respect to horsepower, CMI informed the department that the Volvo 990 produced 277 HP in gear eight.

The specifications were issued in final form on February 26, 2010. In their final form, the specifications for Lot 3 for engine displacement and peak torque were changed to accommodate the Volvo 990. The Lot 3 specifications with respect to horsepower were also changed: they called for a grader with variable horsepower increasing in 5 HP intervals from 274 HP in gear 4 to 289 HP in gear 7, and 277 HP in gear 8. For Lot 3, the

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<sup>1</sup> See Protest, Exhibit A.

<sup>2</sup> Protest, Exhibit B.

<sup>3</sup> Protest, Exhibit B.

<sup>4</sup> Protest, Exhibit D.

specifications identified a Caterpillar Model 14M and Volvo Model 990 as typical and omitted the John Deere Model 872.

Amendment 1 to the ITB included a revised bid price sheet for Lot 2. The amendment added two slopers for which pricing was required as part of the bid price. CMI submitted its bid using the original bid price sheet for Lot 2, and as a result omitted pricing for the slopers, yielding an evaluated price of \$237,927. Had it included the cost of slopers in its bid, CMI would have priced those items at a total of \$113,798, resulting in an evaluated bid price of \$351,625. For Lot 3, CMI offered the Volvo 990, which is rated at 225 net brake HP in the low range, 245 net brake HP in the mid-range, and 265 net brake HP (277 maximum net HP) at the high range.<sup>5</sup>

Following bid opening, the department contacted CMI and asked for clarification of the horsepower ratings for the Volvo 990. The department noted that the maximum horsepower rating for the Volvo 990 is 277 HP, which is less than the horsepower ratings provided in the specifications for gears 5-7, and asked for an explanation.<sup>6</sup> Steve Cole responded that the Volvo 990 includes 11 forward gears, rated at 225 HP (base range), 245 HP (mid range) and 277 HP (high range).<sup>7</sup> The procurement officer followed up, asking for specific information regarding gears 5-8, as well as for an explanation as to whether “[i]f, by offering 11 gears, the horsepower exceeds the stated requirements in the ITB.”<sup>8</sup> Mr. Cole responded that the Volvo 990 provides 225 HP in gears 1-3, 245 HP in gears 4-7, and 277 HP in gears 8-11.<sup>9</sup>

The department determined that CMI’s bid was non-responsive as to Lots 1 and 2 because it failed to include the cost of slopers. It determined that CMI’s bid was non-responsive as to Lot 3 because it did not meet the horsepower specification. The department accordingly issued notice of intent to award the contract to the next lowest bidder, which was NC Machinery on both Lots 1 and 2, and Lot 3.

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<sup>5</sup> Product Specifications, p. 17.

<sup>6</sup> Email, E. Topp to R. Fairbanks, April 2, 2010 @ 10:43 a.m.

<sup>7</sup> Letter, S. Cole to E. Topp, April 5, 2010.

<sup>8</sup> Letter, K. Petty to S. Cole, April 6, 2010.

<sup>9</sup> Letter, S. Cole to K. Petty, April 6, 2010.

### III. Discussion

CMI's protest raised four issues: (1) CMI should be allowed to correct its bid on Lots 1 and 2 because the failure to use the amended bid price schedule was a minor informality;<sup>10</sup> (2) CMI was responsive as to Lot 3 because "[t]he difference in horsepower between CMI's Volvo bid and the bid specifications...is not material";<sup>11</sup> (3) the solicitation should be cancelled because at most one responsive bid was received on both Lots 1 and 2 and Lot 3;<sup>12</sup> and (4) NC Machinery's bid was non-responsive as to Lots 1 and 2.<sup>13</sup> CMI maintains all four arguments on appeal.<sup>14</sup>

#### A. Bid Price Schedule

The bid price schedule includes the basic grader with all required components and attachments, together with a variety of optional items that might or might not be purchased by the department, presumably depending on the department's needs and the price at which the items were offered. The total price for the bid was the sum of the basic grader and required components plus the combined cost of the options. The evaluated price was the total price minus the sum of the bidder's guaranteed replacement value for the grader<sup>15</sup> and the bid cost of scheduled maintenance. CMI's evaluated price for Lot 1 was \$86,831.50; NC Machinery's was \$106,259.67. For Lot 2, CMI's bid price for the basic grader together with required components was \$413,039; NC Machinery's was \$527,641. Reduced to reflect their respective guaranteed replacement values (\$265,500 for CMI; \$250,879 for NC Machinery) and scheduled maintenance, CMI's evaluated price on Lot 2 was \$150,995.50, and NC Machinery's was \$292,870. CMI's combined evaluated price for Lots 1 and 2 was thus \$237,827; NC Machinery's \$399,129.67.

The large discrepancy in these prices was the result of CMI's failure to submit a bid price for the two slopers. CMI asserts that it would have bid those two items at the manufacturer's price plus 10%, or a total of \$113,798, and that had it done so its

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<sup>10</sup> Protest at 4-5.

<sup>11</sup> Protest at 5-6.

<sup>12</sup> Protest at 5; Protest Supplement.

<sup>13</sup> Protest Supplement. CMI did not separately identify NC Machinery's alleged non-responsive bid as a separate protest point. In effect, its argument on appeal is that the procurement officer accepted a bid from NC Machinery that was no more or less responsive than CMI's, and that the two bids should have been treated equally.

<sup>14</sup> See Appeal, April 23, 2010.

<sup>15</sup> The guaranteed replacement value is the amount that the bidder guaranteed as the sales price for the grader in the event the state deemed it unreliable and chose to sell it. See ITB, Section I, ¶6.3.2.

evaluated bid price would have been increased by a like amount, from \$237,827 to \$351,628.

CMI argues that it inadvertently erred by submitting its bid on the bid schedule provided with the original ITB, rather than on the bid schedule provided with Amendment 1. It argues that the submission of a bid on the wrong bid schedule is a minor informality that may be corrected pursuant to 2 AAC 12.170(a).

2 AAC 12.170(a) states:

Inadvertent errors discovered after opening but before award, other than minor informalities, may not be corrected. If a bidder submits proof that clearly and convincingly demonstrates that an inadvertent error other than a minor informality was made, the bidder may withdraw the bid.

For purposes of this decision, it is assumed that CMI's failure to submit a bid that included a price for slopers was an inadvertent error. Thus, CMI may correct the bid if the error was a minor informality. A minor informality is defined in 2 AAC 12.900(8):

“minor informalities” means matters of form rather than substance which are evident from the bid document, or are insignificant matters that have a negligible effect on price, quantity, quality, delivery, or contractual conditions and can be waived or corrected without prejudice to other bidders[.]

CMI argues that the use of the improper bid schedule is simply a matter of form. A matter of form has been defined as “all that relates to the mode, form, or style of expressing facts.”<sup>16</sup> The “fact” at issue here is the price to be charged for two slopers. CMI did not make a mistake of form as to that fact. Rather, it failed to provide any price at all for the slopers. This was a matter of substance, not of form. It would have been a matter of form if CMI had used the original bid schedule, and handwritten in a bid price for slopers. It is not a matter of form to omit any price whatsoever for a required bid item.

CMI's failure to provide a price for the slopers, a required item on the bid schedule, lowered its bid price on Lot 2 by \$113,798 and reduced its evaluated price on that lot by nearly 50%. 2 AAC 12.900(8) provides that an inadvertent error as to price is a minor informality if it has a “negligible effect on price.” A \$113,798 bid price error is not negligible in absolute terms. Nor is it negligible in terms of its effect on the evaluated

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<sup>16</sup> See Brenntag Pacific, Inc. v. Department of Transportation and Public Facilities, OAH No. 09-0347-PRO at 6 (Department of Administration 2009).

price for Lot 2, because it reduced CMI's evaluated price on that lot by nearly 50%. Because the error is not negligible it is not a minor informality. It may not be corrected even if corrected bid would still be lower than any other bidder.<sup>17</sup>

For these reasons, CMI's bid was non-responsive as to Lot 2, and it may not be corrected. Because Lots 1 and 2 were combined for purposes of the contract award, the procurement officer properly disregarded CMI's bid on those lots.

B. Horsepower

1. *CMI May Not Protest the Horsepower Specification*

CMI identified the horsepower specification as problematic at the pre-bid conference. It evidently anticipated that the department would adjust all of the ranges, rather than only the specification for the gear requiring the highest horsepower. However, to the extent that CMI's argument is that the horsepower specification is improper or does not reflect the department's commitment at the pre-bid meeting, its protest fails for two reasons: first, it is untimely;<sup>18</sup> second, the express terms of the ITB specifically informed bidders that "[a]ny statements made at formal workshops will not be official until verified in the 'final' ITB."<sup>19</sup> The specification applies as written.

2. *CMI Did Not Prove that the Horsepower Differential Is Immaterial*

That the specification applies as written does not necessarily mean that it is material. The ITB expressly provides that the specifications are all "important," but that deviation from the specifications is not necessarily a ground for a finding of non-responsiveness: a non-material deviation could be accepted, depending "upon the facts, circumstances, and the proposal in the bid."<sup>20</sup> Further, although a material deviation (defined for purposes of the ITB as "one that is significantly different from an essential aspect of a specification") was deemed a valid ground for rejecting a bid, the procurement officer was not required to reject a bid even if a deviation was material (as

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<sup>17</sup> See, e.g., Brenntag Pacific, Inc. v. Department of Transportation and Public Facilities, OAH No. 09-0347-PRO at 4 (Department of Administration 2009) ("Under 2 AAC 12.170(a), whether a bid may be corrected is not determined based on whether correcting the bid will save the state money.").

<sup>18</sup> AS 36.30.565(a). CMI has not shown good cause to relax this requirement.

<sup>19</sup> ITB Section II, ¶4.0.

<sup>20</sup> ITB Section II, ¶38.3.

that term is defined in the ITB).<sup>21</sup> In short, by the terms of the ITB the procurement officer retained discretion to accept CMI's bid.

In this case, it is clear that the deviation from the horsepower specification was material in a formal sense, and as defined in the ITB: that is, the deviation was not a matter of form, and it was significantly different from the essential aspect of the horsepower specification because the Volvo 990 horsepower ratings are significantly different from the specified horsepower. However, it is an open question whether the deviation is material in terms of the department's actual needs, that is, in terms of the performance standards that the specifications are intended to ensure will be met.<sup>22</sup> In other words, while there is no dispute that the Volvo 990 will not produce horsepower in accordance with the specification, it is very much open to dispute whether its failure to do so would have any material impact on the ability of the grader to perform in accordance with the department's actual needs.<sup>23</sup>

CMI argues that its protest should be sustained, because the department has not argued that the difference in horsepower is material in the latter sense. However, as the appealing party, the burden of proof is on CMI. In order to meet its burden of proof, CMI was required to prove facts demonstrating that the discrepancy between the horsepower of the Volvo 990 and the ITB specifications is immaterial. Put another way, CMI needed to prove that its product will meet the department's actual needs, notwithstanding the difference in rated horsepower. Moreover, CMI needed to demonstrate that it was an abuse of discretion to conclude otherwise.<sup>24</sup>

The preponderance of the evidence is that the rated horsepower of the Volvo 990 is 225 HP in gears 1-3, 245 HP in gears 4-7, and 277 HP in gears 8-11. Because the

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<sup>21</sup> ITB, Section II, ¶38.2 ("Deviation from a specification MAY result in rejection of a bid at the discretion of the Contracting Officer if the deviation is material." [capitalization in original]).

<sup>22</sup> See 2 AAC 12.080.

<sup>23</sup> The Alaska Supreme Court has concluded that even when there is a clear discrepancy between the written specification and the offered product, a bid can be responsive if it is shown that the product offered will meet the purchasing agency's actual needs. See Gunderson v. University of Alaska, Fairbanks, 922 P.2d 229 (Alaska 1996). In that case, as in this one, there is no indication that the terms of the solicitation required a finding of non-responsiveness for failure to comply with the specification in question, which would present an entirely different situation. If the terms of the solicitation expressly require compliance with a particular specification as a condition of responsiveness, the procurement officer generally does not have discretion to accept a product that fails to meet the mandatory specification.

<sup>24</sup> See generally, Quality Foods v. Department of Corrections, OAH No. 06-0400-PRO at 12-13 (Department of Administration 2006).

Volvo 990 is an 11-gear grader, and its rated horsepower applies to three ranges, a direct comparison in horsepower to the 8-gear ITB specification is not possible. The department argues that the Volvo should be considered to have 277 HP only at gear 8, and that accordingly the proper horsepower comparison is this:<sup>25</sup>

| GEAR | ITB SPECIFICATION | VOLVO 990 |
|------|-------------------|-----------|
| 4    | 274               | 245       |
| 5    | 279               | 245       |
| 6    | 284               | 245       |
| 7    | 289               | 245       |
| 8    | 277               | 277       |

However, it is more reasonable to consider that the 277 HP rating for the Volvo 990 gear ranges 8-11 applies to the high range of gears in an 8-gear grader, that is, to at least gears 7 and 8, or possibly to gears 6-8, with the 245 HP rating applying to the mid-range of an 8-gear grader, that is, to at least gears 4-5, and possibly to gear 6. With that adjustment, the horsepower differential is as follows:

| GEAR | ITB SPECIFICATION | VOLVO 990  |
|------|-------------------|------------|
| 4    | 274               | 245        |
| 5    | 279               | 245        |
| 6    | 284               | 245 or 277 |
| 7    | 289               | 277        |
| 8    | 277               | 277        |

CMI asserts that these differences are immaterial, but it has offered no specific evidence to that effect. Some circumstantial evidence supports CMI’s argument, however. First, the department apparently derived its draft horsepower requirements from the Caterpillar Model 14M, rather than on the basis of a demonstrated need. Second, the department lowered the specification for gear 8 in response to a request from CMI, which suggests that perhaps it would have changed the other requirements as well, had CMI requested.<sup>26</sup> Third, the department apparently anticipated that the Volvo 990 would be an acceptable grader for its purposes, or it would not have identified it as a

<sup>25</sup> Motion for Decision on Record at 3.

<sup>26</sup> CMI asserts that it is “illogical” to require higher horsepower at lower gears. Appeal at 6. There is nothing “illogical” in such a requirement, although it may be reasonable to infer that lower horsepower at the lower gears would be appropriate. That lower horsepower is necessarily called for at lower gears if the horsepower at the highest gear is lowered is a factual question, not a logical imperative.



“typical unit”, particularly after having eliminated the John Deere model from that category after the pre-bid meeting.

But there is circumstantial evidence to the contrary, as well. Most importantly, the department had set the draft specifications at a higher level than the standard Caterpillar engine, which provides 274 HP at gears 4-8.<sup>27</sup> This is a clear indication that the department considered the higher horsepower ratings desirable. Had the department reduced its horsepower requirement to 277 HP for gears 5-7 as well as for gear 8 (essentially identical to the standard 274 HP Caterpillar engine, which the department had chosen not to specify in the first place), the Volvo 990 would still have fallen well short for gear 5 and possibly gear 6 as well. Indeed, even if the department had provided the same 5 HP per gear reductions that were used in the draft specification, that would not have been enough to bring the Volvo 990 within the specified horsepower ranges at the lower gears:

| GEAR | REDUCED SPECIFICATION | VOLVO 990  |
|------|-----------------------|------------|
| 4    | 257 or 274            | 245        |
| 5    | 262 or 277            | 245        |
| 6    | 267 or 277            | 245 or 277 |
| 7    | 272 or 277            | 277        |
| 8    | 277                   | 277        |

The Volvo 990 rated horsepower is 89.4% of the specified horsepower in gear 4, 87.8% in gear 5, 86.3% or 97.5% in gear 6, and 95.8% in gear 7; assuming the department’s actual needs for gears 4-7 are lower by 5 HP per gear than the specified horsepower for gear 8, the Volvo 990 rated horsepower is 95.3% of the actual need in gear 4, 93.5% in gear 5, 91.8% or 103.7% in gear 6, and 101.8% in gear 7.

These calculations, and the department’s initial decision to use the higher-powered Caterpillar engine as the basis for the draft specification, suggest that the Volvo 990 may provide somewhat less horsepower in gears 4-6 than the department actually needs. CMI has not carried its burden of proving that it was an abuse of discretion for the procurement officer to conclude that CMI’s bid was non-responsive for failure to comply with the horsepower specification as drafted.

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<sup>27</sup> Manufacturer’s Specifications, p. 19.

C. Cancellation Was Not Required

Assuming that the CMI bid was properly deemed non-responsive, and that NC Machinery's was the only responsive bid on both combined Lots 1 and 2, and Lot 3, CMI argues that the solicitation should have been cancelled pursuant to 2 AAC 12.190, which states:

If only one responsive bid is received in response to an invitation to bid, ...an award may be made to the single bidder if the bidder is responsible and the procurement officer finds that the price submitted is fair and reasonable and that either other prospective bidders had reasonable opportunity to respond or there is not adequate time for resolicitation.

CMI argues that the first condition for award, that the bid price is fair and reasonable, is not met, because NC Machinery's bid was higher than CMI's, even after adjusting CMI's for the cost of two slopers.<sup>28</sup>

This argument is both factually and legally without merit. As a factual matter, NC Machinery's evaluated price on Lots 1 and 2 (combined) and Lot 3 was higher than CMI's adjusted evaluated price. But as to Lots 1 and 2 (combined), that is only because NC Machinery's guaranteed replacement value was less than CMI's; NC Machinery's bid price on Lots 1 and 2 (combined), that is, the actual out-of-pocket cost to the state for the graders, was less than CMI's, as was its bid price for the graders and all options. But, leaving that aside, CMI's argument is also legally without merit. Even if NC Machinery's bid price were higher than CMI's, that does not mean that it is unfair or unreasonable. The difference in bid prices on both Lots 1 and 2 (combined) and Lot 3 is less than 2%, the difference in evaluated prices is less than 15%, and the products offered are different. CMI has presented no evidence to support the assertion that NC Machinery's bid price was disproportionate to the actual cost or reasonable value of the items offered.

D. NC Machinery Bid

In its protest supplement, CMI identified several specifications for Lot 1 and 2 that the Caterpillar Model 14M allegedly does not meet. For Lot 1, it references front axle center clearance and down pressure at the blade; for Lot 2 it references gross vehicle weight. On appeal, CMI argues that the procurement officer improperly afforded NC

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<sup>28</sup> Appeal at 6, note 16.

Machinery the opportunity to supplement its bid by providing testing or additional information, and that this opportunity is inconsistent with denying CMI the opportunity to correct its bid by providing a price for slopers.<sup>29</sup>

As to the first point, CMI has not shown that the procurement officer abused her discretion in accepting NC Machinery's bid. For ground clearance, down blade pressure and gross vehicle weight, as for horsepower rating, it is unknown whether or to what extent the specifications reflect the department's actual needs. Just as it did not prove that the horsepower differential is not material, CMI did not prove that the ground clearance, blade pressure or gross vehicle weight differential is material. As to the second point, the ITB expressly allows the procurement officer to obtain additional product information and to conduct post-bid inspections to determine compliance with bid specifications.<sup>30</sup> Providing such an opportunity is wholly different from allowing a bidder to submit a price on a previously-unpriced item after bids have been opened and prices have been exposed.

#### **IV. Conclusion**

The bid submitted by CMI was nonresponsive as to Lots 1 and 2 because it failed to include a price for a required item. CMI did not prove that the procurement officer abused her discretion in rejecting its bid as non-responsive as to Lot 3. CMI has not shown that NC Machinery's bid price was unfair or unreasonable, or that its bid was not responsive. For these reasons, the appeal is denied.

DATED June 23, 2010.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

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<sup>29</sup> CMI also suggests that the procurement officer's decision to accept NC Machinery's bid, while rejecting CMI's, indicates that the procurement officer applied a more lenient test of responsiveness to NC Machinery's bid than to the CMI bid. To the extent that these arguments by CMI may be taken to suggest that the procurement officer was biased, they are unsupported by any evidence of bias and are therefore rejected. *See, e.g., Empyra.Com, Inc. v. Alaska Permanent Fund Corporation*, OAH No. 06-0520-PRO at 9 (Alaska Permanent Fund Corporation 2006).

<sup>30</sup> ITB, Section II, ¶82.0.

**Adoption**

On behalf of the Commissioner of Transportation and Public Facilities, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 13<sup>th</sup> day of July, 2010.

By: Signed  
Signature  
Frank T. Richards  
Name  
Deputy Commissioner  
Title

[This document has been modified to conform to technical standards for publication.]