

Docket No. 2068 and 2098 Date of Decision: 3/22/99

Appeal Type: Bid Protest Contract Claim

Procurement Identification: Under Department of Budget & Management/Project No. DBM-9803-EKTS

Appellant/Respondent: Fortran Telephone Communications Systems, Inc./Department of Budget & Management

Decision Summary:

Responsiveness - Award - The General Procurement Law and COMAR do not preclude a Procurement Officer from changing a previous determination concerning responsiveness prior to award when the record reflects on its face that the previous determination was legally incorrect or erroneous.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of Fortran)
Telephone Communications)
Systems, Inc.)
) Docket Nos. MSBCA 2068 & 2098
Under Dept. of Budget & Manage-)
ment Project No. DBM-9803-EKTS)
)

APPEARANCE FOR APPELLANT: Robert H. Burrow, Esq.
 Bouland & Brush, LLC
 Baltimore, MD

APPEARANCE FOR RESPONDENT: Geoffrey J.C. Boyd
 Assistant Attorney General
 Baltimore, MD

MEMORANDUM OPINION ON RESPONDENT'S MOTION FOR SUMMARY
DISPOSITION OR, IN THE ALTERNATIVE TO DISMISS APPEAL

The State of Maryland, Department of Budget and Management (sometimes herein DBM) moves for Summary Disposition or, in the alternative, to Dismiss the Appellant's Appeal in MSBCA Docket No. 2098¹ filed with this Board with regard to the captioned solicitation. DBM argues that the bid submitted by Appellant in response to the captioned solicitation (Invitation for Bids) contained the following substantive and material defects which, as a matter of law, render the bid not responsive to the specifications contained in the Invitation for Bids:

- a. The bid contains language through which Fortran attempted to limit and qualify their liability in the performance of contractual obligations in direct contradiction to the

¹ In view of the Board's decision herein, the appeal in MSBCA Docket No. 2068 is moot. We likewise need not consider Appellant's Motion for Summary Disposition.

express and non-negotiable, "Terms and Conditions" of the solicitation; and

b. The bid failed to include all manufacturers' published list prices (most current release) for existing and new EKTS and voice processing equipment as required by the solicitation; and

c. The bid does not provide to the State a clear description of, or number of follow-up training sessions to be made available by Fortran to State employees as required by the solicitation, and the response provided is internally inconsistent, contradictory, vague and ambiguous. Fortran conditioned its response upon the re-quirement that " . . .the notice is reasonable and the class size is reasonable."; and

d. The bid does not provide the State with a clear and unambiguous statement of a plan for remote administration and maintenance of EKTS equipment through modem access and the response provided is internally self-contradicting, internally inconsistent, vague and ambiguous; and

e. The bid does not contain critical written documentation from the manufacturer of each type of EKTS equipment identified in the solicitation that the respective manufacturers would support and fulfill Fortran's contractual obligations during the full term of the contract, if necessary, as required by the solicitation; and

For other reasons as are explained in the accompanying memorandum.²

Findings of Fact

² The issues in item e. were raised for the first time on appeal and the Board lacks jurisdiction to consider them. See Advance Presort Service, MSBCA 1891, 5 MSBCA ¶384 (1995); Service America Corporation, MSBCA 1606, 3 MSBCA ¶292 (1992). In view of the decision that the Appellant's bid was not responsive for the reasons asserted in paragraph b above, the Board will not discuss the issues set forth in paragraphs a., c. and d.

1. The Department of Budget and Management, Division of Telecommunications issued an Invitation for Bids (IFB) on October 14, 1997, for project number DBM-9803-EKTS, seeking a non-exclusive contract with a vendor "...to provide new electronic key telephone equipment, new voice processing systems, new and existing key system maintenance, and moves adds and changes (MACs) in equipment for State agencies.
2. The original Procurement Officer, Mr. Peter Arrey, released the IFB with appropriate publication in the Maryland Contract Weekly, and conducted a pre-bid conference in the Briefing Center at 45 Calvert in Annapolis, Maryland at 10:00 a.m. on October 27, 1997. A Mr. John Flanagan attended the pre-bid conference on behalf of the Appellant along with representatives of seventeen other potential bidders.
3. Addendum #1 to the IFB, issued on December 5, 1997, and mailed to all vendors who attended the pre-bid conference, made a number of changes, additions, and amendments to the IFB.
4. Published as part of the addendum were a series of clarifying questions from vendors and the responses of the Department of Budget and Management to those questions. In pertinent part the following questions and responses were set forth.

Question 8: "Terms & Conditions 5(f) General Requirements/Manufacturer List Pricing. Do bidders have to provide manufacturer's list catalogs for

imbedded base system?"

Response: "Bidders must provide all Manufacturer's Published List Price (most current release). See addendum #1, Section A.1"

Question 15: "Bid Price Forms- Manufacturer's List Price Catalog. Is it required that bidders provide manufacturer's list catalogs for all products (NEC, ONYX, Nitsuko, Fujitsu)?"

Response: "The requirement has been revised. See addendum #1, Section A. Bidders must provide Manufacturer's Published List Price (most current release) for the products identified."

5. At bid opening on December 23, 1997, only three vendors submitted bids in response to the solicitation: Appellant; Telecommunications Management Systems, Inc. (TSM); and L & E Associates, Inc. (L&E). All three of those vendors attended the bid opening and signed the bid opening attendance sheet indicating that they had reviewed the submitted bids upon opening.
6. The bid submitted by L&E was determined upon bid opening to be non-responsive, because the bid did not contain required pricing. The bids submitted by Appellant and TSM, were not determined to be non-responsive upon bid opening. Of those two bids, the bid of TSM is alleged by DBM to have been lower than that submitted by Appellant.
7. On January 16, 1998, twenty-four days after the bid opening date, Appellant provided to the original Procurement Officer via facsimile, a price list for NEC equipment dated November 1994.
8. The original Procurement Officer proceeded to have the project placed on the March 18, 1998 agenda of the Board of Public Works in order to consider a partial award for the sale of new EKTS only to TSM. The Board of Public Works discussed the item, but

deferred consideration of a contract for the partial award of the project work.

9. On March 19, 1998, Appellant delivered to Mr. Arrey a protest challenging: (1) the validity of the low bid submitted by TSM, and (2) the intention of the State to make a partial award of the EKTS portion of the contract to the low bidder, and asserting that Appellant should be awarded the contract.
10. A new Procurement Officer, Mr. William Bowser, was assigned the management of this procurement as a result of the original Procurement Officer having accepted a promotional opportunity in another State agency. Although Mr. Bowser had been the supervisor of Mr. Arrey, each of them aided the other in the performance of various duties as needed, although each had separate and individual responsibility for identified solicitations issued by the Department of Budget and Management.
11. Upon assumption of responsibility of this procurement and a review of the existing files and documentation relating to DBM-9803-EKTS, Mr. Bowser determined on or about May 18, 1998 that the bids submitted by both Appellant and TSM were not responsive to material and essential requirements of the IFB and that, thus, no responsive bids had been received. In keeping with this determination, the Appellant's March 19, 1998 protest was sustained in part concerning TSM's responsiveness. Appellant was further advised in this decision that the bid submitted by Appellant was also not responsive and that the solicitation was canceled. Notice of that cancellation was provided to all interested parties.
12. An appeal to this Board from Mr. Bowser's decision on the Appellant's March 19, 1998 protest was filed by the Appellant on May 29, 1998 and docketed as MSBCA No. 2068.

13. Following the filing of the agency report, Appellant comments thereon, and the rebuttal of DBM, DBM filed a motion to dismiss the appeal (2068) based upon mootness and lateness of the filing of the protest. A hearing on the motion was held on August 4, 1998. However, the Board declined to rule on the motion at that time pending issuance of a second Procurement Officer's decision as discussed below which may have mooted the issues in MSBCA No. 2068.
14. A second protest, which is the subject of the appeal in MSBCA No. 2098, was filed by Appellant on May 28, 1998, raising issues relating to the determination by the second Procurement Officer, Mr. Bowser, that the bid submitted by Appellant was not responsive, and the propriety of the cancellation of the solicitation allegedly due to no responsive bids having been received. The final decision of the Procurement Officer (Mr. Bowser) on this protest (pending receipt of which the Board declined to rule on the DBM Motion to Dismiss the appeal in MSBCA No. 2068) was issued on October 6, 1998.
15. Appellant timely appealed this Procurement Officer's final decision of October 6, 1998 which continued to find that Appellant's bid was non-responsive and upheld the decision to cancel the procurement because no responsive bids were received.

Decision

We note preliminarily that in the determination of a Motion for Summary Disposition, the party moving for summary disposition is required to demonstrate the absence of a genuine issue of material fact. The purpose of summary disposition is not to resolve factual disputes nor to determine credibility, but to decide whether there is a dispute over material facts which must be resolved by the Board as trier of fact. For purposes of a Motion for Summary Disposition, even

where the underlying facts are undisputed, if they are susceptible to more than one permissible factual inference, the choice between those inferences should not be made, and summary disposition should not be granted. In making its determination of the appropriate ruling on the Motion, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the evidence resolved in favor of the party against whom the Motion is directed. Utz Quality Foods, Inc. and Coca-Cola Enterprises, Inc., MSBCA 2060 and 2062, 5 MSBCA ¶441(1998) at pp. 5-6.

We have concluded that Appellant's appeal must be denied because the second Procurement Officer, Mr. Bowser, correctly de-termined that Appellant's bid was non-responsive for failure to include all manufacturer's published list prices (most current release) for existing and new EKTS and voice processing equipment as required by the IFB specifications.³

A "responsive" bidder is defined in COMAR 21.01.02.01(60) to mean a person who has submitted a bid under procurement by competitive sealed bidding which conforms in all material respect to the requirements contained in the IFB.... It is also well settled that "responsiveness" must be determined from the face of the bidding documents.(citations omitted).

General Electric Company, MSBCA 1316, 2 MSBCA ¶143(1987) at pp. 3-4.

As this Board noted in Oaklawn Development Corporation, MSBCA 1306, 2 MSBCA ¶138 (1986) at pp. 4-5, citing Long Fence Company, Inc., MSBCA 1259, 2 MSBCA ¶123 (1986) at p. 6:

It is a well established principle of procurement law that

³Because of our determination that Mr. Bowser correctly determined that Appellant's bid was non-responsive for failure to include with its bid a manufacturer's published list prices (most current release) for existing and new EKTS and voice processing equipment, we will not discuss the assertions in his final decision of October 6, 1998 that Appellant's bid was also not responsive for a number of other reasons.

in order for a bid to be responsive it must constitute a definite and unqualified offer to meet the material terms of the IFB. Free-Flow Packaging Corporation, Comp. Gen. Dec. B-204482, 82-1 CPD 162. The material terms of an IFB are those that could affect the price, quantity, quality or delivery of the goods or services sought by the IFB. Solon Automated Services, Inc., MSBCA 1046 (January 20, 1982). The government must have an unqualified right to performance in strict accordance with the IFB based on the form of the bid at the time of the bid opening. Aeroflow Industries, Inc., Comp. Gen. Dec. B-197628, 80-1 CPD 399. (Underscoring added).

The bid submitted by Appellant failed to include all manufacture's published list prices (most current release) for existing and new EKTS and voice processing equipment as required by the specifications.

Section C, "Specifications", and Exhibit A, "Instructions and Bid Price Form", as amended by Addendum #1, contain many specific statements requiring this information:

Section C, "Specifications", Paragraph 5.f:

Bidders must provide with Exhibit A all Manufacturer's Published List Price (most current release) for new EKTS and Voice Processing, existing key equipment, i.e., the list prices for each of the manufacturers identified by LATA, showing type or model number, part number and description and manufacturer's catalog price for each.

Section C, "Specifications", Paragraph 5.n:

Vendors must use existing cable where available. Only existing cable must be tested by the vendor and may be billed at the contracted labor rates. If, within 90 days from the issuance of a TSR by DBM/OIT to the vendor, cable has been installed by a third party, no additional charge may be assessed by the vendor to test that cable. If the vendor determines existing cable can not be use[d], and the State agrees, the prices bid for the new cable as identified elsewhere in this solicitation may be charged. Prior to any notice to proceed, vendor must notify the agency and DBM/OIT in writing of its findings and provide a quote to perform the cable work. DBM/OIT will notify the vendor of its

decision to proceed with the work or delay work until the replacement cable is performed by another vendor. The "Manufacturer's Published List Price" is generally available. Each bidder must supply the latest edition for each system being bid or maintained. As the "List Price" may be separated by category with varying discounts, the Offeror should indicate the lowest discount percentage available. Upon award, the vendor must provide an actual price list and identify the applicable discounts per category to be incorporated into the contractual rates for the term of the contract.

Exhibit A, "Instructions and Bid Price Forms", Paragraph 4.B):

All unit prices must be the actual unit price the State will pay for the proposed item per this IFB and may not be contingent on any other factor or condition in any manner. All percentages must be the actual percentage reduction that will be applied to the Manufacturer's Published List Price (most current release) supplied.

Exhibit A, "Instructions and Bid Price Forms", Paragraph 5.e.:

Vendors must record the required information on each table as follows:

e. Item 5, Manufacturer's Published List Price
(most current release)-

Column A is provided. In Column B, record the percent of the Manufacturer's Published List Price (most current release) for all products being bid. (This is the minimum discount amount bid by the vendor for any purchase from the Manufacturer's Published List Price (most current release). Additional discounts above this amount may be offered for individual purchases.) In Column C, record the result of multiplying Column A by Column B. In Column D, record the difference by subtracting Column C from Column A. Add Column D and record the results on line 5, Total Price Manufacturer's Published List Price (most current release)-Net Cost to State. Carry this result forward to the appropriate line in Item 6, Bid Price Summary Form.

Exhibit A, "Instructions and Bid Price Forms", (See Addendum

#1, page 3) Paragraph 9. c,d:

c. Bid Price Forms, page 3 (all LATAs) - delete the term "Manufacturer's List Price Catalog and insert the term Manufacturer's Published List Price (most current release).

d. Bid Price Forms, page 4 (all LATAs) - delete the term "Manufacturer's List Price Catalog" and insert the term Manufacturer's Published List Price (most current release).

In addition to these statements contained within the bid specifications and the instructions and bid price forms requiring that bids contain the Manufacturer's Published List Price (most current release), several vendors asked specific questions relating to this requirement at the pre-bid conference held on October 27, 1997. Those questions and the Procurement Officer's response to each question were provided to all interested vendors, in writing, as a part of addendum #1 to the IFB dated December 5, 1997. See Finding of Fact No. 4.

The bid submitted by Appellant contains at TAB 3, the "Bid Response to DBM-9803-EKTS, Section C.", and is prefaced with the following statement: "Section A, 8, b. specifically mandates response only to items within Section C and only to those items which specifically request a response."

In response to Section C, paragraph 5.f. Appellant's bid states as follows:

Response: To the extent available, Fortran Corporation has provided and attached these catalogs. Please note, NEC Corporation does not publish a catalog for distribution to end users and considers this information trade secret. Our agreement with NEC prohibits distribution or dissemination of the manufacturer's pricing data. For more information please contact Regis Dean with NEC at (516) 753-7208. Please note that NEC 1400 and Electra Mark ii are officially discontinued products, as well as all 1 A 2 Key equipment.

Price lists are found in Attachment 2. Price lists for NEC product will be given to the State upon award and execution of NEC's non-disclosure agreement.

In response to Section C, paragraph 7., Appellant's bid states as follows:

Response: Fortran Corporation has included all manufacturer price lists as identified by LATA in Attachment 2 of our response. As identified at 3.f. above, Fortran Corporation is unable to provide certain manufacturer's (NEC's) price lists due to contractual constraints and the manufacturer's policies.

The bid submitted by Appellant thus did not include the required most current published price list from NEC, a manufacturer of EKTS hardware within the embedded base of the State. The alleged "cure" by Appellant on January 16, 1998, twenty-four days after bid opening, through the provision of a copy of an NEC price list dated November 1994, more than three years old,⁴ did not meet the requirements of the solicitation that such price list be provided with the bid. In this fixed-price contract, vendors quoted equipment prices in their bids as a "percentage off" of a manufacturer's list price available to them and were expected to provide the manufacturers' published list prices, most current release, on which their bids were based, so that the State could evaluate the relative value of each bid. The price lists were critical to the State's ability to evaluate bids because the unit prices which vendors could charge for specific items of equipment were to be fixed, based upon the manufacturers' price lists supplied as of the date of bid opening. Appellant failed to provide one manufacturer's

⁴ For purposes of the Motion for Summary Disposition or, in the Alternative to Dismiss Appeal, the Board assumes as asserted by Appellant that the 1994 list was the most current price list. The Board also accepts for purposes of the Motion, Appellant's assertion that NEC does not engage in differential pricing (i.e., charge different vendors different prices for the same piece of equipment).

most current published price list and thus, submitted a bid containing undeterminable prices for NEC equipment which represented a not insignificant portion of the bid.

The solicitation required that a bidder provide each manufacturer's list price catalog (most recent release) for all of the new and existing EKTS equipment which was the subject of the solicitation. Appellant did not provide the NEC price list with its bid.

If Appellant had any concern with regard to the obligation set forth in the IFB to provide each manufacturer's price list (most recent issue) with the bid, Appellant was required to protest such requirement prior to bid opening.

Appellant failed to seek such pre-bid relief from this requirement and is thus bound by the State's criteria. The failure to provide all required price lists is a material defect or deviation from the evaluation criteria in this fixed price contract because the State is unable to evaluate the relative value of the contract, i.e., the price of the goods and services being offered to the State, without knowing the value of the discounts from list price being offered by the vendor. Appellant also failed to challenge the method of price evaluation set forth in the bid prior to bid opening and may not now complain that only the bid price should have been considered to be relevant and not the discount that the bid price represents from the manufacturer's list price. See COMAR 21.05.02.13B.

Failure to provide the NEC published list prices (most current release) made Appellant's bid not responsive to the solicitation. This conclusion is not altered by the fact that the Board for purposes of the Motion must assume that NEC's prices would not be changed after bid opening and such pricing did not vary from distributor (vendors such as Appellant and TSM) to distributor. The problem is that they could have been changed in a way that could have affected determination of the most advantageous bid. Assurance that no changes in price would or had

been made of necessity must be based on post bid extrinsic evidence.

It is well established that responsiveness “. . . must be determined from the face of the bid itself and not from information subsequently obtained through the verification process or extrinsic evidence.” Substation Test Company, MSBCA 2016 and 2023, 5 MSBCA ¶429(1997). Thus, post-bid opening cure of this material defect is not available to Appellant with regard to the non-responsive bid which it submitted. Because the omission affects the ability to determine the relative value of the bid, it is a material omission and thus may not be waived as a minor irregularity or cured under COMAR 21.06.02.04. The fact that the first Procurement Officer apparently determined to allow Appellant to cure the price list defect does not bind the State where the contract has not been awarded.⁵

The State is entitled to Summary Disposition or in the alternative, to Dismissal of the appeal filed by Appellant in this matter because the bid submitted by Appellant did not contain the NEC price list. The bid is therefore not responsive to the requirement to provide this price list contained in the solicitation.

Appellant finally argues that the State is estopped by conduct from rejecting Appellant's bid on responsiveness grounds. In the instant procurement the first Procurement Officer determined to make a partial award to Appellant's competitor for new EKTS equipment only. The second Procurement Officer found that the Appellant's bid and TSM's bid were both not responsive because of failure to submit the

⁵ COMAR 21.01.02.01(8), in effect at the time of bid opening, provided that award meant the decision by the agency to execute a contract after all necessary approvals have been obtained. As amended January 26, 1998, award still requires that all required approvals be obtained. Board of Public Works approval is a required approval. We do not discuss herein the rights of the parties where a non-responsive bid has been awarded after all required approvals have been obtained except to note that resolution of any dispute arising out of the non-responsiveness of the bid would follow contract dispute procedures rather than bid protest procedures.

manufacturer's list price catalogs as required by the IFB.⁶ The first Procurement Officer's presumed determination to either waive or permit cure of such defect as witnessed by his recommendation of a partial award to TSM to the Board of Public Works and his acceptance of a price list from NEC supplied by Appellant after bid opening clearly may be revisited where no award has yet been made. While such action may be viewed as a demonstration of lack of consistency and may be embarrassing to the State unit involved, the Procurement Officer is required by law to make a determination of responsiveness prior to award and "shall reject a bid . . . if . . . the bid is non-responsive." See Section 13-206, State Finance and Procurement Article. See also COMAR 21.05.02.13. We hold that the General Procurement Law and COMAR do not preclude a Procurement Officer from changing a previous determination concerning responsiveness prior to award where the record reflects on its face that the previous determination was legally incorrect or erroneous.⁷ We thus reject Appellant's argument that the State is estopped to reverse the previous determination, noting that ordinarily the doctrine of estoppel does not apply against the State. See ARA v. Department of Public Safety, 344 Md. 85, 96(1996).

We also note Appellant's admission (contained in the pleadings) that the purpose of the manufacturer's published list price was to establish a uniform benchmark for all bidders against which each bidder's discount from that uniform published list price could be

⁶ There is no dispute among the parties that the State may properly reject all bids where no responsive bids are received. See COMAR 21.06.02. The dispute is over whether or not Appellant's bid was responsive.

⁷ Because the Board has found as a matter of law that the admitted failure to provide the manufacturer's published list price makes the Appellant's bid non-responsive, the Board need not determine whether, as inferred by Appellant, the second Procurement Officer had an improper subjective intent or motive to deny Appellant the award of the contract.

evaluated. Accordingly, the price evaluation would center on the amount of each bidder's discount from that price.

Notwithstanding this admission, Appellant has argued that its bid was responsive because (1) Appellant would have provided the manufacturer's published list price with its bid if the manufacturer (NEC) had not then been unwilling to make it publicly available and (2) NEC only had one published list price which did not change from the time of bid opening nor vary from distributor (vendors such as Appellant and TSM) to distributor. We emphasize again that responsiveness is required to be determined from the face of the bid documents. Absent pre-bid challenge of the requirement to provide manufacturer's published list prices, the failure to provide list prices with the bid is fatal.

For the foregoing reasons, the appeal is denied.

Wherefore, it is Ordered this day of ,1999 that the appeal in MSBCA 2068 is dismissed as moot and the appeal in 2098 is denied.

Dated:

Robert B. Harrison III
Chairman

Candida S. Steel
Board Member

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 2068 and 2098, appeal of Fortran Telephone Communications Systems, Inc. under Dept. of Budget & Management Project No. DBM-9803-EKTS.

Dated:

Mary F. Priscilla
Recorder