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| Docket No. 2147 | Date of Decision: 10/27/99 |
| Appeal Type: <input checked="" type="checkbox"/> Bid Protest | <input type="checkbox"/> Contract Claim |
| Procurement Identification: Under DGS Project No. KO-000-981-001 | |
| Appellant/Respondent: Jailcraft, Inc. Dept. of General Services | |

Decision Summary:

Responsibility - Discretionary Determination - The Board will uphold a discretionary determination of a procurement officer unless the determination is unreasonable and thus constitutes an abuse of discretion.

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of :
JAILCRAFT, INC., : MSBCA Docket No. 2147
 :
Under DGS Project :
No. KO-000-981-001 :
 :

APPEARANCE FOR APPELLANT Adam C. Harrison, Esq.
Adam C. Harrison, P.C.
Towson, MD

APPEARANCE FOR RESPONDENT John H. Thornton
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY Mehdi Naimi, President
Certified Maintenance Company

OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on the appeal of Jailcraft, Inc. (hereinafter "Jailcraft"), the second low bidder in the above-captioned procurement, challenging the denial of its bid protest based on the finding by the Department of General Services ("DGS") Procurement Officer that the apparent low bidder, Certified Maintenance Company ("Certified") was responsible.

Findings of Fact

Because Appellant agreed in its Comments to the Agency Report and at the hearing in this matter that the facts set forth in the Agency Report were an accurate summary of the events underlying this appeal, the essentials of the factual summary in the Agency Report are set forth below.

1. On June 22, 1999, bids were submitted for Project No. KO-000-981-001, for cell door track replacement and related work at the Eastern Correctional Institution in Westover, Maryland. Four contractors submitted bids. The Apparent low bidder was

Certified with a bid of \$373,997.88. The second low bidder was Appellant Jailcraft, with a bid of \$392,000.00.

2. The Invitation to Bid ("the ITB") contained definitive experience requirements in section 1.05(A) which said,

1.05 QUALIFICATIONS

A. The Contractor shall submit with his bid the following:

1. Resumes of key personnel showing a minimum of 10 years experience in medium/maximum cell door repair and installation.
2. A statement of qualifications and list of projects performed within the last ten years with references.

Certified, however, did not submit that information with its bid.

3. On the date of bid opening, June 22, 1000, Catherine Seiler, the Procurement Officer, sent a letter to Mehdi Naimi, the owner of Certified, requesting "(1) [r]esumes of key personnel showing a minimum of 10 years experience in medium/maximum cell door repair and installation; and (2) a statement of qualifications and list of projects performed within the last ten years with references that are comparable to the requirements of the project." This letter was sent in order that she could obtain the information necessary to make sure that Certified would be able to comply with the experience requirements of the ITB.
4. On June 25, Certified sent written confirmation of its bid price, general company information, brief resumes of key personnel, and a list of references. In addition, Certified sent by facsimile

- (1) a statement that Certified had timely and successfully completed contracts for the State of Maryland since 1989, that Certified was dedicated to providing quality workmanship, and that Certified was currently working on a project for BWI Airport;
 - (2) a "Resume of Key Personnel" in which Certified stated that its employee, Rashid Abdul Wahid, attended the Afghan Institute of Technology for three years, worked for Jangalak Metal Fabricators in Afghanistan from 1976 to 1988 as a metal fabricator and installer in high security facilities (he was forced to flee Afghanistan in 1988 when armed forces of the Soviet Union occupied the country), and has worked for Certified as a superintendent from 1990 to the present.
 - (3) the name, address, contact name, and descriptions of three projects completed by Certified for State of Maryland detention facilities; and
 - (4) a letter dated August 3, 1998 from Jean A. Band, DGS Chief of Construction, to Certified praising its completion of a contract for shower renovations at the Maryland Correctional Training Center, which Certified completed six months ahead of schedule and with no punch list.
5. On June 30, 1999, Ms. Seiler sent to Certified a letter saying that Certified met the ITB requirement of projects performed within the last ten years but that Certified had not shown that it met the requirement that key personnel have a minimum of ten years experience in medium/maximum cell door repair and installation. Ms. Seiler had reached that conclusion because the information submitted by Certified concerning Mr. Wahid, Certified's proposed supervisor, showed that he had the necessary experience, if the information submitted was true, but it could not be verified. Ms. Seiler's June 30 letter, therefore, requested the name and telephone number of a contact

person so Ms. Seiler could verify that Mr. Wahid had the necessary ten years of experience. The letter informed Certified that Ms. Seiler needed the requested information in order for her to make a determination of Certified's responsibility.

6. At some point thereafter, Certified informed Ms. Seiler that, due to events in Afghanistan since 1988, no further information could be obtained to confirm Mr. Wahid's experience.

7. On July 1, 1999, Jailcraft sent Ms. Seiler's superior, John Cook, a letter requesting copies of resumes submitted by Certified to prove its fulfillment of the experience requirements of the ITB. The next day, July 2, Certified sent to Ms. Seiler by facsimile a letter dated July 1, 1999 in which Certified further described the experience of Certified's personnel, Mehdi Naimi, Mr. Wahid, and Camaran Naimi, and the experience of personnel of a proposed subcontractor, an entity identified as S&M Welding and Fabricators ("S&M").

8. On July 8, 1999, Certified faxed to the Procurement Officer a twelve-page letter describing in more detail the qualifications of S&M and Certified. This letter
 - (1) indicated that S&M has over ten years of relevant experience,

 - (2) provided information for jobs completed by Certified's key personnel, Camaran Naimi, Mr. Wahid, and Mehdi Naimi, since 1990, and

 - (3) contained a copy of a recommendation from Lawrence L. Hoffman, Correctional Maintenance Service Manager II of the Maryland Correctional Institution-Hagerstown, stating that S&M's work "is highly satisfactory,"
S&M's "staff abide by security regulations" and "practical,"
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9. Ms. Seiler forwarded Certified's July 8 letter to the Project engineers, Whitman, Requardt and Associates, LLP ("Whitman"), on July 9 for a recommendation as to Certified's ability to complete the Project. On July 12, Ms. Seiler also sent Certified's July 8 letter to Jailcraft in response to its July 1 request for copies of documents submitted by Certified to prove its compliance with the experience requirements of the ITB.
10. Twenty days after bid opening, on July 12, Jailcraft filed a written protest with the Procurement Officer against the award of a contract to Certified, on the ground that Certified had not satisfied the ITB requirement that key personnel must have a minimum of ten years experience in medium/maximum cell door repair and installation.
11. On July 13, 1999 Ms. Seiler received a letter from Whitman advising her that Certified and its subcontractor, S&M, "are qualified to construct the project." Ms. Seiler, however, concluded that Certified failed to meet the definitive experience requirements of the ITB in that Certified had failed to show that key personnel had at least ten years of experience in medium/maximum cell door repair and installation. She

telephoned Jailcraft on July 14, 1999 and informally notified Jailcraft that Certified was to be found not responsible and that Jailcraft would receive the award for the Project if its references and bonding were approved.

12. Whitman again reviewed the experience information submitted by Certified and sent a letter to Ms. Seiler dated July 15, 1999, stating that both Certified and S&M were qualified to perform the Project but that the information submitted by Certified did not indicate that the key personnel had ten years of experience in medium/maximum cell door repair and installation.
13. In the meantime, Certified evidently had been searching for another subcontractor with key personnel who had the requisite experience, and Certified found one. Late on July 15, Ms. Seiler received a fax from Certified in which Certified proposed to use another subcontractor, United Prison Equipment Company ("United"). Included in the fax was information relating to United's experience and qualifications, key personnel, and references. This information showed that with the addition of United as a subcontractor Certified met all experience requirements of the ITB.
14. Whitman reviewed the new information and in a letter dated July 21 informed Ms. Seiler that Whitman approved Certified, with United as a subcontractor, as qualified to perform the contract because "[t]he data submitted does, in our opinion, indicate ten years experience for key personnel in medium/maximum cell door repair and installation." A copy of this letter was forwarded to Jailcraft by Ms. Seiler by fax on July 23, 1999.
15. In a Procurement Officer's decision dated July 29, 1999, Ms. Seiler denied Jailcraft's protest, finding that Certified was a responsible bidder and met the experience requirements of the

ITB. On August 3, 1999, Jailcraft sent a letter to Ms. Seiler stating that Jailcraft opposed the addition of United as a subcontractor.

16. On August 6, 1999 Jailcraft timely appealed the Procurement Officer's decision to the Board of Contract Appeals.

Decision

Appellant acknowledges that the Procurement Officer was within her rights to allow Certified to submit additional information, after the opening of the bids, in an attempt to satisfy the responsibility requirements. See Appeal of Cam Constr. Co. of Md, Inc., MSBCA No. 1393, 2 MSBCA ¶195 (1988); Appeal of National Elevator Co., MSBCA No. 1252, 2 MSCBA ¶114 (1985). Although Certified failed to submit this information with its bid, such an omission may be considered a minor irregularity, and a procurement officer may accept, at any time prior to award, information necessary to establish the bidder's responsibility. Covington Machine and Welding Company, MSBCA 2051, 5 MSBCA ¶436(1998); Peninsula General Hospital Medical Center, MSBCA 1248, 1 MSBCA ¶109(1985); Construction Management Associates, Inc. ("Construction Management"), MSBCA 1238, 1 MSBCA ¶108 (1985). This Board stated the rationale for this rule in Construction Management at page 4:

Since an issue of responsibility does not affect the competitive position of the bidders, it is appropriate for the procurement officer to invite a bidder to cure an omission of information bearing on *responsibility*

through receipt and *evaluation* of such information after bid opening.

Furthermore, such an omission may be cured after bid opening even when the solicitation purports to require that the information must be submitted with the bid. Niedenthal Corp., MSBCA 1783, 4 MSBCA ¶353 (1994); Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA ¶82.

(1984). Therefore, the Procurement Officer correctly allowed Certified, after bids were opened, to cure its omission and to prove its compliance with the definitive experience criteria of the ITB.

Thus, the question before us is whether the Procurement Officer correctly evaluated the responsibility of the low-bidder, Certified, i.e., was the low-bidder capable of performing fully the contract requirements, and did it possess the integrity and reliability which shall assure good faith performance. COMAR 21.01.02.01(77).

After the initial determination, Certified found a new subcontractor, United, for the purpose of persuading the Procurement Officer to reverse her earlier determination of non-responsibility. As a direct result of this submission, and based upon the experience of the key personnel of United, as well as the experience of Certified and its employees, the Procurement Officer reversed her July 14, 1999 determination and found Certified to be a responsible bidder.

Appellant urges that the Procurement Officer was correct in her original determination of non-responsibility and the later reversal of this determination, after Certified's eleventh hour submission of the new subcontractor (United) without evidence of prior relations between it and United, was clearly erroneous.

Appellant argued that these circumstances presented a case of first impression for the State of Maryland, and that this Board should be guided by caselaw in the federal system, which, it argues, does not support the Procurement Officer's actions in this case, but instead clearly support Appellant's position. Appellant cites In Contra Costa Electric, Inc., B-200660, [81-1 CPD ¶196], B-200660.2, [81-1 CPD ¶381] U.S. Comp. Gen. (1981), wherein the Comptroller General specifically held that "the experience of a proposed subcontractor could be considered in determining whether the bidder

met an experience requirement in the solicitation, if the bidder had been the prime contractor with the proposed subcontractor on the contracts relied on to satisfy the experience requirement." Id. (citing B-140481, 39 Comp. Gen. 173 (1959)). In the present case, Appellant states that Certified presented no evidence to the Procurement Officer that it had ever worked with United before, or any evidence that it had worked with United on any of the contracts Certified used in its bid to satisfy the relevant experience requirement. It argues that here, the prime contractor delegated its responsibility requirement to a subcontractor, United, for the sole purpose of circumventing the express conditions of responsibility set forth in the public bid solicitation, that key personnel show a minimum of 10 years experience in medium/maximum cell door repair and installation.

When discussing the purpose and justification of experience requirements generally set forth in an invitation to bid, the Comptroller General has also noted that

[t]he justification for inclusion in an invitation for bids of any experience requirement designed to indicate a bidder's competency to perform the contract must necessarily be based upon a determination whether the bidder himself has the qualifications required, and not upon a determination of whether the bidder is capable of, or intends to, procure the services of a number of subcontractors whose combined experience is sufficient to meet the experience requirements set out in the invitation to bids. To hold otherwise . . . would permit a bidder with no previous . . . experience to qualify as competent simply by proposing to use experienced subcontractors.

B-140481, 39 Comp. Gen. 173, (1959).

Appellant further notes that the Comptroller General, finding an apparent lower bidder non-responsible, stated that "the failure of the [low bidder] to have previously made such installations, either with its own organization or by using the subcontractors now

proposed, precludes that company from qualifying as a competent bidder." Id.

By contrast, also citing Contra Costa Electric, Inc. and B-140481, supra, Respondent DGS argues that it was proper for the Procurement Officer, upon finding that Certified had extensive experience in like projects, to consider the experience of Certified's subcontractor United in determining whether Certified had complied with the experience requirements of the ITB, and could therefore be found to be a responsible bidder.

If we were presented with a case in which the low bidder had no experience in the kind of installation for which it was bidding, these federal cases might well be instructive. In this case, however, the low bidder has a great deal of experience in exactly the work solicited, and is merely unable to show that the experience of its personnel extends to ten instead of nine and one half years. The Board finds that the Comptroller General's decision is in fact supportive of Respondent's position in this matter. We are not dealing with a bidder with no previous experience who attempts to qualify as competent simply by proposing to use experienced subcontractors. We are dealing with a highly qualified contractor, which for reasons beyond its control, cannot prove the minimal incremental amount of experience necessary to technically comply with the ITB.¹

The Procurement Officer had before her the resumes of the key personnel of Certified, as well as their list of similar projects performed over the past 9+ years. She determined that Mr. Wahid's experience *beyond* the nine and one half years of experience he had

¹Vis, Mr. Wahid's experience in Afghanistan. It is noted that Appellant does not dispute that Mr. Wahid has this additional experience, but like Respondent, is unable to verify the information.

doing correctional projects with Certified could not be verified, and therefore made an initial determination that Certified was non-responsible because it did not show 10 years experience. When Certified presented documentation that it would use, for a portion of the project, United which could show the additional time period of experience required by the ITB, she also correctly determined that as a whole, Certified had shown that it had the requisite experience so that she could make a determination that it was a responsible bidder. According to the standard set forth in B-140481, supra, the Procurement Officer was satisfied that "the low bidder [had] previously made such installations, . . . with its own organization" and that the proposed subcontractor allowed the contractor to meet the experience time requirements of the ITB.

She was completely satisfied that Certified could do the job. This is not a case where an inexperienced contractor bids for the job, and then solicits subcontractors to perform the work. Rather, this is a case where the Contractor itself has been performing similar work exceptionally well for more than 90% of the time required by the ITB. Under these circumstances, the Board will not disturb the broad discretion allowed the procurement officer, and not explore further the propriety of allowing the use of a subcontractor for a portion of the job who has sufficient experience for the bidder to qualify under the ITB.

This finding is consistent with other decisions made by this Board in which it has been determined that the experience of officers and employees, even in a new start-up company, may be counted as experience for the purpose of qualifying the new contractor. See Aquatel Industries, Inc., supra Compare

Independent Testing Agency, Inc.², MSBCA 1908, 5 MSBCA ¶386 (1995).

Accordingly, the appeal is denied.

Therefore, it is ORDERED this 27th day of October, 1999 that the appeal is denied.

Dated:

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

² In Independent Testing, the Board found that the Appellant was unable to show the required experience and therefore denied the appeal: "The Appellant simply has not shown on this record that it has five (5) years experience as a company or corporation nor, if permitted, that it could meet such requirement through consideration of employment of its corporate or company employees elsewhere."

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 Opinion in MSBCA 2147, appeal of Jailcraft, Inc. under DGS Contract No. KO-000-981-001.

Dated:

Mary F. Priscilla
Recorder