

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Sun Technical Services, Inc.)
)
) Docket No. MSBCA 2776
)
)
Under)
SHA Contract No. S-02036)

APPEARANCE FOR APPELLANT: Daniel A. Staeven
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APPEARANCE FOR RESPONDENT: Scot D. Morrell
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OPINION BY BOARD MEMBER DOORY

The determination of bidder responsibility was within the discretion of the procurement officer and was not arbitrary, capricious or contrary to law. The appeal of Sun Technical Services, Inc. is denied.

Findings of Fact

1. The State Highway Administration (SHA) issued an Invitation for Bids (IFB) for a Contract No. S-02036 (Contract) on May 23, 2011. The Contract is for mail courier service for the SHA in Southern Maryland.

2. The IFB contained a notice to bidders that the Contract is a Small Business Reserve (SBR) Procurement. Section I. page 2 of the IFB states the following:

THIS IS A SMALL BUSINESS RESERVE PROCUREMENT FOR WHICH AWARD WILL BE LIMITED TO CERTIFIED SMALL BUSINESS VENDORS. ONLY BUSINESSES THAT MEET THE STATUTORY REQUIREMENTS SET FORTH IN STATE FINANCE AND PROCUREMENT ARTICLE, 14-501 - 14-505, ANNOTATED CODE OF MARYLAND, AND WHO ARE REGISTERED WITH THE DEPARTMENT OF GENERAL SERVICES SMALL BUSINESS RESERVE PROGRAM ARE ELIGIBLE FOR AWARD OF A CONTRACT. REFER TO (ATTACHMENT NO. VIII) FOR FURTHER INFORMATION REGARDING THIS PROGRAM.

3. On June 15, 2011 the bids for Contract were opened in public, and 17 bids were received. The apparent low bid was for \$39,000.00 by Unified Solutions Services, LLC (Unified). The second low bid was for \$41,600.00 from Bay Express, Inc. (Bay Express), and the third low bid was for \$56,640.00, submitted by Sun Technical Services, Inc. (Sun Tech), Appellant.
4. On June 15, 2011 Sun Tech filed a bid protest regarding a claim that Unified's bid was unbalanced and that Bay Express was not a qualified SBR firm whose bid should be considered nonresponsive. On June 21, 2011 Sun Tech filed a second bid protest only regarding Unified's bid, claiming numerous defects.
5. The Procurement Officer issued a final decision on July 14, 2011. Unified's bid was deemed nonresponsive. The decision regarding the SBR status of Bay Express, raised in Sun Tech's protest, was one of bidder responsibility rather than responsiveness. Further, the decision denied Sun Tech's protest regarding Bay Express by stating "Bay Express is a responsible bidder for this contract".

6. The Department of General Services (DGS) administers the self certification process through its website, www.dgs.state.md.us, where there is a hyperlink for the SBR program. COMAR 21.11.01.06E. E-mails dated July 11, 2011 between DGS and SHA's procurement officer confirm that a bidder had to be SBR certified prior to award but not at the time of bid submission. (Exhibit 6). A "Procurement Officer shall verify that apparent awardee is certified by the DGS as a small business." COMAR 21.11.01.06G. Exhibits 5 and 7 of the Agency Report contain a print out of a search screen from DGS's website which includes Bay Express, Inc. on DGS's SBR program's Bidders List.
7. On July 22, 2011 Sun Tech filed an appeal to the Maryland State Board of Contract Appeals (Board) on two grounds, one, that Bay Express was not a qualified small business under the SBR program at the time its bid was submitted; and two, that Bay Express only gave two references when the IFB required three.

Decision

The appeal before the Board relates to the claim by the Appellant that Bay Express was not a certified SBR at the time of bid submission and that Bay Express failed to submit three references with its bid, therefore, rendering the bid nonresponsive. The IFB was an SBR procurement which required SBR certification. Specific notice was given to all bidders. Section I, page 2 of the IFB states:

This is a Small Business Reserve Procurement for which award will be limited to Certified Small Business vendors. Only vendors that meet the statutory requirements set forth in State Finance and Procurement Article Subsection 14-501-14-505, Annotated Code of Maryland, and who are registered with the

Department of General Services Small Business Reserve Program are eligible for award of a contract. Refer to (Attachment No. VIII) for further information regarding this program.

The SBR certification requirement becomes an issue of responsibility, not one of responsiveness. A responsible bidder is one that "... has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance." COMAR 21.01.02.01(77). It is the Procurement Officer who determines if a bidder is responsible. "In making a determination concerning bidder responsibility, it is proper for a procurement officer to consider information relative to work experience and work ability submitted after the bid opening." Covington Machine and Welding Company, MSBCA 2051, 5 MSBCA ¶436 (1998).

There is a significant difference between nonresponsiveness, as claimed by Appellant against Bay Express's bid, and responsibility.

The Board has observed previously that:

Responsiveness in competitive sealed bid procurements concerns a bidder's legal obligation to perform the required services in exact conformity with the IFB specifications. Responsibility, on the other hand, concerns a bidder's capability to perform a contract. Carpet Land, Inc., MSBCA 1093 (January 19, 1983). As we have previously held, a matter of responsibility cannot be made into a question of responsiveness by terms of the solicitation. Aquatel Industries, Inc., MSBCA 1192 (August 30, 1984) p. 5. Information concerning a bidder's responsibility thus may be submitted after bid opening notwithstanding a solicitation provision stating that such information must be submitted with the bid as a pre-requisite to a finding of responsiveness. Carpet Land, supra.

National Elevator Company, MSBCA 1252, 2 MSBCA ¶114 (1985),
Covington Machine and Welding Company, MSBCA 2051, 5 MSBCA ¶436
(1998).

SHA's Procurement Officer, in properly determining Bay Express as a responsible bidder, contacted DGS, the agency responsible for administering the SBR program, to confirm that a bidder does not have to be certified at the time of the bid opening.

COMAR 21.11.01.06G gives guidance to the procurement officer by specifically stating that:

Before awarding a contract under a contract designated as a small business reserve procurement, the procurement officer shall verify that the apparent awardee is certified by the Department of General Services as a small business. A procurement contract award under a small business reserve may not be made to a business that has not been certified.

SHA did just what the regulation required as evidenced by e-mails between the agencies. (Exhibit 6).

SHA confirmed that Bay Express was SBR certified and was qualified for this SBR contract prior to award, and SHA determined Bay Express was a responsible bidder for this contract. (Exhibits 5 and 7). It is well established under Maryland Procurement Law that a procurement officer has broad discretion in determining whether a bidder is responsible. This Board has consistently held that it will not disturb a procurement officer's final decision regarding responsibility unless the decision was arbitrary, capricious or clearly erroneous. Charles Center Properties, MSBCA 629, 3 MSBCA ¶297 (1992).

The SHA decision to deem Bay Express a responsible bidder is upheld because the decision was not arbitrary, capricious or clearly erroneous.

In the matter of the second ground for Sun Tech's appeal, Sun Tech claims that Bay Express only gave two (2) references when the IFB required three (3) references. The Contractors References and Qualification form submitted with the bid listed Bay Express's references as Fairfax County Government and IBM. Sun Tech became aware of Bay Express's bid on June 15, 2011 when all bids were publicly opened. The Appellant had the opportunity to view all bids, including all of Bay Express's bid documents. On June 15, 2011, the same day bids were opened, Sun Tech only protested that Bay Express was not a certified SBR. The claim that the IFB called for three (3) instead of two (2) references should have been protested earlier. COMAR 21.10.02.03B and C state:

B. In cases other than those covered in A, protest shall be filed not later than 7 days after the basis for the protest is known or should have been known, whichever is earlier.

C. The term "filed" as used in A or B means receipt by the procurement officer. Protesters are cautioned that protests should be transmitted or delivered in the manner that shall assure earlier receipt. A protest received by the procurement officer after the time limits prescribed in A and B may not be considered.

Time requirements set forth in COMAR are mandatory and must be strictly construed. Failure to file a protest in a timely manner deprives the Board of jurisdiction to hear the appeal. Jackson Consultants, Inc., MSBCA 1817, 4 MSBCA ¶366. Sun Tech "knew or should have known" of the basis of a protest on June 15, 2011 when it had the opportunity to review Bay Express's bid documents. Sun Tech had to file a second protest by June 22,

2011 to timely file. The second ground in this appeal was noted for the first time on July 22, 2011 in Appellant's Notice of Appeal, and thus did not comply with the 7 day filing requirement. Therefore, this Board is deprived of jurisdiction over this ground.

Nonetheless, despite Bay Express's failure to provide the additional one (1) reference, a procurement officer may accept, at any time prior to award, information necessary to establish bidder's responsibility. Covington Machine and Welding Company, MSBCA 2051, 5 MSBCA ¶436 (1998); H.A. Harris, Co., Inc., MSBCA 1392, 2 MSBCA ¶193 (1988). Bay Express provided a third reference from a law firm. SHA confirmed the work and was satisfied that Bay Express's work was performed in a satisfactory manner. The evaluation of the responsible bidder for this Contract was properly completed. SHA's decision was not arbitrary, capricious or erroneous.

The appeal of Sun Technical Services, Inc. is denied.

Wherefore it is Ordered this _____ day of September, 2011 that the above-captioned appeal is DENIED.

Dated:

Ann Marie Doory
Board Member

I Concur:

Michael J. Collins
Chairman

Dana Lee Dembrow
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 2776, appeal of Sun Technical Services, Inc. under SHA Contract No. S-02036.

Dated:

Michael L. Carnahan
Deputy Clerk