

**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of)
Control Sources, LLC)
)
) Docket No. MSBCA 2987
)
Under)
DGS Project No. K-745-161-003)

APPEARANCE FOR APPELLANT: Thomas A Baker, Esq.
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Lauri A. McGuire
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Baltimore, Maryland

OPINION BY BOARD MEMBER BEAM

On April 29, 2016, the Department of General Services ("DGS") issued an Invitation for Bids ("IFB") on eMaryland Marketplace, requesting bids to provide labor, materials, and equipment necessary to replace the existing Building Automation System ("BAS") at the Baltimore Central Booking and Intake Center with a new HVAC BAS controls package. The IFB was assigned a "D" classification code by the Project Manager of the using agency, the Department of Public Safety and Correctional Services ("DPSCS"), which indicated that the project costs would likely range in the \$1,000,000 to \$2,500,000 range, and was slated for 120 days to complete the project. The IFB also instructed bidders to include four allowances totaling \$355,000 in their bid prices as follows: (1) Test and Balance (\$250,000), (2) Replacement of AHU actuators (\$15,000), (3) Replacement of VAV actuators (\$30,000), and (4) Repair of the smoke evacuation system actuators (\$60,000). Four bids were submitted, which were

opened on May 20, 2016. The lowest bid of \$633,731 was submitted by Control Sources, LLC ("Control Sources"). The highest bid of \$2,049,567 was submitted by Johnson Controls. Siemens Industry, Inc. ("Siemens") submitted a bid of \$1,894,000. Enviser submitted a bid of \$659,373.

Given the wide disparity between the two lowest bids and the two highest bids, the DGS Procurement Officer, Ms. Colleen Haynes, consulted the Project Manager of DPSCS regarding the bid price. Ms. Haynes has been a DGS procurement officer for 20 years, during which she has evaluated numerous bids for DGS construction projects. She routinely relies upon the expertise of project managers at the various using agencies, particularly on construction projects due to the unique requirements of these types of projects. In this case, Ms. Haynes consulted Mr. John Gauthier, the DPSCS Project Manager, who has extensive experience in facilities maintenance and has worked for DPSCS for 11 years as the Assistant Director for Facilities Maintenance for the Division of Capital Construction and Facilities Maintenance. He also served as the Director of Maintenance Services for the Western Maryland Health Systems for 14 years, after working as a Test Director for Goodyear Aerospace Corporation. His experience includes management of approximately 150-200 maintenance and construction projects for DPSCS valued around \$120,000,000.

To assist in preparing the IFB and evaluating the bids, Mr. Gauthier relied upon the DPSCS in-house engineer, who estimated that the project would cost around \$2,000,000. Mr. Gauthier also requested the DPSCS in-house consultant that provides maintenance services downtown, Carter Goble Lee, to obtain estimates from two independent contractors, Pritchett Controls and Trane. While they did provide cost estimates for the project, neither of these contractors formally submitted bids because they were unable to complete the project in the time frame allotted.

Pritchett Controls, the contractor responsible for maintaining the existing system for the previous five years, estimated that replacement of the system would cost approximately \$1,005,000 to \$1,400,000; while Trane, an independent third party, estimated that it would cost approximately \$1,355,000 to \$2,000,000. The estimates submitted by Pritchett and Trane, however, were not directly comparable. For example, it was unclear whether the allowances had been included or factored into the Trane estimate. None of the exclusions in the Trane estimate included these allowances; therefore, DPSCS added the allowances provided for in the Pritchett estimate, and blended the two estimates to establish a benchmark for bid comparison purposes. The Trane estimate was used primarily to establish the scope of work, while the Pritchett estimate was used to establish the necessary allowances.

Relying upon the in-house engineer estimate and these third party estimates, Mr. Gauthier was concerned that the Control Sources bid was missing critical information because it appeared to be insufficient to complete the work for the bid amount submitted. When subtracting the allowances from the bid total, only \$278,731 would remain to complete the project, an amount which he believed was insufficient to get the job done in the timeframe allotted. Ms. Haynes contacted both Control Sources and Enviser and requested a breakdown of their bid prices to include labor prices for the design of the new controls and programming, labor to install the new equipment, pricing for the parts needed to replace the system, and pricing for the new network system. On May 20, 2016, Control Sources sent a letter to Ms. Haynes that provided a breakdown of, and confirmed, its bid.

Upon receipt of the breakdown and bid confirmation, Ms. Haynes forwarded it to Mr. Gauthier. Mr. Gauthier expected to find that the bid had mistakenly failed to include the costs of

the allowances, but was surprised to find that this was not the case. He concluded that Control Sources had not included sufficient man hours in the base bid to account for the extended time required to move about a prison facility. He knew that both Pritchett Controls and Trane had experience with the time required to do prison work, but he had never worked with Control Sources and did not know whether they had done any prison work before. He believed that the State was at risk for not being able to get the job done for the amount bid in the timeframe allotted for completion.

Mr. Gauthier also factored into his consideration the fact that the funds for the project were coming from a year-end budget surplus at DPSCS. Therefore, if the contract were awarded to Control Sources, DPSCS could only encumber the contract amount. No additional funds would be available for change orders, additions, or overruns. Mr. Gauthier testified that they would rather forego the project and not risk incurring these additional costs, continuing the maintenance contract with Pritchett Controls until they could obtain sufficient funds to cover all the costs for the project.

Mr. Gauthier relayed all of these concerns to Ms. Haynes. Neither Ms. Haynes nor Mr. Gauthier had any concerns about Control Sources' character or integrity. Rather, their concern regarding Control Sources' ability to do the job was based solely on the "unreasonably low" bid. Ms. Haynes concluded that Control Sources was not a responsible bidder under COMAR 21.06.01.01. By letter dated May 31, 2016, DGS rejected the bid, stating that the bid was "determined to be unreasonably low in comparison to government estimate and the other bids submitted for this project," that "the work cannot be done for the quoted price," and that "it is in the State's best interest to reject the bid submitted by Control Sources, LLC, as non-responsible."

By letter dated June 6, 2016, Control Sources protested the

DGS determination that it was not a responsible bidder on the grounds that “[b]esides carrying the usual licenses, this firm is responsible because the firm is experienced in the type of work involved, because this firm is bonded for the project and because this firm has double checked its quoted price and confirms to you that the work can be done for the quoted price.” On June 10, 2016, Control Sources sent an extended bid breakdown to Ms. Haynes, again confirming its bid and providing further breakdown of its labor estimates. Mr. John Beahm, Jr. testified on behalf of Control Sources that it was indeed prepared to do the entire scope of work for the base bid of \$278,000, which did not include the \$355,000 for allowances. He also testified that the cost to have escorts accompany workers as they moved about the secured areas of the facility had also been factored into the Control Sources bid.

On June 17, 2016, the DGS Procurement Officer issued a final decision letter denying Control Sources’ protest on the grounds that it was “unreasonably low and should be rejected.” Ultimately, DGS recommended award of the contract to Siemens, which was approved by the Board of Public Works (“BPW”) in the face of the bid protest on June 22, 2016. On June 29, 2016, Control Sources filed its appeal of the DGS decision. A full evidentiary hearing was held by this Board on October 14, 2016.

DECISION

The issue in this case is whether the Procurement Officer for DGS was unreasonable or abused her discretion when she rejected the lowest bid submitted by Appellant, Control Sources, LLC, or whether her rejection of the bid was contrary to laws or regulations. The essence of Appellant’s position is that Control Sources was a responsible bidder and that rejection of its bid was contrary to law. Equating the attributes of responsibility

with the attributes of character and integrity, Appellant concludes that absent any evidence or dispute regarding Control Sources' character or integrity, it is by definition a responsible bidder.

Relying on Hanover Uniform Co., MSBCA 1059, 1 MSBCA ¶14 (1982), Appellant further asserts that it is in the best interests of the State to select Control Sources' bid because it was the lowest bid submitted, that there is no legal authority by which an "unreasonable price" can be equated with an "unreasonably low price," and that there is no legal authority allowing a procuring agency to reject the lowest bid. Appellant argues that under COMAR 21.06.02.03(B)(3), there are only four legal bases by which a responsible bid can be rejected and that the only basis for rejection applicable here is the provision whereby a price is determined to be unreasonable. Appellant concludes that (1) Control Sources' bid was responsible, (2) its bid was not unreasonably low, and (3) even if were unreasonably low, rejection of its bid would not be in the best interest of the State and is thus contrary to law.

Appellant is correct that under Maryland law, a procurement officer "shall award the procurement contract to the responsible bidder who submits the responsive bid that...is the lowest bid price..." MD Code Ann., State Govt., §13-103(e)(i). Thus, a procurement officer has no discretion as to whether to award a contract to the lowest bidder. This is true, however, only when the bid is both responsive and responsible. "A procurement officer shall reject a bid or proposal if the procurement officer determines that: (i) the bid is nonresponsive or the proposal is unacceptable, or (ii) the bidder or offeror is not responsible." MD Code Ann., State Govt., §13-206(a). Thus, a procurement officer has no discretion to award a contract to a bidder that is either nonresponsive or nonresponsible—if it fails to meet either of these criteria, it must be rejected.

Accordingly, the threshold questions that must first be determined are whether the bid is both responsible and responsive. If the bid was both responsive and responsible, we must then consider Appellant's arguments that (1) the bid was not "unreasonably low" and (2) whether this was a proper basis for rejecting the bid under Maryland law.

There is no dispute regarding the responsiveness of Control Sources' bid. Here, the dispute centers around whether the bid was responsible and, if so, whether its rejection as the lowest bid was proper. In determining whether a bid is responsible, Maryland law provides that:

A procurement officer may determine that a person is not a responsible bidder or offeror for:

- (1) unreasonable failure to supply information promptly in connection with a determination of responsibility under subsection (a) of this section; or
- (2) any other reason indicating that the person does not have:
 - (i) the capability in all respects to perform fully the requirements for a procurement contract; or
 - (ii) the integrity and reliability that will ensure good faith performance.

MD Code Ann., State Govt. §13-201(c); See also, COMAR 21.06.01.01(B). Under COMAR 21.01.02.01(77), "responsible" is defined as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance."

While there is no dispute that Control Sources provided timely information in response to the procurement officer's requests, nor is there any dispute regarding Control Sources' integrity or reliability to perform in good faith, the issue is whether Control Sources had "the capability in all respects to perform fully the requirements for a procurement contract." Control Sources' bid was significantly lower than the in-house

engineer estimate and the two independent estimates obtained from Trane and Pritchett Controls. It was also significantly lower than the bids submitted by Siemens and Johnson Controls.

Mr. Gauthier trusted the estimate provided by Pritchett Controls because it had been maintaining the system for five years and knew the time and labor requirements to move about a prison system. Similarly, Mr. Gauthier knew that Trane had been working in prisons for years and had incorporated these time and labor requirements into its estimate. Mr. Gauthier was reasonable in relying on these estimates and thus considered the Control Sources' bid to be "unreasonably low." This unreasonably low bid led Mr. Gauthier to believe that Control Sources lacked the necessary experience and capability to complete the work (i) for the bid price, (ii) in the prescribed environment, and (iii) in the time allotted. Relying on Mr. Gauthier's expertise and his concerns, the DGS Procurement Officer, Ms. Haynes, had a rational basis for concluding that the bid was not responsible and should be rejected.

Under Maryland law, the determination of a bidder's responsibility is the duty of the procurement officer who is vested with a wide degree of discretion and business judgment in making that determination. Lamco Corp., MSBCA 1227, 1 MSBCA ¶96 (1985); Louise T. Keelty, Esq., MSBCA 1195, 1 MSBCA ¶85 (1984); Board of Education of Carroll Co. v. Allender, 206 Md. 466 (1954). The rationale for granting procurement officers such leeway has been addressed as follows:

Deciding a prospective contractor's probable ability to perform a contract to be awarded involves a forecast which must of necessity be a matter of judgment. Such judgment should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the contracting officers involved who should be in the best position to assess responsibility, must bear the major brunt of any difficulties

experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the State's [Government's] behalf.

Lamco Corp., MSBCA 1227, 1 MSBCA ¶96 (1985) (quoting 39 Comp. Gen. 705, 711; 43 Comp. Gen. 228, 230 (1963)). In this regard, a procurement officer's finding of nonresponsibility will not be disturbed unless it is shown that the determination was made in bad faith or lacked a reasonable basis.

We have repeatedly held that we are reluctant to substitute our judgment for that of an agency, in part because it is the procuring agency that will have to "live with the results" of its decision. Klein's of Aberdeen, MSBCA 1773, 4 MSBCA ¶354 (1994). Likewise here, we are unwilling to substitute our judgment for that of Ms. Haynes and Mr. Gauthier regarding their determination that Control Sources did not possess "the capability in all respects to perform fully the requirements of the procurement contract" and that it was not a responsible bidder.

Having determined that the DGS Procurement Officer was reasonable in concluding that the Control Sources bid was not a responsible bid, our analysis need not go any further. We are nevertheless compelled to point out the flaw in Appellant's remaining argument that "[t]he best interest of the State is only applicable if the bid price is unreasonable." Appellant suggests that a contract must be awarded even when the bid price is unreasonably low because it is in the best interest of the State. This proposition defies logic and cannot be upheld. Appellant argues that "[t]he law and judicial authority speak in a united voice that even an unreasonably low bid cannot be rejected in the best interest of the State." Were this so, a contractor need only submit a bid of \$1.00 to be awarded a contract, since it is in the State's best interest to minimize costs. A \$1.00 bid is clearly unreasonably low, but awarding a contract for this amount would be irresponsible. It is highly unlikely that a contractor

could perform any work for this amount. And it would be irresponsible and not in the State's best interest to award a contract based on such an unreasonably low bid. This is why a bid must meet the threshold requirement of responsibility in order to be properly considered for award.

For all of the foregoing reasons, the appeal of Control Sources must be DENIED.

Wherefore it is Ordered this _____ day of January, 2017 that this appeal be and hereby is DENIED.

Dated:

Bethamy N. Beam
Board Member

I Concur:

Michael J. Collins
Chairman

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 2987, appeal of Control Sources, LLC, under DGS Project No. K-745-161-003.

Dated:

Michael L. Carnahan
Deputy Clerk