

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of ALLSTATE POWER)
VAC. INC)
)
) Docket No. MSBCA 2008
Under Dept. of General Services)
Project No. SR-000-950-003)
)

June 17, 1997

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.

APPEARANCE FOR APPELLANT: Frank M. Benson, Jr., Esq.
 David K. Hayes, Esq.
 Boyd, Benson & Hendrickson
 Baltimore, MD

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

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the decision of the Department of General Services (DGS) Procurement Officer that it was not a responsible bidder.

Findings of Fact

1. On November 19, 1996, DGS issued an invitation for Bid (IFB) for Project No. SR-000-950-003, Upgrade Fuel Storage and Delivery System for State Highway Administration, Eastern Region.
2. The bid documents packet contained a document entitled "Special Provision for Underground Storage Tank Upgrade and Fuel Management System (SHA)" (Special Provision) which required the "apparent low bidder" to submit, within five days after notification that it was the "apparent low bidder", a completed "Contractor's Qualifications" Form which was included in the Special Provision.¹ The Contractor's Qualifications Form was needed by

¹ The Special Provision provided that: "[p]rior to award of this contract the Department will determine whether or not the bidder submitting the low bid is responsible. The Procurement regulations define a responsible bidder as "a person (or firm) who has the capability in all respects to perform fully the contract requirement [sic], and the integrity and reliability that shall assure good faith performance." In connection with this responsibility determination, within five (5) days, the apparent low bidder

DGS to obtain information on the low bidder necessary for making a determination of the bidder's responsibility. This form requested information as to (1) the bidder's status as a corporation, sole proprietorship or partnership, (2) the bidder's experience, management approach (key on-site personnel; office and on-site contact people; plans for control and monitoring), and resource allocations to the project (manpower and equipment), and (3) the bidder's subcontractors and their experience. The Special Provision advised potential bidders that the information was needed in order for the Procurement Officer to make a responsibility determination.

3. Bids were opened on February 18, 1997. Seven bids were received. The apparent low bidder was Appellant.
4. On February 19, 1997 at approximately 11:05 a.m., a man who identified himself as Ted Piotrowski telephoned the Procurement Officer, John Cook, of the Office of Procurement and Contracting requesting the bid results. Mr. Piotrowski is Appellant's contracts administrator. Mr. Cook informed Mr. Piotrowski at that time that Appellant was the apparent low bidder. Mr. Cook then switched Mr. Piotrowski over to Mr. Robert Langton, another employee in the DGS Office of Procurement and Contracting and Mr. Cook's subordinate.
5. Mr. Langton testified that he informed Mr. Piotrowski during this February 19, telephone conversation that Appellant should send in all required submittals. Appellant was also advised to send in its Maryland construction license number and the name of its Maryland resident agent, which information was missing from its bid. This testimony is supported by Mr. Langton's contemporaneous notes of the telephone conversation. The Board finds that the Appellant was thus notified that it was the apparent low bidder and that pursuant to the Special Provision the Contractor's Qualifications Form was due five days later or by February 24, 1997.
6. On the same day, February 19, 1997, shortly after this telephone conversation Appellant faxed to Mr. Langton a copy of its Maryland Contractor's license and a copy of its Foreign Corporation Qualification (which included the name of its resident agent) filed with the Department of Assessments and Taxation.
7. By March 10, 1997, the DGS Procurement Officer had not received Appellant's Contractor's Qualifications Form as required by the Special Provision from which to make a determination whether Appellant was a responsible bidder, and on March 10, 1997 the Procurement Officer rejected Appellant's bid on the ground that he could not find Appellant to be a responsible bidder because of Appellant's failure to timely submit the required form. Mr. Cook informed Appellant of the rejection of its bid on responsibility grounds by letter dated March 10, 1997.
8. On March 17, 1997 Appellant filed a protest against the rejection of its bid.
9. Appellant's protest provided in part as follows:

*John Cook/CFCC Procurement
State of Maryland DGS*

shall provide to the Procurement Officer the following information:" This introductory language is followed by the Contractor's Qualifications Form.

301 W. Preston Street
Baltimore, MD 21201

RE: DGS Project #SR-000-950-003 (Eastern Region) Fuel Storage Upgrade

Allstate Power-Vac, Inc. (APV) wishes to officially protest the rejection of our bid on the above referenced project. APV was not notified of its being the low bidder on this project and consequently none of the contractor qualification submissions as required by the Special Provision were mailed to your attention. Furthermore, the "Special Provisions" were not included in the bid package that we purchased. Failure of your department to include the Special Provision in our bid package and to notify us of the bid results has precluded us from submission of additional information.

I have made repeated phone inquiries to your office to determine when the bid was going to be opened, to determine the bid results and whether further information was required. In response, Mr. Langton stated that proposals of the low bidders were still being evaluated and that a copy of our Maryland Contractor's License and a copy of our Foreign Corporation Certificate showing the name of our registered agent be forwarded. This fact is confirmed by APV telefax on 2/18/97 (copy of cover letter is attached).

Additionally, contrary to your letter of 3/10/97, Mr. Langton never contacted APV on 2/19/97 regarding submittals nor had APV received any communication of any type until the letter of 3/10/97.

10. This protest letter was written by Mr. Piotrowski. The portion set forth above contains factual matter that is inconsistent with the Board's findings of fact as set forth in Findings of Fact Nos. 4, 5 and 6.
11. By a decision dated April 3, 1997, Mr. Cook denied Appellant's protest. The grounds for the denial were that the Special Provision was included in all bid packages given to bidders and that Mr. Cook and Mr. Langton both had conversations with Appellant on February 19, 1997 which put Appellant on notice that its completed Contractor's Qualifications Form had to be submitted promptly. The Procurement Officer's decision noted that at the time the decision was issued, April 3, 1997, 24 days after Appellant was sent written notice that its bid was rejected, Appellant still had not submitted the completed Contractor's Qualifications Form.²
12. Appellant filed an appeal with this Board from the Procurement Officer's denial of its protest on April 14, 1997.
13. In a related procurement conducted a few weeks earlier for upgrade of the fuel storage and delivery systems in the Central Maryland region, Mr. Cook likewise rejected the low bid after the bidder failed to submit a completed Contractor's Qualification Form in a timely manner.

² The completed form was received April 4, 1997, the day after Mr. Cook rejected Appellant's bid protest.

Decision

Appellant makes two arguments concerning why it was improper for the State to reject its bid for failure to timely provide an executed Contractor's Qualifications Form as set forth in the Special Provision. The first argument is that DGS was required to give Appellant written notice of intent to award the contract to it as set forth in the Instructions to Bidders included in the bid package before the requirement to submit the Contractor's Qualifications Form became effective. It is uncontested that no written notice of intent to award a contract to Appellant was ever sent. Appellant was advised orally during the telephone conversation of February 19, 1997 that it was the apparent low bidder and should supply information missing from its bid and all required submittals. The Board finds this oral notice sufficient to trigger the requirement of the Special Provision that "within five (5) days, the apparent low bidder shall provide to the procurement officer" the information required by the Contractor's Qualifications Form included in the Special Provision.

The requirements of the Instructions to Bidders (Instructions) regarding written notification to bidders in relevant part provide as follows:

12. AWARD AND EXECUTION OF CONTRACT:

a. AWARD OF CONTRACT:

- (1) *Unless otherwise stated in the contract documents, the award of the contract, if it be awarded, will be to the responsible bidder submitting the lowest responsive bid or evaluated bid. The successful bidder will be given a written notice of intent to award stating that its bid (including applicable add or deduct alternates) has been accepted and that it has been selected for award of the contract. The basis for award of alternates is set forth in the subsection B below, "Award of Alternates."*
- (2) *Award of this contract by DGS will not be final and complete until after (a) a proposed award is approved by the appropriate public authorities, (b) the contractor submits complete and satisfactory documentation required under the contract, such as insurance certificates, affidavits, MBE compliance documents, bonds, etc., and (c) DGS executes a contract and forwards it to contractor.*

Appellant argues that this language requires that Appellant receive from DGS a written notice of intent to award stating that Appellant's bid has been accepted and that it has been selected for award of the contract before the requirement of the Special Provision to submit the Contractor's Qualifications Form becomes effective. Appellant asserts that the Contractor's Qualifications Form is the same as the other documentation required to be completed and submitted under subparagraph

(2) of paragraph 12 of the Instructions. In Appellant's view the language of paragraph 12 of the Instructions as set forth above, requires the agency to determine that (1) the contractor's bid is responsive, (2) that the contractor is responsible, and (3) to secure approval for the proposed award of the contract to the contractor from the Board of Public Works prior to advising the contractor in writing of intent to award the contract to it which only then would obligate the contractor to file the Contractor's Qualifications Form.

The Board of Contract Appeals disagrees. The above referenced language of the Instructions to Bidders, consistent with the General Procurement Law and COMAR, requires the agency to make a determination that the contractor's bid is responsive and that the contractor is responsible, i.e. has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance. COMAR 21.05 .02.13; 21.01.02.01(77). The requirement set forth in the Special Provision to provide the executed Contractor's Qualifications Form in five days relates to the initial determination the Procurement Officer must make that the low bidder is responsible. Neither the Special Provision nor the Instructions to Bidders require that a bidder be notified in writing that its bid has been accepted and that it has been selected for award of the contract prior to the agency determining that the bidder is responsible. Our conclusion that a responsibility determination based on an executed Contractor's Qualifications Form may be made prior to issuance of a written notice of award is strengthened by reference to the actual wording of the Special Provision which states that "[p]rior to award of this contract, the Department will determine whether or not the bidder submitting the low bid is responsible."

Appellant next argues that it is not bound by the requirements of the Special Provision because the Special Provision was not included in its bid package. We find, however, that the Appellant has not sufficiently demonstrated that the Special Provision was not included in its bid package.

Appellant's Contract Administrator, Mr. Piotrowski, did not testify. He submitted an affidavit attesting the truth of statements in Appellant's Comments on the Agency Report that Appellant's bid package did not contain the Special Provision and Appellant was not aware at the time of bid opening of the Special Provision nor the Contractor's Qualifications Form, that was to be provided to the Procurement Officer, contained therein. Both Mr. Cook and Mr. Langton did testify and the Board was thus able to observe their demeanor. Their testimony reflects and the Board finds that Mr. Piotrowski spoke to both Mr. Cook and Mr. Langton on February 19, 1997 and was advised by Mr. Cook and Mr. Langton that Appellant was the apparent low bidder and advised by Mr. Langton to supply items missing from its bid and all required submittals. The record also reflects that Appellant faxed the missing items (Maryland Contractors License and name of resident agent as reflected in its Foreign Corporation Certificate) to DGS on February 19, 1997 after Mr. Piotrowski spoke to Mr. Cook and Mr. Langton earlier in the day.

In Appellant's March 17, 1997 protest letter to Mr. Cook, Mr. Piotrowski states in relevant part:

AVP was not notified of its being low bidder on this project. . . .

I have made repeated phone inquiries to your office to determine when the bid was

going to be opened, to determine the bid results and whether further information was required. In response, Mr. Langton stated that proposals of the low bidders were still being evaluated and that a copy of our Maryland Contractor's License and a copy of our Foreign Corporation Certificate showing the name of our registered agent be forwarded. This fact is confirmed by APV telefax on 2/1/8/97 (copy of cover letter is attached).

Additionally, contrary to your letter of 3/10/97, Mr. Langton never contacted APV on 2/19/97 regarding submittals nor had APV received any communication of any type until the letter of 3/10/97.

These statements made by Mr. Piotrowski in this letter are not consistent with the testimony of Mr. Cook and Mr. Langton that Mr. Piotrowski spoke to Mr. Cook and Mr. Langton on February 19, 1997 (and not February 18, 1997) and that Mr. Piotrowski was advised that he was the low bidder and to provide missing items and all required submittals at that time. We find that these inconsistencies cast sufficient doubt on Appellant's assertion that the Special Provision was not included in its bid package that we reject such assertion. Appellant was thus bound to submit the Contractor's Qualifications Form in timely fashion. The Procurement Officer found that Appellant failed to submit the Form in timely fashion and the Procurement Officer determined that Appellant was not responsible as a result of this failure. The Procurement Officer has an affirmative duty to determine whether a bidder is responsible. COMAR 21.05.02.13D. The determination by a Procurement Officer of whether a bidder is responsible is a discretionary determination. N.B.R., Incorporated, MSBCA 1830, 4 MSBCA ¶364(1994). The Board will uphold a discretionary determination of a procurement officer unless the determination is unreasonable and thus constitutes an abuse of discretion. Id. We have found that the Appellant was required to submit the Contractor's Qualifications Form by February 24, 1997. The Procurement Officer did not determine to reject Appellant's bid until March 10, 1997. The Board does not conclude that the Procurement Officer abused his discretion in finding that Appellant was not responsible for failure to submit the Form after the passage of nineteen days from being notified on February 19, 1997 that it was the low bidder.

The appeal is therefore denied. Wherefore it is Ordered this 17th day of June, 1997 that the appeal is denied.

Dated: June 17, 1997

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
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 2008, appeal of Allstate Power Vac. Inc. under Dept. of General Services Project No. SR-000-950-003.

Dated: June 19, 1997

Mary F. Priscilla
Recorder

