

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of ASPLUNDH TREE)
EXPERT COMPANY)

) Docket No. MSBCA 2087
)

Under MTA Contract No. MTA-8000-)
0010)

October 9, 1998

Responsibility – Issues of bidder responsibility involve the exercise of discretion by a Procurement Officer. A Procurement Officer's determination regarding responsibility will not be disturbed unless that decision was arbitrary, capricious or clearly erroneous.

APPEARANCE FOR APPELLANT:

None

APPEARANCE FOR RESPONDENT:

Irwin Brown, Esq.
Chief Counsel
Mass Transit Administration
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its protest that the apparent low bidder was not responsible.

Findings of Fact

1. On June 9, 1998, the Mass Transit Administration (MTA) issued a solicitation for tree trimming and vegetation control services along the MTA Light Rail line at an hourly rate for a specified crew.
2. At bid opening on July 14, 1998, bids were received from Mercier's Tree Experts (Mercier's), Appellant and Excel Tree Company, Inc. (Excel).
3. The bids were tabulated and Mercier's was the low bidder with Appellant's appearing as the second low bidder.
4. Mercier's was notified of its award on August 4, 1998 and on August 19, 1998, Appellant and Excel were notified of their unsuccessful bids.
5. A Notice to Proceed was issued to Mercier's on August 19, 1998. Also on that date Appellant protested the award to Mercier's and the award notice was subsequently rescinded by MTA.
6. The basis of Appellant's protest was that the apparent low bidder, Mercier's, failed to meet the "Scope of Work" qualification requirements of the contractor in MTA's solicitation.

Specifically, Appellant complained that:

The Asplundh Tree Expert Company - Railroad Division, 708 Blair Mill Road, Willow Grove, PA 19090, wishes to protest the award of Contract No. MTA-8000-0010 to Mercier's Tree Expert Company, on the basis that the bid specifications were not met by this vendor, specifically the following specification:

B-1 Qualification of Contractors, Page SOW [Scope of Work] 1 of 4

It is Asplundh's contention that Mercier's Tree Expert Company does not have the "experience, technical knowledge, or the ability to satisfactorily perform the necessary work while working in areas of electrified tract, live overhead wires and train traffic" nor has it provided to the Administration any proof of such experience, knowledge, or abilities.

7. Paragraph B "Qualifications of Contractor" in the Scope of Work section of the subject contract provides as follows:

Contractor must be able to demonstrate to the Administration satisfaction that he has the experience, technical knowledge, and ability to satisfactorily perform the necessary work while working in areas of electrified track live overhead wires and train traffic; further, that he has and will employ sufficient men and equipment to complete the work.

Subparagraph a. under the above provision additionally states:

A review of personnel and necessary equipment as described in Sections C and D will be required as a condition of award.

Paragraph D in the Scope of Work section outlines the requirements of a typical crew specifying that the working foreman and climber and bucket truck operator must have experience around high voltage wires in addition to their experience in performing tree surgery and removal. Additionally, the working foreman must be "highly knowledgeable in the safety rules and regulations required for working along the transit's railroad right-of-way.

8. Mercier's responded to Appellant's protest by letter dated August 21, 1998 and on August 24, 1998, MTA employees, to include the MTA Project Manager responsible for the administration of the contract work visited Mercier's place of business to gather information necessary to access the allegations of non-responsibility on the part of Mercier's.
9. On August 24, 1998, Mercier's provided copies of four tree trimming contracts and two herbicide contracts illustrating the work it previously performed and/or is performing for various governmental entities.
10. The MTA issued its Procurement Officer's decision finding Mercier's responsibility on

September 1, 1998 which was received by Appellant on September 3, 1998 and Appellant appealed to this Board.

Decision

Appellant's protest asserts that Mercier's lacks experience in working in the area of electrical track and train traffic. This asserted lack of experience is ascribed to the contractor and not to members of the crew.

On investigating Mercier's experience and ability to perform this contract, i.e., issues of responsibility, the MTA received the resume of Mr. Richard H. Priddy, who was retained by Mercier's to provide railroad experience to Mercier's tree removal operations. Nothing in the solicitation prohibits Mercier's from hiring experienced personnel to perform under the contract after bid opening.

The qualifications specified in the Scope of Work requires that the contractor demonstrate to MTA's satisfaction that he has the experience, knowledge, and ability to perform the work in areas of overhead wires, electrified track and train traffic. The Procurement Officer found that Mercier's has had extensive experience along highway rights-of-ways and overhead wires. The Procurement Officer also concluded that Mercier's possessed the necessary equipment and experience to perform tree-trimming activities generally. To the extent that Mercier's previously lacked technical knowledge in areas of train traffic, the Procurement Officer found it has cured such deficiency with the retention of Mr. Priddy's expertise.

Appellant has challenged whether Mercier's is a responsible contractor. A responsible contractor is one "who 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).

This Board has consistently taken the position that issues of responsibility such as those raised in this appeal involve the exercise of discretion by the Procurement Officer, whose decision is not to be disturbed unless there is no rational basis for his conclusion. See Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA ¶82 (1984) at p. 4; Environmental Controls, Inc., MSBCA 1356, 2 MSBCA ¶168 (1987); Lamco Corporation, MSBCA 1227, 1 MSBCA ¶96 (1985); Charles Center Properties, MSBCA 1629, 3 MSBCA ¶297 (1992).

The record in this appeal reflects that there were grounds for the Procurement Officer to decide that Mercier's was a responsible bidder. According to the Procurement Officer's decision the Procurement Officer considered tree trimming, brush removal and herbicide application contracts between Mercier's and the Maryland State Highway Administration (SHA), the Virginia Department of Transportation, and Howard, Charles, Anne Arundel and Montgomery Counties. The contract work with SHA and Charles and Anne Arundel Counties involved tree trimming activity near high voltage lines. In the visit to Mercier's place of business, MTA officials observed all the equipment possessed by the company and were able to discuss contract performance with Mr. Craig Mercier, the owner of Mercier's, and with Mr. Priddy and to assess Mercier's ability to perform. Information gathered in this visit was shared with the Procurement Officer by the MTA Project Manager for the tree trimming and vegetation control services covered by the procurement.

This Board has recently reaffirmed the principle that it will not disturb the Procurement Officer's determination regarding responsibility unless that decision was arbitrary, capricious or clearly erroneous. See Covington Machine and Welding Company, MSBCA 2051, 5 MSBCA ¶436 (1998). The issue herein is whether, considering all of the material bearing on Mercier's experience and knowledge considered by the Procurement Officer, the Procurement Officer could rationally conclude as he did that Mercier's had the ability to perform under the terms of the contract. Having expressed a rational basis for his conclusion that Mercier's was possessed of such ability, his decision will not be disturbed. Accordingly, the appeal is denied.

Wherefore, it is ORDERED this 9th day of October, 1998 that the appeal is denied.

Dated: October 9, 1998

Robert B. Harrison III
Chairman

I concur:

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 2087, appeal of Asplundh Tree Expert Company under MTA Contract No. MTA-8000-0010.

Dated: October 9, 1998

Mary F. Priscilla
Recorder

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