

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ASSURED MEDICAL TEMPS,))
INC.))
)) Docket No. MSBCA 1739
Under DHMH Blanket Departmental))
Contract for Sitter Service for))
Facility Clients))

September 30, 1993

Bids - Lateness Exception

A late bid may not be excused under COMAR 21.05.02.10B if the bidder's unreasonable action or inaction is an intervening cause or contributing factor for the bid being delivered late.

Responsibility - Procurement Officer Discretion

The procurement officer has wide discretion in determining the responsibility of a bidder which this Board will not disturb unless, arbitrary, capricious or clearly erroneous.

APPEARANCE FOR RESPONDENT: Thomas P. Lyon, Esq.
Law Offices
J. Edward Davis
Towson, MD 21204

APPEARANCE FOR RESPONDENT: Sharon Krevor-Weisbaum
Asst. Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: Gordon B. Heyman, Esq.
Dackman & Heyman
Baltimore, MD 21218-5641

OPINION BY MR. MALONE

Appellant timely appeals a denial by the DHMH Procurement Officer, that (1) the bid of Supportive Lifeline, Inc. (Supportive) was late and (2) that Thomas & Thomas, Inc. (Thomas) was not a responsible bidder. The facts material to the issues in the appeal are largely uncontested.

Findings of Fact

1. On April 6, 1993 the Division of Contracts and Telecommunications (DCT) of the Department of Health and Mental Hygiene (DHMH) issued an invitation for bids (IFB) DHMH - DCT-93-914 to provide sitter services¹ at Spring Grove Hospital Center, with the option for other DHMH facilities to use the selected vendor. The vendors were to

¹A sitter is someone to act as a companion (provide supervision) for patients hospitalized at a general hospital for medical or surgical treatment.

provide a coordinated pool of qualified employees to act as sitters on an "as needed" basis.

2. The bid documents originally provided bids were to be received at the Office of Assistant Superintendent - Spring Grove Hospital Center, Leonard F. Gmeiner (Administration Conference Room) Wade Avenue, Catonsville, Maryland 21228 until 2:00 o'clock P.M., Thursday, April 8, 1993. Subsequently, the solicitation was amended to the level of a Departmental solicitation and by amendment bidders were advised bids would be received at the Office of Contracts and Telecommunications, 201 W. Preston Street, Room 511, Baltimore, Maryland 21201 until 2:00 P.M., May 19, 1993, Room 511 and that any bid not received by that time and date shall be disqualified. All of the parties received this amendment.

3. The IFB was structured for multiple contracts which were given priority according to the IFB.

4. The IFB provided,

"F. MULTIPLE CONTRACTS/PRIORITY

The Department may contract with more than one vendor, on occasions when a sitter is needed. The bidder submitting the lowest single weighted hourly bid rate price at a designated general hospital, as taken from the bid page of this contract, shall be given the first opportunity to provide a sitter. If this lowest rate bidder is not able to provide a worker within one hour after being requested, the requesting facility will then contact the next lowest bidder, etc., and will authorize such service to be provided based on availability and cost. The Department does not guarantee any number of hours of needed Sitter Service at any general hospital, even to the lowest cost vendor.

A bidder may choose to submit a bid at one, several, or all general hospitals listed, but must bid for all shifts at any general hospital for which it submits a bid. Bid sheets should only be completed and submitted for those general hospitals for which a vendor will provide sitters. (Don't return any blank bid sheets)."

5. The bidder was also to provide telephone numbers to the DHMH as follows:

"1. Telephone numbers

With its bid, each vendor must provide one or more telephone number(s) that will be answered 24 hours per day and must

also provide a list of representative personnel who will be available to answer such calls. The Department or any of its facilities reserves the right to make verification calls to this (these) number(s) to ascertain if they will be answered 24 hours per day by an appropriate representative of the vendor."

6. The bidders were also required to provide at least two references where it currently or within the past two (2) years, provided similar or a higher level of service as follows:

"2. References

As evidence of the ability of a vendor to satisfactorily provide the "sitter" service needed, each prospective bidder must have at least two (2) references of where it is currently, or has within the past 2 years, provided similar or a higher level of service. With its bid, each vendor must identify these references, provide a description of the type, duration, and value of the service, and the name, title, and telephone number of a contact person with the reference who can verify the nature of the services and the level of satisfaction with its performance."

7. DHMH also required in the IFB that all sitters be employees of the vendor who as employer would be responsible for the insurance, taxes and other ordinary and necessary costs of the employees.
8. The Procurement Officer for this IFB was present at bid opening together with two (2) representatives of Appellant and two (2) representatives of Personal Touch Home Health Care. The bid box containing the bids was taken to Room 522 at 2:02 p.m. to open the bids due to the lack of space in Room 511. The bid box contained eight bids. While opening the second bid, a representative of Best Temporary Services (BEST) entered the Room, 522, and since it was 2:05 P.M. was told the bid was late. The representative of BEST left and returned a few minutes later with the Director of Fiscal Services Administration, DHMH, who informed the Procurement Officer the Best bid had been at Room 511 by 2:00 p.m. The Procurement Officer suspended bid opening to confirm these facts. At approximately 2:10 P.M. while in the hallway, a representative

of Supportive appeared before the Procurement Officer to deliver its bid. The Supportive representative told the Procurement Officer she was at Room 511, 301 West Preston Street at 1:50 P.M. to deliver the bid, and since there were no State personnel to take the bid, waited a few moments and upon making an inquiry discovered she was in the wrong building. The Procurement Officer further suspended bid opening to confirm the facts offered by the Supportive representative.

9. The Procurement Officer then accepted the Best Bid.² The Procurement Officer then correctly advised Supportive that before he could accept its late bid, he had to obtain written approval from the Attorney General's Office pursuant to COMAR 21.05.02.10B. The Procurement Officer after consultation with the Attorney General and confirmation of the facts offered by Supportive, accepted the late bid as an exception to late bids under COMAR 21.05.02.10B.
10. The Procurement Officer concluded that but for the inaction of State personnel directing the procurement activity or their employees the bid of Supportive would have been delivered before 2:00 P.M. This reasoning was based upon a well known problem of insufficient signage for the 301 and 201 West Preston Street office buildings. The two buildings are adjacent and the 201 West Preston Street building has no specific address identification on it. There is a sign stating, "The Herbert R. O'Connor State Office Building", but no numbered address except a sign "Building 4". A small sign does appear on one of the revolving doors of the lobby which reads "201". This is not the main entrance to the building.
11. Between the 201 and 301 W. Preston Street buildings are two small signs, one facing north and one facing south. One sign reads "201 W. Preston St." with an arrow towards the 201 Building and the other "301 W. Preston St." with an arrow towards the 301 Building.

² Appellant did not protest Best as a late bid.

12. The 301 W. Preston Street building has a large sign identifying it as "State Office Building." The sign is in a prominent location along W. Preston Street on the northeast corner of the building. Toward the middle of the building are small number markings identifying the building as "301." These numbers are easily missed. Nowhere else on the 301 W. Preston Street building is there any street address.
13. Room 511 of the 301 W. Preston Street building is a Department of Personnel (DOP) testing room used by candidates seeking State employment. It is common for individuals coming to these State offices to confuse the buildings and end up in the wrong place. There have been many circumstances when individuals looking for the personnel testing room have found themselves at the DRMH Procurement Officer's office in Room 511 of the 201 W. Preston Street building.
14. The inadequate signage is an endemic problem for these buildings. State personnel conducting the procurement were well aware of the signage problem and were constantly helping lost members of the public. While inconvenient, the problem never rose to a level where State personnel took action to have adequate signs erected.
15. The Supportive representative, while generally familiar with the State Office Complex had never been to Room 511 of 201 W. Preston Street. The Supportive representative parked the car shortly before 2:00 P.M. and went into the first building of the complex without relying on a sign or direction from any person. She simply reasoned this was the first building she came to and assumed it was 201 W. Preston. The underlying rationale of the Procurement Officer that the State's failure to erect adequate signage was the linchpin for accepting the late bid.
16. Thomas also bid on this IFB. Thomas currently provides uniformed guard services at a mental health institution under a State contract and provides drawbridge operators under another. Thomas also provides security and detective agency services.

17. The DDMH Procurement Officer determined Thomas a responsible bidder based upon its past work history operating 24 hours a day, seven days a week providing security services for over ten years and made inquiries into the references provided. After reviewing the background of Thomas and considering its prior history working with and training workers the Procurement Officer concluded it had sufficient experience to provide the level of skill necessary to comply with the sitter requirements of the IFE.
18. The Procurement Officer was satisfied Thomas could provide the necessary level of 24 hour telephone service required and employees to sit with patients awaiting health care services. Only elementary knowledge of basic principles of patient care were required as expressed in the IFE.

"By submitting a bid for this service Bidders will be deemed to specify that they are capable of providing qualified, sufficient staff should the need arise for covering more than one patient either at the same hospital or at more than one hospital for lengthy periods of time. By submitting a bid for service, Bidders are stating that in the performance of this Contract the employees they provide possess the ability to work with and accept the psychiatrically or developmentally handicapped patient; to provide the services described in caring, humane and respectful manner; and to maintain a therapeutic attitude toward the patient.

Credentialing of all staff will be required. The Contract must provide the Department, and upon request each respective facility, with documentation that each staff member has had appropriate training.

A copy of a resume for any staff provided by a vendor must be provided to the Department, and upon request each respective facility, prior to the use of such employee under this contract. Copies of any credentials, certificates, etc. for employees must also be provided to the Department, and upon request to each respective facility.

Additionally, the Contractor must provide the Department, and upon request each respective facility, with documentation of what their training entails and also documentation of the evaluations of their staff.

For the purpose of this Contract appropriate training shall consist of:

- a. Development of skill, knowledge, ability and attitude necessary for the provision of "sitter" care of the psychiatric patient.
- b. Training in the elementary knowledge of basic principles of patient care, of sanitation and personal hygiene, and of the responsibilities of employees in the proper care of the psychiatric patient.
- c. The proper techniques for lifting and positioning clients.
- d. A knowledge of correct procedures for self protection for the safety of clients who pose a danger to themselves and/or others. This should include a knowledge of violent behavior management.

The Department and/or a particular facility reserves the right to refuse to accept any individual "Sitter" provided by any Contractor with just cause."

Decision

A. Late Bid

Generally, late bids may not be considered. COMAR 21.05.02.10A. The problems inherent in late bids requires this. However, this strictly enforced and often harsh rule does have an exception where, but for the action or inaction the State personnel directing the procurement activity or their employees, a bid would have been timely. COMAR 21.05.02.10B. The Attorney General's Office upon request has made a written approval for accepting the Supportive late bid in this appeal, following a reasoned examination of the cause for the bids lateness. The Attorney General and Procurement Officer found the cause of the late bid was inadequate signage.

The approval of the Attorney General to allow the receipt of the late bid is supported by a reasonable analysis of the facts. The decision of the Procurement Officer together with the approval of the Attorney General's Office must be given weight by this

in that the lateness of the bid is measured in minutes only and that if the building had been clearly marked the Attorney General reasoned the bid would have been delivered in a timely manner. While it is troubling that Supportive arrived at a State Complex it was not specifically familiar only minutes before bid opening and while a more prudent bidder may have made a greater effort to overcome or allow for unforeseen circumstances such as inadequate signage; these aspects of Supportive's behavior are not enough by themselves to overcome the reasoning given in the Procurement Officer's decision. However, at the hearing it became clear that Supportive's bid was not late due solely to the poor signage.

The Board is not persuaded by the argument of DHMH relying upon the Board's decisions in Giant Food Stores, Inc., MSBCA 1603, 3 MICPEL ¶284 (1991) nor Wilson's Grocery, MSBCA 1594, 3 MICPEL ¶283 (1991). Those cases were not inaction by State personnel factual scenarios but rather, bid box cases. The legal analysis of this case is more closely found in American Air Filter Co., MSBCA 1199, 1 MICPEL 89 (1984) at p. 5 where this Board in deciding the issue of late bid stated;

"Bidders primarily are responsible for choosing the method and manner in which they transmit their bids to assure their timely arrival in accordance with the requirements of solicitation. Compare Ferrotherm Co., Comp. Gen. Dec. B-203288, September 1, 1981, 81-2 CPD ¶194. Thus, the University may not consider a late bid delivered by commercial carrier unless improper State action is the sole or paramount cause of the late receipt. The Tower Building Corp., MSBCA 1057 (April 6, 1982); Olympia USA, Inc., Comp. Gen. Dec. B-215139, May 21, 1984, 84-1 CPD ¶535; Viscar Co., Inc., Comp. Gen. Dec. B-208701, January 31, 1983, 83-1 CPD ¶100; Edison Electronics Division, Armtec Industries, Inc., Comp. Gen. Dec. B-202342, June 10, 1981, 81-1 CPD ¶478; Southern Oregon Aggregate, Inc., Comp. Gen. Dec. B-190159, December 16, 1977, 77-2 CPD ¶477. In this regard, a late bid is not excused if the bidder's unreasonable action or inaction is an intervening cause of the bid being delivered late, even where the lateness in part is attributed to improper State action or advice. Avantek, Inc., Comp. Gen. Dec. B-185248, February 5, 1976, 76-1 CPD ¶75; Empire Mechanical Contractors, Inc., Comp. Gen.

Dec. B-202141, 81-1 CPD ¶471. Compare The Tower Building, supra. "(Emphasis added)

In that case involving a bid opening at the University of Maryland at College Park the Appellant had failed to establish that the lateness of its bid was attributable solely to the incorrect address given to it by the State personnel conducting the procurement activity since the Appellant failed to demonstrate that the person delivering the bid was on the campus prior to the time set for bid opening.

The facts here are distinguished in that here, Supportive clearly was on time, but in the wrong building. The question here is whether Supportive's bid, late by minutes, was late due to the inadequate signs for the office complex. DHME infers in its argument that a reasonably diligent bidder may assume that the designated bid box location would be capable of being found within a reasonable amount of time and since it was not, due to State failure to take remedial action relative to inadequate signage, the late bid can be excused. The Supportive representative revealed for the first time at the hearing that she did not rely upon and was not misguided by the inadequate signage. In fact, she simply went into the first building she came to at the State Office Complex and assumed it was the 201 W. Preston Street address. We find that this assumption of the Supportive representative was unreasonable and directly contributed to the lateness of the bid. We also agree with the Procurement Officer that poor signage contributed to the public confusion as to the 201 W. Preston Street address and did therefore contribute to the lateness of the bid. However, as a result of the testimony of the Supportive representative the record before this Board clearly reflects that poor signage was not the sole cause for the late bid and therefore fails to meet the test for acceptance of late bids under COMAR 21.05.02.10E.

Exceptions for late bids is an especially sensitive area of the Procurement Law and, as in this case, presents difficult factual scenarios which must be reviewed on a case by case basis.

This Board in weighing the facts as revealed at the hearing with the benefit of testimony, cross examination and argument of counsel must sustain the appeal on this ground and reject the Supportive bid as late and not properly within the late bid exception based upon inaction of State personnel.

The bid box cases cited by DEHM are distinguished by their factual scenarios. This Board while cognizant of the difficulty in resolving these issues during the actual procurement process must rely on its reasoning reflected in American Air Filter Co., supra. This reasoning is consistent with The Tower Building, Corp., MSBCA 1057, 1 MICPEL 13 (1982) where an unidentified State employee allegedly waived over the telephone the proposal closing date. This was not sufficient action to trigger the exception for late bids since the bidder unreasonably relied on the telephone waiver knowing that amendments could only be made by the Procurement Officer and therefore, in part, by its unreasonable reliance directly contributed to the lateness of its bid. Here, the bid is only minutes late but clearly late nonetheless, since Supportive's action in delivering its bid was an intervening cause of the bid being delivered late under the facts of this appeal. Consequently, the Board sustains the appeal on this basis.

B. Responsibility

The Procurement Officer has wide discretion in determining the responsibility of a bidder which this Board will not disturb unless arbitrary, capricious or clearly erroneous. See, Environmental Controls, Inc., MSBCA 1356, 2 MICPEL 192 (1987).


Under Maryland procurement law a procurement officer has broad discretion in determining whether a bidder is responsible. The Appeals Board will uphold a procurement officer's technical judgment that a bidder is or is not qualified in all respects to perform fully the contract requirements unless unreasonable or contrary to law or regulations. See, Environmental Controls, Inc.,

MSBCA 1356, 2 MICPEL 168 (1987); Data Systems Supply Co., MSBCA 1399, 2 MICPEL 192 (1988).


The training requirements under this IFB were minimal. The DHMH was seeking sitters to act as companions and was primarily interested in employees with some basic training to be attentive and present while patients awaited medical care. The sitter service offered by Thomas fills the minimum needs as to the requisite experience and skill to support a finding it is a responsible bidder. Appellant has failed in its burden of proof to demonstrate that the decision of the Procurement Officer, as to Thomas's responsibility, was in error and the appeal is denied on this basis.

Wherefore, it is this 30th day of September, 1993 ORDERED that the appeal is sustained in part and denied in part as described above.

Dated: 9/30/93


Neal E. Malone
Board Member

I concur:


Robert B. Harrison III
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 1739, appeal of Assured Medical Temps, Inc. under Blanket Departmental Contract for Sitter Service for Facility Clients.

Dated: 9-30-93

Mary F. Priscilla

Mary F. Priscilla
Recorder