

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CAM CONSTRUCTION
COMPANY OF MARYLAND, INC.

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) Docket No. MSBCA 1393
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Under DGS
Project No. AG-000-831-001

November 3, 1988

Responsibility - Responsiveness - A responsible bidder is one who has the capability in all respects to perform fully the contract requirements and possesses the integrity and reliability that will assure good faith performance. On the other hand, a responsive bid is one that is submitted in response to a solicitation in a competitive sealed bid procurement and at the time of bid opening conforms in all material respects to the requirements contained in the solicitation.

Responsibility - Responsiveness - A procurement agency may receive and evaluate information pertaining to a bidder's responsibility up to the time of contract award. In contrast, the procurement agency makes a responsiveness determination, i.e., whether the bid as submitted constitutes a definite and unqualified offer to meet the material terms of the solicitation, based on information in the bid at the time of bid opening.

Responsibility - Responsiveness - The requirement for a certificate of attendance at a Department of the Environment training program for sediment and erosion control seeks to ensure that the bidder has the ability to comply with important State environmental protection goals during performance of the work. As such, the certification requirement involves the bidder's capability to perform the work, a responsibility requirement. The procurement officer thus may determine the bidder's compliance prior to award, although the invitation for bids contained a requirement for submission of the certificate with the bid. In this regard, the certification requirement does not involve a commitment by the bidder to meet certain, specific environmental standards independently spelled out elsewhere in the contract. The required training certificate thus did not raise the question of the intent of the bidder to enter into the contract to perform the work, since the contractor is otherwise required to meet the specified environmental standards.

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OPINION BY MR. KETCHEN

This appeal raises the issue of whether the failure of a bidder to submit with its bid a certificate of attendance at a required training seminar sponsored by the State of Maryland regarding sediment and soil erosion control renders that bid nonresponsive, or whether such required certificate addresses an issue of responsibility and, therefore, may be submitted at any time prior to award.

Findings of Fact

1. The Department of General Services (DGS) issued an Invitation for Bids (IFB) for Project AG-000-831-001 for construction of an addition to the Maryland Department of Agriculture building in Annapolis, Maryland.

2. Six bids were received and opened on June 14, 1988. The low bidder was Eugene Simpson and Bros., Inc. (Simpson). Appellant was the second low bidder.

3. The Contract Specifications, Section 022800, state in pertinent part:

1.01 DESCRIPTION

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B. Work consist [sic] of but is not limited to: Preventing pollution of land, air and water and for controlling erosion and runoff of earth and silt, etc. Sediment control shall be accomplished as to preclude sedimentation generally and sedimentation particularly of adjacent waterways and stormwater systems.

1. The Contract Price is understood to include all Erosion and Sediment Control Work required for the safe conduct of work, whether or not it is specifically mentioned in specifications or indicated on the contract drawings. No additional charge for work will be considered except as specified in the GENERAL CONDITIONS.

1.02 QUALITY ASSURANCE

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B. Soil Erosion and Sediment Control: The Contractor shall implement soil erosion and sediment control in strict accordance with the provisions of the 1983 Maryland

Standards and Specifications for Soil Erosion and Sediment Control. Accordingly, before proceeding with grading operations, the Contractor shall become thoroughly familiar with the above standards and their impact on the work herein specified.

1.03 SUBMITTALS

* * *

- B. The Contractor shall submit a copy of a certificate of attendance from a Department of Natural Resources [Environment] training seminar for control of sediment and erosion with his bid. The Contractor shall also be required to display a copy of this certificate at the site with the building permit. (Training seminars are available at no cost through the Department of Natural Resources)[Environment].¹

4. The Legislature provided for sediment and erosion control measures, including the pertinent provision in the Maryland Annotated Code, Environmental Article §4-104b which requires:

¹Effective July 1, 1987, the Legislature transferred responsibility for sediment and erosion control from the Department of Natural Resources to the Department of Environment. These changes were implemented by substitution of "the Environment" for "Natural Resources" at the appropriate places in the statute. See Md. Ann. Code, Environmental Article §4-101 et sec. These changes are not reflected in the language of the IFB.

After July 1, 1983 any applicant for sediment and erosion control plan approval shall certify to the appropriate jurisdiction that any responsible personnel involved in the construction project will have a certificate of attendance at a Department of Environment approved training program for the control of sediment and erosion before beginning the project. (Underscoring added).

5. On June 16, Appellant protested an award to Simpson on the ground that its bid did not include a certificate of attendance from the required training seminar for control of sediment and erosion. (See Finding of Fact No. 3).

6. On June 21, prior to award of the contract, Simpson submitted to DGS a copy of the requisite certificate of attendance at the required training program for sediment and erosion control.

7. On June 24, 1988, the DGS procurement officer denied the protest. He found that the certificate requirement concerned an issue of contract responsibility and therefore could be submitted prior to award.

8. Appellant noted a timely appeal to this Board.

Decision

Maryland Annotated Code, State Finance and Procurement Article ("General Procurement Law") §11-102(q) and COMAR 21.01.02.59 state that a responsible bidder is one who has the capability in all respects to perform fully the contract requirements and possesses the integrity and reliability that will assure good faith performance. General Procurement Law §11-101(r) and COMAR 21.01.02.60 state that a responsive bid is one that is submitted under a procurement by competitive sealed bidding and conforms in all material respects to the requirements contained in the solicitation.

The distinction between responsiveness and responsibility is important because information pertaining to the determination of a bidder's responsibility may be received and evaluated after bids are opened but prior to contract award. Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA ¶82 (1984). A procurement officer has broad discretion in determining whether a bidder is responsible. Environmental Controls, MSBCA 1356, 1 MSBCA ¶168 (1987). To the contrary, a responsiveness determination is made at the time of bid opening. A bid to be responsive must constitute a definite and unqualified offer to meet the material terms of the IFB. Long Fence Co., Inc., MSBCA 1259, 1 MSBCA ¶123 (1986).

The thrust of Appellant's argument that the certificate in question goes to an issue of responsiveness is that it constitutes a material requirement of the IFB and is analogous to the certification requirement found by this Board in Track Materials, MSBCA 1097, 1 MSBCA ¶30 (1982) to address an issue of responsiveness. In Track Materials, the

IFB required bidders to include in their bids two affirmative action certificates evidencing their commitment to use the services of minority business enterprises. The Board held that Track Materials' failure to provide this certification in its bid rendered it non-responsive, stating:

Since an IFB requirement that a bidder commit itself to MBE program goals at the time of [bid is a matter of] substance rather than form, we conclude that the omission of such a commitment, where required, likewise is a material bid defect under Maryland law.

* * *

The absence of a required signature on an IFB affirmative action certification reasonably may be interpreted as a refusal by the bidder to commit itself to MBE goals and requirements. Thus, where some additional statement is not elsewhere contained in the bid package to otherwise demonstrate the bidder's intent to pursue the required level of minority business participation under an awarded contract, the bid is ambiguous and thus non-responsive. (Underscoring added).

Track Materials at 5,6.

There is no question that the sediment and erosion control requirements addressed by the Legislature in the Environment Article of the Maryland Annotated Code and also addressed in this IFB are material requirements of grave importance to the State. However, we find that the certification requirement in Track Materials is distinguishable from the requirement in the instant IFB. In this appeal, the certificate required by the IFB insures that the contractor has the ability to comply with the erosion and sediment control standards which are elsewhere contained in the bid package and to which Simpson committed itself when it signed and submitted its bid. Whether a certification requirement represents a matter of responsiveness or responsibility depends upon the impact of that certification. In Track Materials, the certification served to commit the contractor to the goals set forth in that certificate, without which the contractor would not have been required to meet those goals. Here, however, the certificate does not constitute a commitment by the bidder to meet certain standards - those standards are independently set forth in the contract and the contractor otherwise is obligated to meet them.

The present case is more analogous to our recent decision in Civic Center Cleaning Co., MSBCA 1357 (January 3, 1988). There, the IFB required bidders to include with their bids a copy of their State asbestos removal license and a copy of their patent license to use a special asbestos removal process. The Board held that these license requirements went to an issue of responsibility rather than responsiveness, stating:

The two licenses are necessary in order for the contractor to have the capability to perform in accordance with the contract's terms. As such, they do not involve bid responsiveness, but bidder responsibility, as defined in COMAR 21.01.02.59; i.e., the capability in all respects to perform fully the contract requirements.

Civic Center Cleaning Co., supra at 6. See also National Elevator Co., MSBCA 1251, 2 MSBCA ¶115 (1985); Construction Management Associates, Inc., MSBCA 1238, 1 MSBCA ¶108 (1985).

Furthermore, a matter of responsibility cannot be converted into one of responsiveness by virtue of the language in the IFB. As this Board stated in National Elevator, MSBCA 1252, 2 MSBCA ¶114, at 4 (1985):

... A matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation. 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. (Citation omitted).

See also Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA ¶82 (1984); Lithographic Publications, Inc., B-217263, 85-1 CPD ¶357 (1985); Marine Power & Equipment Co., Inc., B-208393, 82-2 CPD ¶514 (1982).

In this appeal, the failure of the low bidder, Simpson, to submit the certificate with its bid in no way affected its commitment to meet the material terms of the IFB. Thus the omission raised an issue of responsibility which a procurement officer must determine under his broad discretion. See National Elevator, MSBCA 1251, supra. In this regard the omission constituted a minor irregularity which was corrected by the subsequent submission of the certificate, causing no prejudice to the other bidders. COMAR 21.06.02.03 permits cure of a deficiency in a bid prior to award, provided that the defect's affect on price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement. In this instance, the procurement officer did not waive the requirement for attendance at the seminar; he only waived the requirement that a certificate evidencing that attendance be furnished at the time of bid opening. Furthermore, the statutory requirement that the certificate be provided before the project is begun (See Finding of Fact No. 4) was clearly satisfied.

For the foregoing reasons, therefore, the appeal is denied.