

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CALLOWAY'S AIR)
CONDITIONING AND REMODELING)
Under MdTA Contract) Docket No. MSBCA 1416
POT-AC 88)

February 1, 1989

Responsibility - Required Prior Work Experience - When evaluating a bidder's qualifications in making a responsibility determination, the procurement officer may consider prior work experience of company officers and employees to establish required minimum work or skill requirements for a new company.

Responsibility - Company Determination - The underlying analysis necessary to reach a determination of responsibility requires an evaluation of the bidder's capability as a business, considered as a whole, which would include consideration of its employees and their capabilities. Where the procurement officer's determination of Appellant's lack of technical experience may have been flawed for not considering earlier experience of company officers or employees, the determination that Appellant was not responsible as a firm was not unreasonable, arbitrary, an abuse of discretion or contrary to law or regulations.

APPEARANCE FOR APPELLANT None
APPEARANCE FOR RESPONDENT Steven W. Vanderbosch
Assistant Attorney General
Baltimore, MD

OPINION BY MR. LEVY

This is an appeal from a Maryland Transportation Authority (MdTA) procurement officer's final determination that Appellant was not a responsible bidder.

Findings of Fact

1. On July 11, 1988, MdTA issued its Invitation For Bids (IFB) on Contract POT-AC 88 for the maintenance and emergency repair service to the boilers, air conditioning units, heating units, ice maker, refrigerators and

water coolers at the Harry W. Nice Memorial Bridge, Newburg, Maryland.

2. The IFB, section 4, contained the following language regarding the qualifications of bidders:

All prospective bidders must have a minimum of two (2) years successful experience in fully maintaining air conditioning/heating units, boiler units, ice maker, refrigerators and water coolers of the various types described herein.

3. Bids were opened on August 1, 1988. Of the six bids received Appellant's was the apparent low bid and Alpine Refrigeration's the second low bid.

4. On or about August 4, 1988, Ms. Frances W. Riley, procurement officer, telephoned Appellant to verify experience and qualifications. Appellant advised the procurement officer that he had been in business only since February 1987, which was less than the minimum required two years. Mr. Calloway further advised that he is the owner and sole employee of Appellant and work that he is unable to handle is subcontracted to friends when they are available. Prior to forming the Appellant enterprise, Mr. Calloway worked for approximately eight years in the air conditioning and refrigeration department at Bethlehem Steel Co. He alleges that he had worked there on all of the units described in the IFB. Appellant was unable to provide any commercial references as most of Appellant's work had been on residential systems.

5. By letter dated August 15, 1988, the procurement officer informed Appellant that it did not meet the minimum requirement for experience listed in section 4 of the IFB.

6. Appellant protested the procurement officer's decision on August 17, 1988.

7. By letter dated October 3, 1988, the procurement officer notified

Appellant of her decision to deny its bid protest.

8. Appellant filed a timely appeal with this Board on October 10, 1988.¹

Decision

The State appears to maintain that Appellant was not a responsible bidder eligible for contract award because Appellant did not meet the two year experience requirement provided for in section 4 of the IFB. On the other hand, Appellant contends that it has the relevant experience by virtue of Mr. Calloway's experience not only with its own company since February 1987 but also his approximately eight years experience in the air conditioning and refrigeration department at Bethlehem Steel Co.

If the procurement officer was just relying on the section 4 experience requirements of the IFB to justify her finding of Appellant's nonresponsibility we might have a difficult time sustaining her determination in this appeal. We have stated on several occasions that when evaluating a bidder's qualifications in making a responsibility determination, the procurement officer may consider prior work experience of company officers and employees to establish minimum work or skill requirements for a new company. Environmental Controls, Inc., MSBCA 1356, 2 MSBCA ¶168. Just because Appellant had been in business as an entity for less than the required two years should not have automatically led to a determination of nonresponsibility when as here Appellant's principal employee is alleged to have had eight years of the required work experience. The State should have investigated and evaluated Mr. Calloway's past experience at Bethlehem Steel Co. and where alleged lack of work experience the sole ground of the finding of nonresponsibility we would remand for such consideration.

¹ This opinion is based on the written record since a hearing was not requested by either party within the time allowed by COMAR 21.10.07.06.

However, an examination of the entire written record indicates that the procurement officer made a determination of Appellant's nonresponsibility based on several other reasons which justified the finding. The procurement officer sent a memorandum to Assistant Attorney General Vanderbosch on August 29, 1988 (Agency Report, Exhibit 4-D) seeking approval to deny Appellant's protest. In the memorandum the procurement officer states that the following information was gathered about Appellant:

1. Calloway Air Conditioning and Remodeling was started February 1987.
2. Mr. Calloway is the only full-time employee and there are no part-time employees.
3. All work that Mr. Calloway is unable to handle is subcontracted to friends when they are available.
4. Mr. Calloway is unable to provide any commercial references. Most of the company's work has been on residential systems.

She then concludes with, "[f]or the above reasons, I plan to deny Mr. Calloway's bid protest and award the contract to Alpine Refrigeration." While the procurement officer's final determination letter of October 3, 1988 does not specifically list all of these factors (it does list No. 1 and No. 4), we believe that all of these factors went into the final determination of nonresponsibility. The procurement officer has made in effect a determination that not only has Appellant not had the necessary technical experience for two years but also Appellant does not have the necessary business experience for two years and there is no indication that adequate service can be provided over the life of this contract.

We have held that the underlying analyses necessary to reach a determination of responsibility requires an evaluation of a bidder's capability as a firm, considered as a whole, which would include consideration of its

employees and their capabilities. Maryland New Directions, Inc., MSBCA 1367, _____ MSBCA ¶ _____ (June 9, 1988); The National Elevator Company, MSBCA 1266, 2 MSBCA ¶124 (1986). Thus, pursuant to COMAR 21.06.01.01 and Section 13-206, State Finance Procurement Article, Annotated Code of MD, (1988 Vol.) the procurement officer determined that Appellant was not responsible in that it lacks "the capability in all respects to perform fully the requirements" for this contract. We conclude, therefore, that while the procurement officer's determination of Appellant's lack of two years technical experience might have been flawed for not even considering earlier experience, the determination that Appellant was not responsible as a firm was not unreasonable, arbitrary, an abuse of discretion or contrary to law or regulations and we will not disturb the procurement officer's finding. See National Elevator Company, MSBCA 1251, 2 MSBCA ¶115 (1985).

For the above reasons, the appeal is denied.

The undersigned hereby certifies that the above is a true and correct copy of the original document as filed with the Secretary of State of the State of Michigan on this _____ day of _____ 19____.

Notary Public for Michigan

My commission expires on _____