

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CARPET LAND, INC.)	
)	Docket No. MSBCA 1093
Under University of Maryland)	
Request To Bid No. ES-93735-D)	

January 19, 1983

Responsiveness - The submission of a required seaming diagram after bid opening was not considered a material deviation from the invitation for bids because it did not affect either the competitive position of the parties or the legal obligation of the low bidder to perform the required services in exact conformity with the IFB specifications.

Responsibility - Information bearing on a prospective contractor's ability to perform in accordance with the contract terms relates to responsibility. This type of data may be received and evaluated after bid opening.

Equal Products - While the State does not have to approve anything less than the functional equivalent of a brand name item, it may amend a solicitation, prior to bid opening, to specify the acceptability of a lesser product and, by implication, any equal thereto.

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APPEARANCES FOR THE RESPONDENT:

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OPINION BY CHAIRMAN BAKER

This appeal is taken from a University of Maryland procurement officer's final decision to award a contract for the furnishing and installation of carpet to Chesapeake Interior Planning (Chesapeake). Appellant alleges that Chesapeake's bid was non-responsive in that it did not include a required seaming diagram and was not premised upon the use of a carpet which was equal to that specified in the bidding documents. The University of Maryland denies both of these allegations and contends that an award properly was made to the lowest responsive and responsible bidder.

Findings of Fact

1. On May 18, 1982, the University of Maryland Hospital and Professional Schools (University) solicited competitive sealed bids for the furnishing and installation of carpet and door matting in 80 units of a garden type apartment complex to be used for student housing.

2. This project was to be funded through a low interest loan obtained under the Federal Campus Housing Program. Because repayment of this loan was to commence in 1983, the University wanted the apartment complex to be ready for occupancy by September 1, 1982 so as to assure adequate income to meet its loan obligations. In order to meet this occupancy date, the University included a provision in the bidding documents which required installation of the carpet by August 1, 1982.

3. Prior to preparing the Invitation for Bids (IFB), the University retained an interior design firm to devise a color scheme and select furnishings that would be able to withstand the wear and abuse common to dormitory life. This design firm made certain recommendations which were included as requirements in the bidding documents.

4. The IFB, as issued, apprised vendors that they would be required to provide J & J Commercialon #3100 quality carpet, or an approved equal, in the apartment areas. The corridors and manager's office were to be carpeted with Stratton-Longford # LF-3937 Copper Kettle quality, or an approved equal. The IFB included the manufacturer's specifications for these carpet types and also specified that vendors would be responsible for measuring the apartment units to obtain exact dimensions and determine quantities.

5. The Specifications and Conditions attached to the IFB addressed the submission of substitutes or alternates as follows:

1. Pre-Bid Conference- To be held on May 25, 1982 at 9:30 a.m. in room 165 H. H. (Bid Room). [sic] for the purpose of approving alternates, questions and field measuring. Samples must be submitted at the pre-bid conference in order to be approved for acceptance. Samples for alternates will not be accepted after the bid opening.

* * *

5. . . . Alternates must meet the required specification and match color wise [sic]. (Underscoring added.)

6. Although a number of alternates were submitted for approval as equals prior to bid opening, only two are pertinent to this appeal. Appellant sought approval of a carpet denominated as "Focus Proof" and Chesapeake sought approval of a carpet denominated as "Wunda Weave Endowment".

7. The proposed alternates were reviewed by the University's procurement officer and its interior designer. Wunda Weave was approved and Focus Proof was rejected. The rejection of Focus Proof was due to its failure to withstand the minimum specification requirement for abrasion resistance as measured by the Taber Abrasion Test.¹

8. All vendors who had requested an IFB were notified 3 days prior to bid opening that Wunda Weave had been approved as an equal.

9. Bids were opened on June 3, 1982. Chesapeake, having submitted a quote of \$55,519.66 based on the furnishing and installation of Wunda Weave carpeting, was identified as the low bidder. Appellant submitted multiple bids on the Focus Proof and J & J Commercialon carpets. These bids respectively were the second and third lowest of those received and were in the amounts of \$56,435.25 and \$59,744.94.

10. Paragraph 7 of the Specifications and Conditions attached to the solicitation further instructed bidders that:

All vendors must submit a seaming diagram.² The University is trying to obtain the fewest [sic] number of seams.

11. Chesapeake did not submit the required seaming diagram with its bid. The University's procurement officer was apprised of this fact, shortly after bid opening, by Appellant's sales representative who had been given an opportunity to review the bids received. The procurement officer immediately called Chesapeake and gave it 24 hours to submit the required diagram. The seaming diagram thereafter was delivered within the allotted time.

12. Appellant's seaming diagram showed 66 seams while Chesapeake's indicated ". . . 33 or 34" seams. (Tr. 38-39, 58).

13. By letter dated June 3, 1982, Appellant filed a protest contending that Wunda Weave was not equivalent to the contractually required J & J Commercialon carpet and that the absence of a seaming diagram rendered Chesapeake's bid non-responsive.

¹The Taber Abrasion Test is prescribed by the American Society of Testing Materials (ASTM) to measure abrasion resistance. The test ordinarily is administered by an independent laboratory and provides for an abrasion wheel to be run, in a circular path, along the top of a carpet sample. The abrasion wheel is rotated until the carpet wears to a specified degree. Here the specifications required the carpet to withstand 20,000 cycles or revolutions. Focus Proof withstood only 17,500 cycles. (Tr. 30, Exh. E to Notice of Appeal).

²A seaming diagram depicts where the carpet seams will be placed when the carpet is installed.

14. On June 24, 1982, the University's procurement officer both denied this protest and awarded a contract to Chesapeake.

15. Appellant filed a timely appeal on July 9, 1982.

Decision

Appellant initially contends that Chesapeake gained an undue advantage over its competitors by submitting its seaming diagram after bid opening. In this regard, we are told that Chesapeake, after learning of its competitor's seaming plans,³ could have tailored its diagram to best meet the University's stated goal of achieving the least number of carpet seams in the installation process. For this reason, the absence of the seaming diagram from the bid package was said to be a material deviation from the requirements of the IFB.

Contract award in a competitive sealed bid procurement, however, is made on the basis of lowest price or evaluated price. Hanover Uniform Co., Division of Sanford Shirt Co., Inc. MSBCA 1059, April 3, 1982. Bidders do not compete on any other basis under this type of procurement. Accordingly, award could not have been made to the vendor who offered to provide the least number of carpet seams unless that vendor also submitted the lowest bid price. Since the seaming diagram, therefore, could not have affected the competitive position of the bidders under this procurement, its late submission is not considered a material deviation from the terms of the IFB. See 40 Comp. Gen. 321, 324 (1960).

It also is significant that the IFB did not specify a maximum number or range of seams which a vendor was obligated to achieve in the installation of the carpet. The seaming diagram, therefore, could have been utilized solely to evaluate the capability of a vendor to install carpet on this contract so as to minimize the seams. Information bearing on a prospective contractor's ability to perform in accordance with the contract terms and not on its legal obligation to perform the required services in exact conformity with the IFB specifications relates to responsibility. See Bow Industries, Inc., Comp. Gen. Dec. B-181828, 74-2 CPD ¶ 330; James E. McFadden, Inc., Comp. Gen. Dec. B-186180, 76-1 CPD ¶ 393. As this Board previously has held, it is appropriate to receive and evaluate information, after bid opening, if it pertains to the determination of a bidder's responsibility. Track Materials, MSBCA 1097, November 30, 1982, p. 9; Maryland Supercrete Company, MSBCA 1079, October 14, 1982, p. 8. Thus, the late submission of the Chesapeake seaming diagram was not fatal to its bid and it was permissible for the University's procurement officer to utilize it to determine responsibility.

The second issue raised by Appellant concerns the acceptability of Wunda Weave as an equal to the specified J & J Commercialon. In this regard, Appellant alleges that certain of the Wunda Weave performance specifications fall substantially below those set forth in the IFB for J & J Commercialon carpeting. Assuming, without finding, that this is true, it

³Chesapeake did not send a representative to the bid opening and there was no evidence to suggest that it reviewed its competitor's seaming diagrams before submitting its own.

nevertheless is of no consequence to this dispute. Here, all alternates had to be approved prior to bid opening. Approved alternates became specified contractual items and, thereafter, all bidders had equal opportunity to submit prices based thereon. Further, as long as the University arbitrarily did not reject other carpet alternates which functionally were equivalent to the J & J Commercialon or any alternate it approved as an equal thereto, no bidder could complain of unfair treatment. We conclude, therefore, that while the University did not have to approve anything less than the functional equivalent of the J & J Commercialon, it had an absolute right to amend its solicitation, prior to bid opening, to specify the acceptability of a lesser product and, by implication, any equal thereto.

Finally, Appellant alleges that the University arbitrarily rejected the "Focus Proof" alternate which it had submitted for approval prior to bid opening. Although there is evidence of record which would enable us to compare "Focus Proof" to either the specified J & J Commercialon or the approved alternate, Wunda Weave, and thus decide the issue raised, such an analysis is unnecessary. Appellant, despite the pre-bid rejection of Focus Proof as an equal, premised one of its two bids on the use of this product. Even had the Focus Proof carpet been considered acceptable, it is clear that Appellant would not have been entitled to an award since its Focus Proof bid was not lower than the responsive bid submitted by Chesapeake.⁴

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

⁴Both the issues concerning the approval of Wunda Weave and the rejection of Focus Proof concerned improprieties in the solicitation which were apparent before bid opening. Pursuant to COMAR 21.10.02.03A, a protest regarding these matters should have been made prior to bid opening. The record is unclear when these matters were first addressed to the procurement officer. In view of this and because the University has not contended that the protest on these grounds was untimely, we have considered the questions raised.

investigation is of an administrative nature. The purpose of this investigation is to determine the accuracy of the information provided by the complainant and to determine the appropriate action to be taken. The investigation will be conducted in a fair and impartial manner. The results of the investigation will be reported to the appropriate authority.

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It is the policy of the organization to maintain the confidentiality of all information received from complainants. This policy is intended to protect the identity of complainants and to ensure the integrity of the investigation process.

APPENDIX A

1. The investigation was conducted on [Date].
2. The complainant provided the following information:
3. The investigation revealed the following findings:
4. The appropriate action to be taken is [Action].
5. The results of the investigation will be reported to the appropriate authority.

The investigation was conducted in a fair and impartial manner. The results of the investigation will be reported to the appropriate authority. The investigation was conducted in a fair and impartial manner. The results of the investigation will be reported to the appropriate authority.