

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CHESAPEAKE BUS AND EQUIPMENT)
COMPANY)
Under MTA Contract No. 16-0009) Docket No. MSBCA 1347

November 2, 1987

Protest - Timeliness - By waiting until the notice of appeal to the MSBCA to allege for the first time a reason why an award of a contract should not be made, Appellant waives its right to protest on that ground since COMAR 21.10.02.02, COMAR 21.10.02.03 and COMAR 21.10.02.09 require items of protest to be raised initially with the agency procurement officer.

Responsibility - Listing of Subcontractors - Who will perform subcontract work relates to the ability of the bidder to perform and as such relates to the issue of bidder responsibility which may be determined at the time of contract award. Information pertaining to its determination may be received and considered after bid opening.

Responsibility - Licensing, Bonding and Certification - Compliance with Maryland Motor Vehicle Administration statute that requires manufacturers and distributors to be licensed and bonded relates to the ability of the bidder to perform and as such relates to the issue of bidder responsibility and need not be complied with at time of bid opening.

Interested Party - A bidder was not an interested party pursuant to COMAR 21.10.02.01A because it could not show that it was in line for award in the event its protest concerning the responsiveness of lower bids was upheld.

APPEARANCE FOR APPELLANT: None
APPEARANCE FOR RESPONDENT: William B. Tittsworth, Jr.
Assistant Attorney General
Baltimore, MD

OPINION BY MR. LEVY

This is an appeal of a Mass Transit Administration (MTA) procurement officer's final decision denying Appellant's protest. The appeal generally deals with the issues of alleged poor past performance on MTA contracts by another bidder; alleged improper use of a bidding form by another bidder; and the alleged noncompliance by other bidders of the Motor Vehicle Administration (MVA) Code requirements for licensing and bonding. The opinion is based on the written record since a hearing was not held.

Findings of Fact

1. MTA advertised a Request For Bids (RFB) on January 16, 1987 to procure 28 customized para-transit vehicles to accommodate various nonprofit organizations who provide transportation services for elderly and handicapped persons. The vehicles vary in size and equipment, depending upon the special needs of the various organizations. The vehicles sought to be procured are as follows:

- Bid Item 1 - One (1) mini van;
- Bid Item 2 - Twelve (12) 15 passenger seat vans;
- Bid Item 3 - Four (4) small buses, comprising
 - 3A - One (1) 21 passenger seat;

- 3B - One (1) 21 passenger seat;
- 3C - One (1) 12 passenger seat, including two (2) wheel chair positions and a wheel chair lift;
- 3D - One (1) 12 passenger seat, including two (2) wheel chair positions, a wheel chair lift and air conditioning.

Bid Item 4 - Nine (9) converted vans comprising

- 4A - One (1) 13 passenger seat with air conditioning;
- 4B - Two (2) 9 passenger seat with air conditioning, one wheel chair position and a wheel chair lift;
- 4C - Three (3) 7 passenger seat with air conditioning, including two (2) wheel chair positions and a wheel chair lift;
- 4D - One (1) 7 passenger seat including two (2) wheel chair positions and a wheel chair lift;
- 4E - One (1) 7 passenger seat with air conditioning, two (2) wheel chair positions with flip seats and a wheel chair lift;
- 4F - One (1) 8 passenger seat with air conditioning, four (4) wheel chair positions, a wheel chair lift, all seats to be flip seats with aero-equipped securement devices.

Bid Item 5 - Two (2) school bus type vehicles comprising

- 5A - One (1) 10 passenger seat with air conditioning, six (6) wheel chair positions, a wheel chair lift, and three speed automatic transmission;
- 5B - One (1) 10 passenger seat with air conditioning, six (6) wheel chair positions, a wheel chair lift, and a five speed manual transmission;
- 5C - One (1) same as Item 5A, except with 8.2 liter diesel
- 5D - One (1) same as Item 5B, except with 8.2 liter diesel engine. (substitute option).

2. Special Provision No. 4 of the RFB (p. SP 1 of 3) provides:

Pursuant to Article 8, paragraph a of the General Provisions, the contractor may be awarded a contract for an individual item based on the lowest responsible and responsive bid received for each item.

3. General Provision No. 8, paragraph a, of the RFB (p. GP 3 of 17) provides:

Contracts and purchases will be made or entered into with the lowest responsive and responsible bidder meeting specifications, subject to the provisions herein. Where more than one item is specified in the specifications, unless otherwise provided, the MTA reserves the right to make award or awards on a lump sum basis or an individual bid item basis, whichever is in the best interest of MTA.

4. Bids were received and opened on May 15, 1987 with the following pertinent results:

Item 3B

Allen Ashley, Inc.	\$29,774
Appellant	31,981
Colonial Equipment Co.	32,349
Marketing Assessments, Inc.	35,060
Pat Co. Distributors	39,984

Item 3C

Allen Ashley, Inc.	\$30,177
Appellant	31,275
Colonial Equipment Co.	31,919
Pat Co. Distributors	39,675
Marketing Assessments, Inc.	41,060

Item 3D

Allen Ashley, Inc.	\$31,528
Appellant	33,722
Colonial Equipment Co.	34,919
Pat Co. Distributors	39,875
Marketing Assessments, Inc.	42,060

Item 4A

L&S Mobility	\$19,459.83
Allen Ashley, Inc.	20,269.44
Appellant	21,181.28
Collins Bus Corp.	21,208.00
Air Surrey, Inc.	21,387.70
Colonial Equipment Co.	21,791.00
The Braun Corp.	26,122.00

Item 4B

L&S Mobility	\$42,685.66
Air Surrey, Inc.	45,835.40
Collins Bus Corp.	45,912.00
Allen Ashley, Inc.	45,956.00
Appellant	46,300.56
Colonial Equipment Co.	48,980.00
The Braun Corp.	52,096.00

Item 4C

L&S Mobility	\$63,801.42
Appellant	65,805.84
Allen Ashley, Inc.	68,423.04
Air Surrey, Inc.	68,535.00
Collins Bus Corp.	68,805.00
Colonial Equipment Co.	73,146.00
The Braun Corp.	78,144.00

Item 4F

L&S Mobility	\$21,659.82
Collins Bus Corp.	23,046.00
Air Surrey, Inc.	23,117.40
Appellant	23,371.28
Allen Ashley, Inc.	23,372.52
Colonial Equipment Co.	24,974.00
The Braun Corp.	25,945.00

5. The Allen-Ashley, Inc. bid was rejected by MTA as nonresponsive. Allen-Ashley, Inc. protested the rejection but subsequently withdrew its protest.

6. Appellant filed its bid protest with the procurement officer on May 26, 1987 which raised the following issues:

- A. The proposed second stage manufacturers listed on the bids of (1) L&S Mobility Systems, Ltd. (L&S) and (2) Allen-Ashley, Inc. are not presently licensed and bonded with the Motor Vehicle Administration (MVA) of the Maryland Department of Transportation. Therefore, these two bidders may not be considered eligible to participate in the bidding process.
- B. The bid of L&S, on Bid Form BF 4C 1 of 6, improperly listed more than one (1) subcontractor and/or equipment provider where designated information was required on that Bid Form.
- C. In several respects, the bid of Allen-Ashley, Inc. is conditional.

- D. The Contract Affidavit furnished with the bid of L&S Mobility Systems, Ltd. has not been attested by a Notary Public, thus negating the value of that document.
 - E. The Disadvantaged Business Certification and Contract Affidavit furnished with the bid of Allen-Ashley, Inc. failed to have the Notary Public affix the corporate seal of the bidder, thus negating the value of that document.
 - F. Chesapeake Bus & Equipment Co. has the lowest cumulative bid price for the several individually bid items: Small Buses and Converted Vans. Thus, Chesapeake is entitled to award of all of those vehicles.
7. The procurement officer rejected the protest in his June 12, 1987 final determination. His general response to each of Appellant's issues, in the same order, are as follows:

- A. The IFB does not require bidders to be pre-certified by the MVA. Requirements that bidders be certified or licensed are matters of bidder responsibility which can be determined subsequent to bid opening. Besides L&S Mobility is a licensed Motor Vehicle Dealer in the Commonwealth of Pennsylvania and does not offer or intend to transfer the vehicles to an unlicensed dealer or second stage manufacturer in Maryland for resale to this agency. The Allen-Ashley, Inc. bid is non-responsive for other reasons.
- B. The fact that L&S additionally listed alternative proposed subcontractors and equipment products cannot, of itself, detract from the fact that in respect to this Form L&S is a responsive bidder. The mere listing of alternates does not convert the Form into a conditional bid. By its bid, L&S is bound and remains bound. The bid is a definite and unqualified offer to meet the material terms of the IFB.
- C. The Allen-Ashley, Inc. bid is going to be rejected as nonresponsive.
- D. The Contract Affidavit submitted by L&S was not required as part of the bid package. However, examination of this document indicates that the document has been fully executed including a Notary Seal.
- E. The Allen-Ashley, Inc. bid is going to be rejected as non-responsive. However, an examination of the Disadvantaged Business Certification submitted by Allen-Ashley, Inc. with its bid has found that document to be fully executed.
- F. As provided in General Provision No. 8, paragraph a, (p. GP-3 of 17), and Special Provision No. 4 (p. SP 1 of 3) it was and still is the intent of the MTA to award a contract for an individual item based on the lowest responsive and responsive bid received for each item.

8. By letter dated July 30, 1987, Appellant filed an appeal with this Board in which it raised the following issues:

- A. L&S has exhibited poor performance and quality of workmanship on past MTA contracts. Responsiveness of bidders is measured in their ability to perform. The Appellant questions the decision of the Procurement Officer to award a contract to L&S.
- B. L&S has exhibited improper procedure in the bidding process. The customary bidding procedure when offering multiple products is to submit each individual product on a separate bid form.
- C. Requirements that bidders be certified and licensed cannot be considered to be bidder responsibility. Only pre-certified, pre-bonded and pre-licensed bidders with the Motor Vehicle Administration are eligible bidders.
- D. Air Surrey of Roanoke, Illinois is neither licensed nor bonded to do business in this State nor has a licensed distributor in this State.

9. In its appeal to this Board the Appellant contends it should be awarded bid items 3B, 3C, 3D, 4A, 4B, 4C, and 4F. Since the Allen-Ashley, Inc. bid was rejected, Appellant was informed that it would be awarded items 3B, 3C and 3D. Therefore, this appeal only deals with bid items 4A, 4B, 4C, and 4F.

Decision

The Appellant has raised four (4) items in its appeal to this Board (Finding of Fact No. 8) and we will address each one individually. Of the six (6) items raised in Appellant's original letter of protest (Finding of Fact No. 6) only the first two (2) are raised again on appeal. Accordingly, we need not address the other four (4) items (Finding of Fact No. 7) in this decision.

Appellant initially argues that L&S Mobility Systems, Ltd. (L&S) has exhibited poor performance and quality of workmanship on past MTA contracts and questions the decision of the procurement officer to award a contract to L&S. However, this issue is not raised timely. It is being raised before this Board for the first time; it was not raised in the original protest to the procurement officer and was not addressed by him. COMAR 21.10.02.02, COMAR 21.10.02.03 and COMAR 21.10.02.09 require items of protest to be raised initially with the agency procurement officer. By waiting until the notice of appeal to this Board to allege for the first time a reason why an award of a contract should not be made, Appellant waives its right to protest and have this Board consider that issue. The Trane Company, MSBCA 1284, 2 MICPEL ¶118 (December 9, 1985); General Electric Co., MSBCA 1316, 2 MICPEL ¶143 (February 24, 1987).

The second argument raised by Appellant is that L&S exhibited improper procedure in its bidding process by supplying multiple responses to information requested on Form BF4C(1) of 6. This form was added by addendum no. 3 which provided, "[i]n addition to the UNIT PRICE SCHEDULES enclosed with the original bid package, the attached additional forms must be submitted for each unit item bid." The form in question pertains to information about converted vans specifically requesting the name of the conversion company; chassis manufacturer; air conditioner manufacturer; lift manufacturer, and the nearest warranty and parts representative for each. L&S supplied two (2) or three (3) responses to each inquiry. In its initial protest Appellant referred to this as a conditional bid (Agency Report, item 5, p. 2) but this was rejected by the procurement officer who held that L&S was still bound to meet the material terms of the RFB.

We have held that information sought by an RFB bearing on a prospective bidder's ability to perform in accordance with the contract terms relates to the issue of responsibility and not responsiveness of the bid which is the legal obligation to perform the work sought by the RFB. We also have held that the State may determine bidder responsibility at the time of contract award and information pertaining to this determination may be received after bid opening. Roofers, Inc., MSBCA 1284, 2 MICPEL ¶133 (July 11, 1986). The listing of the information sought by Form BF4C(1) of 6 pertains to L&S's responsibility and not its responsiveness to the RFB. Who will perform subcontract work clearly relates to the ability of the bidder to perform and not its legal obligation to perform. Here, the information supplied by L&S could be considered and clarified by the procurement officer after bids were opened. There was no limit placed on bidders to supply only one source for each category of subcontractor. We, accordingly, hold that L&S's bid was not made unresponsive because of its treatment of Form BF4C(1) of 6.

Appellant's third argument concerns the requirements of the Motor Vehicle Administration law that manufacturers and distributors be licensed and bonded. In Appellant's protest letter of June 30, 1987 it refers specifically to Transportation Article Sections 15-203, 15-204, 15-205 and 15-206, MD Ann. Code and L&S's lack of compliance with these sections. Appellant argued at the agency level, as well as on appeal, that these are not responsibility matters but issues of responsiveness. In other words, a bidder must comply with the code requirements at the time of bid opening.

The procurement officer argues that not only did the RFB not require any form of precertification, but the "[g]eneral requirements that bidders be certified or licensed are consistently viewed as issues of bidder responsibility, matters that may be determined subsequent to bid opening." We concur with, and sustain, the procurement officer's position on this issue. The licensing, bonding or certification of bidders goes directly to the ability

to perform and has nothing to do with the legal obligation to perform. 47 Comp. Gen. 539 (1988). Accordingly, it was not necessary that bidders be in compliance with the noted code requirements at the time of the bid opening.¹

Appellant's final argument is that Air Surrey, Inc., another bidder, is neither licensed nor bonded pursuant to the MVA Code requirements, supra. This issue is raised for the first time in Appellant's letter of appeal to this Board. For the reasons we noted above, we hold that not only is this an issue of responsibility which can be dealt with after bid opening but it is an issue that has been waived by Appellant since it was not raised timely.

We also note that the bid results for bid items 4B and 4F indicate that Appellant has not established that it is in line for award; under item 4B it is fifth in line and under item 4F it is fourth in line. Appellant has advanced no reasons to the procurement officer or to this Board why the lower bid of Collins Bus Corp. should be rejected. Therefore, even if Appellant was successful in all of its arguments, it still could not be awarded items 4B and 4F ahead of Collins Bus Corp. Appellant, therefore, is not an interested party pursuant to COMAR 21.10.02.01A and cannot maintain this protest for these two bid items. As we said in Erik K. Straub, Inc., MSBCA 1193, 1 MICPEL ¶83 (September 11, 1984):

COMAR 21.10.02.02A³ provides that only an interested party may have its protest considered. An "interested party" is an actual or prospective bidder, offeror or contractor that may be aggrieved by the actions of the procurement officer affecting its competitive position. COMAR 21.10.02.01A; RGS Enterprises, Inc., MSBCA 1108 (April 8, 1983); Delmarva Drilling Co., MSBCA 1096 (January 26, 1983). Whether a party is affected competitively involves consideration of the party's status in relation to the procurement and the nature of the issues involved. International Business Investments, Comp. Gen. Dec. B-202164.2, June 8, 1981, 81-1 CPD ¶459. A party not in line for contract award normally is not affected competitively since it will receive no direct benefit if the protest is upheld. Pluribus Products, Inc., Comp. Gen. Dec. B-210444, March 7, 1983, 83-1 CPD ¶226; Photica, Inc., Comp. Gen. B-211445, July 11, 1983, 83-2 CPD ¶74. (footnote omitted).

See also Honeywell, Inc., MSBCA 1317, 2 MICPEL ¶148 (May 8, 1987).

For all of the above reasons, the appeal is denied.

¹While there is some suggestion in the Agency Report (pp. 9-10) that L&S may not have to comply with the noted code requirements, we will not address the issue of the enforcement of the code since that is not appropriately before us.