

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CIVIC CENTER
CLEANING CO., INC.

Under DGS Project
TB-000-862-103

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Docket No. MSBCA 1357

January 4, 1988

Responsiveness - Minor Irregularity - Failure to submit bid in a preprinted, colored sealed envelope - Deviation from the requirement of the IFB that bids be submitted in a preprinted, blue envelope sealed by moistening the flap was waivable as a minor irregularity under COMAR 21.05.02.12A and 21.06.02.03 where there was no evidence of tampering with the bid and no evidence that other bidders were prejudiced by the submission of the bid in question in a manila envelope sealed with a metallic clasp.

Responsibility - Require Licenses - The procurement officer acted within his discretion in considering licenses possessed by a bidder that were necessary to the performance of the work already on a file with the agency, although the IFB required submission of the licenses with the bid, in making his required determination that the bidder who had not included the licenses with its bid was responsible. The IFB requirement to include the licenses with the bid could not turn a matter of responsibility (capability to perform the contract requirements) into one of responsiveness.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Michael P. Kenney
Assistant Attorney General
Baltimore, MD

1169

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the decision of the Department of General Services (DGS) procurement officer denying its bid protest on grounds that the bid of the low bidder MARCOR of Maryland, Inc. (MARCOR) should be rejected because it failed to submit its bid in a sealed blue envelope and failed to include with its bid a State asbestos removal license and a license to use a patented asbestos removal process.

Findings of Fact

1. DGS issued an invitation for bids (IFB) for Project TB-000-862-103 for asbestos abatement work at three buildings at Bowie State College. Bids were due in Room 1311 of the State Office Building in Baltimore by 10:00 a.m. on October 26, 1987.

2. The IFB required that the bid include State asbestos removal license and evidence of a license to use a patented asbestos removal process known in the trade as "Negative Air" from the holder of U.S. Patent No. 4, 604, 111. The IFB also required that bids be submitted in a preprinted blue envelope supplied by DGS and sealed by moistening the flap. At the prebid conference held at the job site on October 30, 1987, Mr. L. G. Walker III, a DGS employee, allegedly orally advised bidders that failure to submit bids in the sealed blue envelope and to include therewith a copy of both licenses would render the bid nonresponsive.

3. Four people appeared at Room 1311 on October 26 between 9:42 a.m. and 9:52 a.m., envelopes in hand, to submit bids. Each of the four personally

inserted his envelope in the DGS time stamping machine in room 1311, the last envelope stamped in being MARCOR's 9:52 a.m., then placed his envelope in a wall slot designated for bids. The slot led to a padlocked wooden bid box. Of the four envelopes placed in the padlocked wooden bid box, three were the blue color preprinted envelopes supplied by DGS that had been sealed by moistening the flap as required by the IFB. The fourth envelope was manila in color and sealed only with a metallic clasp.

4. Shortly after 10:00 a.m. Frances Atkins, a DGS contract services officer, unlocked the bid box and carried the four envelopes across the hall to room 1308. The four envelopes were opened there, beginning about 10:06 a.m., by DGS employees L. G. Walker III and John T. Ingalls, and the bids were tabulated. Bids had been submitted by Appellant, A & I, Inc., MARCOR, and Asbestos Removal Company (ARC). Present in the same room at the time of bid opening and tabulation were Kenneth S. Bielecki, representing Appellant, Russell McKeever, representing A & I, Inc., Terry Merchant, representing MARCOR, and Jim Wallace, representing ARC.

5. Upon opening of the bids, it was determined that the bid form of ARC, the second low bidder, was not signed by a company principal, although related affidavits and certificates accompanying a bid were signed by the secretary/treasurer of the company. The low bid of MARCOR, submitted in the manila envelope sealed only with the metallic clasp, enclosed no State

asbestos removal license, nor did it include a license from the holder of U.S. patent no. 4, 604, 111, for use of the special asbestos removal process. However, at the time of bid opening copies of both these licenses previously submitted by MARCOR in connection with other work were on file with DGS.

6. Appellant, the third lowest bidder, protested the next day, October 27, on grounds that the bid of ARC was nonresponsive because it was not signed, and that the low bid of MARCOR was likewise nonresponsive because it was not submitted in the preprinted blue sealed envelope, and did not include the two licenses.

7. The procurement officer upheld the protest against ARC's bid and declared it nonresponsive. However, the procurement officer denied the protest against MARCOR's bid on all grounds and recommended that the contract be awarded to it as the low responsive and responsible bidder.

Decision

Appellant contends that the MARCOR bid is nonresponsive because MARCOR submitted its bid in a manila-colored envelope sealed only with a metallic clasp. Appellant stresses concern about someone's being able to open such an envelope and tamper with its contents, undetected.

DGS argues that the failure to submit the bid in the preprinted blue colored envelope, sealed in the manner called for in the IFB was properly waived by the procurement officer as a minor irregularity under COMAR 21.05.02.12A and 21.06.02.03.¹ In this regard, DGS asserts that the evidence

¹COMAR 21.05.02.12A and 21.06.02.03 provide:

21.05.02.12 Mistakes in Bids

A. General. Technicalities or minor irregularities in bids, as defined in COMAR 21.06.02, may be waived if the procurement officer determines that it shall be in the State's best interest. The procurement officer may either give a bidder an opportunity to cure any deficiency resulting from a technicality or minor irregularity in his bid, or waive the deficiency where it is to the State's advantage to do so.

of record does not demonstrate that any tampering occurred nor that any party was otherwise prejudiced by the failure of MARCOR to use the proper envelope and manner of sealing and that such failure did not affect the price, quantity, quality, or delivery of the asbestos abatement services sought.

DGS has called our attention to two decisions of the Comptroller General in support of its position. In Ryan-Walsh Stevedoring Company, Inc., B-182039, March 5, 1975, 75-1 CPD ¶129 the procurement [contracting] officer accepted a bid, hand delivered to the bid depository in an unsealed envelope, in spite of the solicitation's requirement for a sealed envelope. The Comptroller General upheld acceptance of the bid upon review of the circumstances surrounding its submission, stressing the fact of hand delivery and the fact that the bid was in the government's possession only a few minutes prior to bid opening. Under the circumstances, the Comptroller General held that it was evident that the other bidders were not prejudiced and that each had an equal opportunity to compete for the contract.

In 37 Comp. Gen. 37 (1957) a bidder placed his bid, in an unsealed envelope, on the table in front of the government officials opening the bids. The Comptroller General held that the failure to enclose the bid in a sealed envelope, as called for by the invitation for bids, was a technicality which was waivable.

21.06.02.03 Minor Irregularities in Bids or Proposals.

A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors. The defect or variation in the bid or proposal is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State.

As stated by the Comptroller General in his opinion in Ryan-Walsh

Stevedoring Company, Inc., supra:

The requirement that bids be submitted in sealed envelopes is intended to maintain and protect the integrity of the competitive bidding system. However, our Office has held that the failure to enclose a bid in a sealed envelope as provided by the terms of the solicitation is not an automatic ground for rejection, but may be waived, where under the particular circumstances of the procurement it can be demonstrated that the other bidders were not prejudiced and their interests were not compromised by the deviation in the manner of submission of the bid in question. 37 Comp. Gen. 37 (1957). Considering the circumstances surrounding the submission of ITO's unsealed bid, including the fact that the bid was hand delivered to the depository, and that the bid was in the Government's possession only approximately ten minutes prior to the opening of bids, we must conclude that the other bidders were not prejudiced and each had an equal opportunity to compete for the contract in question. Accordingly, the contracting officer's acceptance of the ITO bid for award consideration, although not submitted in a sealed envelope, was proper.

75-1 CPD ¶129 at p. 3.

In this case, the circumstances indicate that there was little or no opportunity for tampering with MARCOR's bid, and that the other bidders were not prejudiced by its submission in the manila envelope sealed with the metallic clasp. MARCOR's bid, as evidenced by the time stamps, was the last of the four bids received. It was delivered personally by a MARCOR messenger or official, time-stamped by such person at 9:52 a.m., and deposited in the padlocked bid box shortly thereafter.² Once in the padlocked box, MARCOR's bid was in the custody and control of State personnel in room 1311, until the DGS contract services officer, Frances Atkins, unlocked the box and carried the four envelopes across the hall to room 1308 at approximately 10:06 a.m. She put the four envelopes on the table in front of

²Up until its bid was deposited in the padlocked bid box, MARCOR, as were all other bidders, was entitled to make any changes it desired to its bid. There is no evidence, however, that any changes were made to the MARCOR bid from the time it arrived in Room 1311 until its deposit into the bid box.

DGS employees L. G. Walker III and John T. Ingalls, in the presence of representatives from all four bidding firms. Any tampering with these bids, therefore, was highly unlikely.

Based on these facts, we find that the procurement officer acted within his discretion when he waived the color and manner of sealing the envelope as a minor irregularity under COMAR 21.05.02.12 and 21.06.02.03, and, accordingly, we deny Appellant's appeal on grounds of failure to submit the bid in the preprinted blue sealed envelope.

Appellant also contends that MARCOR's failure to submit copies of its asbestos removal license and patent license with its bid as specifically required by the IFB made its bid nonresponsive. DGS, however, argues that such requirement properly relates to bidder responsibility rather than responsiveness.

We agree with DGS. 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.

A procurement officer is required to determine whether a bidder is responsible. Capability to perform the contract is a matter expressly required to be considered by a procurement officer in determining whether a bidder is responsible. See COMAR 21.05.02.13 and COMAR 21.01.02.59; National Elevator Company, MSBCA 1251, 2 MICPEL ¶115 (1985). The record reflects that the required licenses were on file at DGS prior to bid opening on October 26, 1987, and we find that the procurement officer acted within his discretion in considering these documents on file with DGS in making the

required determination concerning whether MARCOR was a responsible bidder, i.e., capable of performing the contract. Accordingly, the appeal is denied on this ground as well.

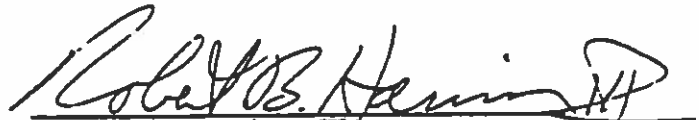
The final matter raised by Appellant is its contention that DGS is bound by certain oral representations made by Mr. Walker at the prebid conference in which he allegedly stated that bids not submitted in sealed blue envelopes, and including the asbestos removal and patent licenses would be considered nonresponsive. Since we have determined that the requirement for the specified licenses involves a matter of responsibility, such failure is not affected by either oral or written contrary direction. As we have previously noted, neither can change a matter of responsibility into a matter of bid responsiveness, and responsibility deficiencies may be cured after bid opening. See Construction Managements Associates, Inc., MSBCA 1238, 1 MICPEL ¶108 (1985); National Elevator Company, *supra*.

Regarding the IFB requirement to use a blue colored envelope and to seal it, we note that COMAR 21.05.02.07, Pre-Bid Conferences, states that "[n]othing stated at the pre-bid conference shall change the invitation for bids unless a change is made by the procurement officer by written amendment." Similarly, Section 2.2.1.2.3 of Section 1 of the Further Instructions to Bidders in the IFB states that "[o]ral explanations or instructions will not be binding. Only written addenda are binding." The stated requirements of the IFB regarding color and sealing of bids were never amended by the DGS procurement officer in writing to state that a bid not submitted in the preprinted blue envelope sealed by moistening would be considered nonresponsive. Other DGS employees lacked authority to orally amend IFB requirements so as to change the terms of the solicitation or otherwise limit the procurement officer's authority to waive immaterial IFB requirements that do

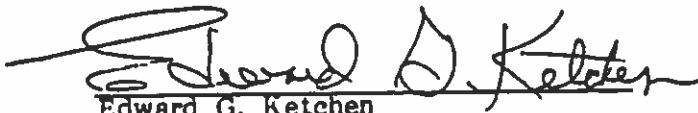
not prejudice any bidders. Compare: Granite Construction Co., MDOT 1011, 1 MICPEL ¶8 (1981) with Eagle International, Inc., MSBCA 1121, 1 MICPEL ¶40 (1983). See generally: Department of General Services v. Cherry Hill Sand and Gravel Co., 51 Md. App. 299, 443 A.2d 628 (1982).

For the above reasons, the appeal is denied.

Dated: January 4, 1988


Robert B. Harrison III
Chairman

I concur:


Edward G. Ketchen
Board Member

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1357, appeal of CIVIC CENTER CLEANING COMPANY, INC., under DGS Project TB-000-862-103.

Dated: January 5, 1988


Mary E. Priscilla
Recorder

