

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CONSTRUCTION)
MANAGEMENT ASSOCIATES, INC.)
Under University of Maryland) Docket No. MSBCA 1238
Bid Request No. 53901-P)

August 2, 1985

Responsibility - Information sought by the RFB concerning the bidders experience in the type of project to be undertaken (installation of 1200 replacement windows in a graduate dormitory) and which of several approved window manufacturers products it proposed to use in the project properly related to a bidders responsibility and the procurement officer, therefore, erred in his determination that failure to submit the information with the bid made the bid nonresponsive. Since the information sought properly relates to the bidders ability to perform the work in accordance with the contract terms (i.e., responsibility), the failure to supply such information with the bid could be cured by its submission prior to award.

Responsibility - The COMAR requirement for pre-award determination of a bidder's responsibility is a matter reserved for the procurement officer's judgment.

Responsibility - Where the procurement officer rejected Appellant's bid without affording Appellant the opportunity to supply information bearing on its responsibility, and thereafter making the required determination of responsibility, such error would ordinarily require remand since the Board may not substitute its judgment for that of the procurement officer. However, the Board declined to remand the matter to the procurement officer in this instance since the record before the Board reflects that the Appellant had conceded that it did not have experience in window installation projects equivalent to the RFB's definitive responsibility criteria regarding number and size of previous projects.

APPEARANCE FOR APPELLANT: None
APPEARANCE FOR RESPONDENT: Frederick G. Savage
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant appeals from a University of Maryland at College Park (University) procurement officer's decision that its apparent low bid was nonresponsive due to its failure to list three projects of similar scope to that

provided for in the specifications and its failure to specify which window manufacturer's product it proposed to use as required by the Request For Bids (RFB). Appellant maintains that its failure to provide such information with its bid constituted minor irregularities which should have been waived by the University.

Findings of Fact

1. On February 15, 1985, the University issued RFB No. 53901-P, requesting bids to replace approximately twelve hundred (1200) windows at the Lord Calvert Apartments, a graduate student residents building located in College Park, Maryland. The work was to be completed within 190 calendar days from the date of contract execution by the University or issuance of notice to proceed by the University whichever occurred first. The original due date for bids, March 19, 1985, was extended to March 22, 1985. Bidders were to bid on a base bid for aluminum-clad wood windows and on an alternate for more expensive aluminum "thermal-break" windows.

2. The University issued one addendum to the RFB which required submission with the bid of a listing of three completed projects of similar scope, within a 350 mile radius of College Park, involving installation of at least 300 replacement windows per project. The list of similar projects was to be submitted on the bidder's letterhead and contain the name of the project, date completed, location, approximate number of windows installed, and the name of the owner or contact person. The addendum also required the bidder to name which of the approved window manufacturers listed in the specifications whose product it proposed to use for the base bid and the alternate. Appellant acknowledged receipt of the addendum in its bid.

3. Appellant did not supply a listing of completed projects as specifically required. In numbered paragraph 10 of the Contractor's Qualification Statement, submitted with Appellant's bid, the following was noted.

10. List the name of project, Owner, Architect, contract amount, date of completion, percent of work with own forces of the major projects your organization has completed in the past five years:

1. Alter/Repair Bldg. 4864 - U.S. Air Force - Andrews AFB
\$526,126.00 completed 2/85 - 40% with own forces.

2. Jug Bay Development, Anne Arundel County - Arch.
Edward Rayne, \$209,245.00 completed 11/84 - 80% with own forces.

3. Interior Modifications Pier E - BWI - Md. DOT - SAA -
Architect Hayes, Seay, Mattern & Mattern - \$210,900 - completed
8/83 - 60% with own forces.

Appellant also listed the following information regarding projects in process in numbered paragraph 9 of its Contractor's Qualification Statement:

9. List name of project, Owner, Architect, contract amount, percent complete and scheduled completion of the major construction projects your organization has in process on this date:

1. Administration Bldg. E-3101 & Parking Lot, U.S. Army Corps of Engineers, Architect Jeffrey Hinte, \$285,218.00 - 70% complete - 6/13/85 completion date.

2. Repairs to Annex Bldg. 125 - U.S. Naval Academy - Architect - U.S. Navy - \$174,420.00 - 25% complete - 8/15/85 completion date.

None of the above listed projects involved replacement of at least 300 windows.

4. Appellant also did not list the window manufacturer whose product it proposed to use for either the base bid or alternate bid.

5. The University received five (5) bids. It determined to issue a contract based on the base bid type windows. Appellant was the apparent low bidder at \$320,700 while Orfanos Contractors, Inc. (Orfanos) was second low bidder at \$345,400.

6. Appellant's bid was determined to be nonresponsive by the University because it did not contain a list of comparable jobs and the name of the window manufacturer whose product it proposed to use, as required by the addendum to the RFB. Orfanos was determined to be the lowest responsive and responsible bidder and the University proposed to award the contract to it.

7. Appellant formally protested the proposed award to Orfanos by letter dated March 29, 1985 characterizing the omissions from its bid as minor irregularities.

8. The procurement officer issued a final decision on April 23, 1985 denying the protest on the following grounds:

In your letter you characterize the non-responsive features of your bid as "minor irregularities" that were not of sufficient gravity to warrant the University's action. Section 21.06.02.03 of the Code of Maryland Regulations defines a minor irregularity as one which either "is merely a matter of form and not of substance" or constitutes a negligible or trivial variation in price, quantity, quality or delivery of the supplies or services being procured. As you may know, Section 21.05.02.12 provides that minor irregularities in bids may be waived if the procurement officer determines that it is in the State's best interest to do so.

I have reviewed the requirements of Bid Request NO. 53901P, as well as the proposal submitted by CMA [Appellant]. CMA's bid is not materially responsive in that it lacks information necessary to evaluate the bid. The bid supplied by CMA failed to comply with two specific requirements set out in Addendum Number One. First, a listing of three projects of similar scope was not supplied as requested in Document 00100, paragraph 4.6, subparagraph 9. The purpose of this requirement was to provide the procurement officer a method of evaluating the Contractor's ability to perform the job based on past performance.

Second, a "Revised Form of Proposal" was issued as an attachment to Addendum Number One which superseded the Form of Proposal on which CMA's bid was submitted. The revised form added the requirement that the name of the window manufacturer whose product the contractor proposed to use be indicated following the words "Base Bid" and "Alternate No. 1". This information is not present on the form submitted by CMA, and it is, therefore, impossible to evaluate the products to be used.

I conclude that the deficiencies in CMA's bid were not minor irregularities as you assert, but significant deficiencies going to the non-responsiveness of the bid. For that reason, CMA's protest is denied.

9. On April 24, 1985, the Board of Public Works made a determination that in order to protect a substantial State interest, the windows should be replaced prior to the weather turning cold, and, therefore, decided to permit award of the contract, despite the protest. Accordingly, the University issued the contract to Orfanos Contractors, Inc with a substantial completion date of November 25, 1985.

10. Appellant took a timely appeal to this Board on May 7, 1985. A hearing was not requested as provided for in COMAR 21.10.07.06. Appellant did not elect to comment on the agency report as provided in COMAR 21.10.07.03D.¹

Decision

Our decision herein is guided by the following general principles.

First, minor irregularities in a bid may be waived if the procurement officer determines that it is in the State's best interest to do so. COMAR 21.05.02.12A. Minor irregularity is defined in COMAR 21.06.02.03 as one which either is merely a matter of form and not of substance, or constitutes a negligible or trivial variation in price, quantity, quality or delivery of the supplies or services being procured, the correction or waiver of which would not be prejudicial to other bidders.

Secondly, 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 RFB specifications, relates to responsibility. Since an issue of responsibility does not affect the competitive position of the bidders, it is appropriate for the procurement officer to invite a bidder to cure an omission of information bearing on responsibility through receipt and evaluation of such information

¹The University, through oversight, neglected to forward Appellant a copy of its agency report filed with the Board on May 31, 1985 until June 19, 1985. See: COMAR 21.10.07.03(C). The Board does not find that Appellant was prejudiced by this oversight.

after bid opening. Lamco Corporation, MSBCA 1227 (February 21, 1985); Aquatel Industries, Inc., MSBCA 1192 (August 30, 1984); Carpet Land, Inc., MSBCA 1093 (January 19, 1983) at p. 5; Track Materials, MSBCA 1097 (November 30, 1982) at p. 9; Maryland Supercrete Company, MSBCA 1079 (October 14, 1982) at p. 8. Likewise, if responsibility may be determined from information otherwise supplied with the bid, the omission of information in the form or manner requested may be waived as a minor irregularity.

Appellant argues in this appeal that its failure to provide the information required in the addendum to the RFB constituted only minor irregularities which should have been waived. Appellant, however, did not protest the solicitation's imposition of such requirements prior to bid opening as required by COMAR 21.10.02.03, thereby waiving the right to challenge the propriety of the requirements. See: Lamco Corporation, *supra* at p. 10. We, therefore, are called upon by Appellant to find, despite the absence of prebid protest as to the propriety of the requirements, that the procurement officer abused his discretion in not waiving Appellant's failure to supply the information with its bid. The project involves replacement of 1200 windows in a dormitory that will be fully occupied in the fall, and it is necessary to expeditiously complete the work in workmanlike fashion before winter weather to minimize inconvenience to the residents. It was not unreasonable, therefore, given the scope of the project and the need for expeditious completion, to require that bidders provide information concerning experience in window replacement and to commit to the product of an approved manufacturer at bid opening or at least before award to permit evaluation of the product and to evaluate the bidder's capability to perform the work in the time allowed. Accordingly, we find no error respecting the procurement officer's discretionary determination that it was not in the State's best interest to waive the failure to provide the information called for in the specified definitive responsibility requirements as minor irregularities. We, therefore, deny the appeal on the grounds asserted.

However, while the procurement officer did not err in declining to waive the experience and product use requirements, he specifically rejected Appellant's protest on grounds that the failure to submit the required information at bid opening made Appellant's bid nonresponsive, therefore, requiring its rejection. This determination, for reasons that follow, we find to have been erroneous.

As to the admitted failure of Appellant to list similar projects in its bid, Appellant contends that it has sufficient experience in this type of project as shown by the information contained in its Contractor's Qualification Statement.² See: Finding of Fact No. 3. However, the procurement officer

²In its written appeal to the Board, Appellant made the following argument concerning evaluation of its experience.

"My appeal is based on the grounds that my ability to perform the job could have been easily evaluated with the additional information which I provided on the Contractor's Qualification Statement (Document 004 00 which was submitted with the bid). This Statement called for major projects completed by my organization in the past five years. The following information was provided:

1. Alter/Repair Bldg. 4864 OSI - U.S. Air Force Base - Andrews

found this information insufficient on its face to demonstrate experience in window replacement, and Appellant has not asserted that any of the listed projects involved replacement of at least 300 windows. Further, the agency report reflects that Appellant's President, Mr. Charles L. Gomez, in a conversation on April 2, 1985, advised Mr. William F. Armstrong, who had initially reviewed Appellant's bid on behalf of the University, that Appellant had not undertaken a window installation project the size and complexity of the Lord Calvert Apartments. During this conversation, Mr. Gomez suggested that Appellant's general experience in construction should suffice and requested that the University waive its specific requirement for listing projects involving window replacement. The substance of this conversation was conveyed to the procurement officer by Mr. Armstrong in a memorandum dated April 5, 1985.

In his final decision, the procurement officer characterized the omission of a listing of similar projects as pertaining to Appellant's responsiveness, i.e., as affecting the legal obligation of Appellant to perform the work in exact conformity with the terms of the RFB and requiring rejection of the bid. In our view the experience requirement properly relates to a bidder's responsibility, i.e., as bearing on ability to perform in accordance with the contract terms, so as to permit submission of such information by the bidder after bid opening. Accordingly, prior to making a determination on a bidder's responsibility, the procurement officer is required to afford the bidder the opportunity to demonstrate that it is able to perform. Aquatel Industries, Inc., supra; Carpet Land, supra. While under Maryland law, the determination of a bidder's responsibility is the duty of the procurement officer, who is vested with a wide degree of discretion and business judgment in making that determination, Lamco Corporation, supra, and cases cited therein at pp. 6-7, the procurement officer's determination was that he "lack[ed] information necessary to evaluate the bid." He thus did not expressly make a responsibility determination, although arguably he could have done so based on (1) Appellant's post bid admission that it had no experience on a window project of this size and (2) Appellant's Contractor's Qualification Statement which indicates that it did not meet the definitive responsibility criteria regarding scope and size of projects involving installation of windows specified by the RFB. See: COMAR 21.06.01.01.

\$526,126. Completed 2/85 - 40% with own forces.

2. Jug Bay Development, Anne Arundel County Dept. of Public Works \$209,245. Completed 11/84 - 80% with own forces.
3. Interior Modifications Pier E - BWI - Md. DOT-SAA \$210,900. Completed 8/83 - 60% with own forces.

I find it difficult to believe that the University of Maryland feels that a General Contractor with several years of experience and the bonding capacity to bid a \$300,000 project would have difficulty with the installation of windows."

We turn now to Appellant's failure to specify in its bid which window manufacturer's product it would use. The procurement officer also treated this omission as a matter of responsiveness stating that Appellant's failure to list the window manufacturer whose product it proposed to use made it impossible to evaluate the products to be used.³ Appellant contends that the product listing requirement was meaningless since the University provided in the bid specifications a list of approved window manufacturers one of whose products would ultimately have to be used by it in performing the work. Accordingly, Appellant argues that failure to provide the name of the particular manufacturer it would use in submitting its bid did not make its bid nonresponsive.

While perhaps there may be a question as to whether the requirement to utilize the product of one of the several window manufacturers listed properly relates to responsibility or responsiveness we are of the opinion that the requirement relates to the ability of the contractor to perform the work (responsibility) rather than its commitment to do so in exact conformity with the RFB specifications (responsiveness). Compare 52 Comp. Gen. 240 (1972) with 42 Comp. Gen. 728 (1963).

Appellant made the following specific argument in its appeal to the Board:

The University of Maryland also claims that it was impossible for them to evaluate the "products" to be used on this project because I failed to list the window manufacturer on my proposal form (I inadvertently [sic] submitted the wrong form). The bid documents provided by The University of Maryland clearly specified which window manufacturers would be acceptable - several were listed. I fail to see what difference it made, at the time of the bid opening, which of the approved and specified manufacturers I intended to use. As it was, at the time of the bid we were negotiating with two or three of the specified suppliers.

While Appellant states that it inadvertently submitted the wrong form, implying that the omission of window manufacturers was accidental, it also states that at the time of the bid it was negotiating with two or three of the specified manufacturers. However, we find that at the time of bid opening, Appellant had not determined which of the approved window manufacturers it would use.

Nevertheless, since the Appellant was required to use the product of one of the listed manufacturers and since the requirement relates to bidder responsibility, Appellant's bid should not have been rejected solely with respect to this failure without affording it the opportunity to commit to a particular manufacturer's product for evaluation by the University prior to award.

³The Agency Report characterizes the University's reasons for the requirement in terms of assurance that the bid price was realistic and firm. The procurement officer, however, stated in his final decision that the requirement related to evaluation of the products to be used by the bidders and the Board is bound by the procurement officer's characterization of the matter.

In summary, we find that Appellant's failure to provide with its bid information concerning its experience in window replacement demonstrating its compliance with definitive responsibility criteria and its failure to commit to the product of an approved manufacturer at bid opening raised questions concerning Appellant's ability to perform. Accordingly, the procurement officer improperly rejected Appellant's bid on the grounds it was not responsive to the RFB. While we could remand the matter to the procurement officer to determine whether Appellant could meet the responsibility criteria, we do not do so here. In its appeal Appellant merely argues that "my ability to perform the job could have been easily evaluated with the additional information which I provided on the Contractor's Qualification Statement (Document 00400 which was submitted with the bid)." However, the record shows that Appellant informed the University following bid opening that it did not have experience in window installation projects equivalent to the RFB's definitive responsibility criteria regarding number and size of previous projects. Under these circumstances, we find that Appellant could not demonstrate to the procurement officer that its qualifications met or were equivalent to the RFB's definitive responsibility criteria thus demonstrating that it is a responsible bidder.

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