

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of
CONTROL SYSTEMS SERVICES, INC.

Under DGS
Project No. 88/60-APB&G

)
)
)
)
)
)
)
)

Docket No. MSBCA 1397

September 19, 1988

Responsibility - A bidder's failure to furnish with bid required evidence that it was able to respond to emergency service within two hours was not appropriate grounds to find the bid nonresponsive since such material concerns the bidder's capability to perform the contract which deals with a responsibility determination and a matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation.

Responsibility - A procurement officer, who has broad discretion in determining bidder responsibility, may consider the bidder's performance history under a similar contract in making his determination and his decision will not be overturned unless shown to be clearly unreasonable, an abuse of discretion, or contrary to law or regulation.

APPEARANCE FOR APPELLANT:

Richard W. Moore, Esq.
Moore, Libowitz & Thomas
Baltimore, MD

APPEARANCE FOR RESPONDENT:

Michael P. Kenney
Assistant Attorney General
Baltimore, MD

OPINION BY MR. LEVY

This appeal is taken from a Department of General Services (DGS) procurement officer's final decision denying Appellant's protest of the award of the captioned contract to Cuddeback Service, Inc. (Cuddeback). Appellant maintains that Cuddeback's bid should have been rejected by DGS as nonresponsive and Cuddeback as nonresponsible.

Findings of Fact

1. Project 88/60-APB&G provides for a three-year service contract for the maintenance of automatic temperature controls in buildings at the Annapolis State Office Complex.

2. Section IV, paragraph 3 of the specifications provides in pertinent part as follows:

3. QUALIFICATION OF BIDDERS:

a. Contractor must possess at least five (5) years of continuous immediate past experience in the maintenance of automatic temperature control systems of this type. He shall also possess sufficient financial responsibility, technical ability, shop equipment and technical organization, and have demonstrated the ability to maintain automatic temperature control systems of the types covered by these specifications. The bidder must furnish with his proposal the following:

*

*

*

(3) Evidence that he is able to respond to any emergency service call within two (2) hours, when conditions warrant such service.

3. Bids were opened on May 9, 1988 with the following results:

Cuddeback	\$53,769
BTE/Service	\$58,464
Appellant	\$64,440
Machinery and Equipment Sales, Inc.	\$94,530
Johnson Controls, Inc.	\$115,200

4. On May 12, 1988 Appellant protested the bids of Cuddeback and BTE/Service (BTE). The procurement officer by letter dated July 5, 1988, sustained the protest against BTE but denied the protest against Cuddeback. BTE did not take an appeal of the procurement officer's decision.

5. In its protest against Cuddeback, Appellant alleged that Cuddeback (1) failed to include evidence with its bid submission of its ability to respond to emergency service calls within two (2) hours as required in Section IV, paragraph 3, above; (2) failed to sign its bid; and (3) failed to affix its corporate seal.¹ In denying the protest against Cuddeback, the procurement officer informed Appellant that the failure to furnish the information concerning emergency service was solely a matter of responsibility and information relating to responsibility may be submitted up to the time of award.

¹At the hearing of its appeal on September 7, 1988, Appellant dropped as grounds of appeal Cuddeback's alleged failure to sign its bid or to affix its corporate seal. (Tr. p. 11, 15).

6. Appellant noted a timely appeal to this Board on July 14, 1988.

Decision

Appellant's remaining ground for appeal is that Cuddeback should not be considered a responsible and responsive bidder due to Cuddeback's failure to furnish with the bid "evidence that he is able to respond to an emergency service call within two (2) hours when conditions warrant such service." This Board has dealt with this issue on several occasions. As the Board stated in National Elevator Co. MSBCA 1252, 2 MSBCA ¶114 (1985):

Responsiveness in competitive sealed bid procurements concerns a bidder's legal obligation to perform the required services in exact conformity with the IFB specifications. Responsibility,³ on the other hand, concerns a bidder's capability to perform a contract. Carpet Land, Inc., MSBCA 1093 (January 19, 1983). As we have previously held, a matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation. Aquatel Industries, Inc., MSBCA 1192 (August 30, 1984) p. 5. Information concerning a bidder's responsibility thus may be submitted after bid opening notwithstanding a solicitation provision stating that such information must

be submitted after bid opening notwithstanding a solicitation provision stating that such information must be submitted with the bid as a pre-requisite to a finding of responsiveness. Carpet Land, supra.

(Footnote omitted)

Here, the materials requested in the solicitation (Section IV, paragraph 3) clearly relate to the capability to perform in accordance with the contract terms and thus concern responsibility. Elsewhere in the solicitation, the issue of emergency service response time is made a condition of the contract. (Tr. p. 21). By signing its bid, Cuddeback committed itself to the emergency service requirement of the solicitation. The provision in question, under the heading Qualification of Bidders, seeks information concerning how the bidder will comply with this requirement in order for the procurement officer to determine bidder responsibility. As such, it was appropriate for the procurement officer to consider information supplied after bid opening bearing on Cuddeback's responsibility.

The procurement officer determined that Cuddeback had the capability to meet the emergency service requirement based on the procurement officer's personal knowledge of Cuddeback's performance under a similar three-year contract covering some of the same buildings in the Annapolis State Complex. (Tr. p. 17-20). Under Maryland law, a procurement officer has broad discretion in determining whether a bidder is responsible. This Board will not disturb such a determination unless

clearly unreasonable, arbitrary, an abuse of discretion, or contrary to law or regulation. Environmental Controls, Inc., MSBCA 1356, 2 MSCBA ¶168 (1987). Thus the procurement officer acted within his discretion in finding Cuddeback a responsible bidder even though information concerning Cuddeback's qualifications was not submitted with its bid.

For the reasons the appeal is denied.