

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of)
)
COVINGTON MACHINE AND)
WELDING COMPANY)
) MSBCA No. 2051
)
Under SHA Contract)
No. AW2956114)
)

May 28, 1998

Responsibility - In making a determination concerning bidder responsibility, it is proper for a Procurement Officer to consider information relative to work experience and work ability submitted after the bid opening.

Responsiveness & Responsibility - Distinguished - In a competitive sealed bid procurement responsiveness concerns a bidder's legal obligation to perform the required services in exact conformity with the IFB specifications. Responsibility, on the other hand, concerns a bidders capability to perform fully the contract requirements.

APPEARANCE FOR RESPONDENT Gary C. Duvall, Esq.
Miles & Stockbridge
Towson, MD

APPEARANCE FOR RESPONDENT Scot D. Morrell
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY CORMAN CONSTRUCTION INCORPORATED (Corman) Donald A. Tobin, Esq.
Bastianelli, Brown & Kelley
Washington, DC

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial by the State Highway Administration (SHA) of its bid protest that the bid of the Interested Party should be rejected.

Findings of Fact

1. The bid opening for the above-captioned contract for machinery and structural repairs on drawbridges in District Nos. 1, 2 and 5 occurred on November 13, 1997. Corman was announced as the low bidder for the Contract with a bid amount of \$1,274,165. Appellant, the incumbent on the predecessor contract for such work, had the next lowest bid amount with a bid of \$1,470,350.
2. The Contract special provisions state in relevant part that:

MINIMUM REQUIREMENTS FOR BIDDERS

In order to be eligible to bid on this contract, the contractor shall have at the time of bid personnel in their company who have a minimum of five (5) years experience determining the cause of problems or "Trouble Shooting" problems on drawbridges and drawbridge machinery, and in performing subsequent repairs as a result of their findings. This contract requires 24 hour contact with the contractors liaison. This experience shall be for drawbridges and drawbridge machinery similar to those owned by the State of Maryland.

- (a) The Contractor shall have available 24 hours a day, 7 days a week on a first priority basis, a machine shop, welding/fabrication facility and the capacity of performing millwright and machinery repair both in the field and in the machine shop.
 - (1) The machine shop shall contain at least large capacity lathes 34 x 144 in., boring mills, radial arm drill press, metal brakes, surface grinding equipment, horizontal and vertical milling machines, metal cutting band saw with a 12 in. min. capacity, keyway broaching equipment, steel shaper and planer, and gear cutting equipment.

The Contractor shall have available 24 hours a day, 7 days a week, at least T.I.G. and M.I.G. spray weld equipment, air arc, flux arc welder, 400 amp AC driven welding machine and portable DC welding machines.
 - (2) The fabricating facility shall be currently approved by the State of Maryland under Section 408.03.20 of the Standard Specifications. The facility shall as a minimum have the proven ability to perform those operations required to fabricate components needed to facilitate repairs. This shall include but not be limited to those operations and procedures, including all required pre-qualified welding procedures in SAW/SMAW in AWS D 1.5, as necessary when the effected

areas are designated as "Primary LOAD Caring [sic] and/or Fracture Critical Members". Additionally all welders shall be qualified in accordance with Section 408.03.19 (a) or (b). This facility shall be available 24 hours a day, 7 days a week as required/needed to facilitate repairs. Additionally the contractor shall have the field/portable equipment, facilities, capacity, and proven ability to effect the removal/installation of effected portions of structure as required.

- (b) The Contractor shall submit with the bid documentation that they meet all the requirements necessary to be eligible to bid on this contract. This documentation shall include the location of each bridge, a detailed description of the work and date performed, names of the personnel performing the work, a list of all equipment, and the location of the machine shop, and fabrication facility, etc. Failure to comply with the minimum requirements to bid or failure to provide the necessary documentation of meeting these requirements will be grounds for rejection of the bid.
- (c) The Contractor shall provide with the bid an accurate listing of the fabrication facilities to be used on this project that are currently approved to perform fabrication work on Administration projects. Upon Award of Contract, the Contractor shall furnish an updated copy of their Quality Control Manual.

The Contract general provisions (GP-8.01 Subcontracting) also required that the contractor perform 50% of the Contract with its own forces.

- 3. Appellant filed a letter dated November 20, 1997 protesting an award of the Contract to Corman, disputing whether Corman "has the personnel with the experience and knowledge to perform bridge repairs in an emergency situation covering the same scope of problems as the [SHA] has required to be addressed in past years." Appellant also questioned whether Corman could perform 50% of the Contract with its own forces as required by the Contract.
- 4. By letter dated November 25, 1997, Appellant reiterated its position that Corman did not have the necessary experience to perform the work required by the Contract. In this letter Appellant also asserted that there was no bid item number for the fabricated structural steel or its facility which in past SHA contracts was included in the machine shop item. Therefore Appellant argued that a responsible bidder must have a machine shop capable of performing all necessary welding/fabrication and scheduled repair and emergency work on a 7-day-a-week, 24-hour basis as required by the specifications. Appellant noted that it has such a capability at its own plant and that a preliminary inquiry by Appellant suggested that there were no machine shops with welding/fabrication facilities in the area for Corman to rely on that were available 24 hours a day, 7 days a week. Accordingly, Appellant argued that Corman could not meet the specifications that allegedly called for combined machine shop and welding/fabrication capabilities in one facility with round-the-clock availability.
- 5. The Board finds that the specifications allow for separate machine shop and welding/fabrication facilities as long as both are available 24 hours a day, 7 days a week on a first priority basis. There is no geographical restriction placed on the location of such

facilities in the specifications.

6. In its bid Corman listed its fabrication facilities as the Williams Enterprise (Williams Bridge Company) facility located in Manassas, Virginia, and the Wilton Corporation facility located in Finksburg, Maryland. The record reflects that Williams will perform fabrication of structural components designated as "Primary Load Carrying and/or Fracture Critical Members," and that Wilton will fabricate miscellaneous metals not fabricated by Williams. Chesapeake Machine, of Baltimore, Maryland, was identified in Corman's bid as the machine shop and a list of Chesapeake's equipment and major clients was also provided with Corman's bid.
7. On November 26, 1997, a meeting between Corman and SHA representatives was held to discuss Corman's capability to perform the Contract requirements. SHA expressed particular concern over the ability to handle electrical problems. Although not listed in its bid, Corman advised that Simpson Electrical Co., Inc. would be its electrician for trouble-shooting electrical problems. At this meeting Corman indicated that it would use Appellant as its machine shop source. Appellant, however, declined to act as Corman's subcontractor.
8. Following the meeting, in a letter dated December 2, 1997, SHA requested Corman to provide additional information with respect to Corman's electrical troubleshooter, machine shop and fabrication shop. In response, by letter dated December 5, 1997, Corman submitted additional information regarding the entities Corman would use for any necessary electrical "troubleshooting", machine shop work and fabrication. Specifically, letters were provided from Simpson Electrical, Williams Bridge Company, Wilton Corporation and Chesapeake Machine confirming their availability to handle emergency calls, 7 days a week, 24 hours a day. Williams Bridge included its current AISC Fracture Critical certifications and Chesapeake included the equipment list previously supplied with Corman's bid. Information concerning Simpson Electric's qualifications was also included with this letter. Corman also reiterated that the names and qualifications of Corman personnel had previously been submitted with its bid.
9. By letter dated December 16, 1997, SHA requested additional information on Corman's proposed electrician, Simpson Electrical Co., Inc.
10. On December 29, 1997, Corman sent additional information to SHA regarding the names and years of experience of Simpson Electrical Employees and a description of Simpson Electrical's project experience. This information was contained in a letter from Simpson to Corman in response to SHA's December 16, 1997 request for information. Identified were five Simpson employees with between 11 and 44 years of MDOT bridge experience and 16 Maryland bridges on which Simpson had maintenance contracts in the past, some of which are the same bridges which are to be repaired and maintained under the instant Contract.
11. Based on information provided with its bid and further information subsequently submitted as described above, the Board finds that SHA had a sufficient factual predicate to determine whether or not Corman was a responsible bidder.
12. On January 15, 1998, SHA's Office of Bridge Development prepared a Bid Justification recommending award to Corman which, with respect to Corman's responsibility, concluded that:

We have reviewed the documentation submitted by the low bidder and find it to meet the Minimum Requirements for Bidders specified in the Invitation for Bids. We met with the low bidder (Corman

Construction, Inc.) on November 25, 1997, and are satisfied that Corman Construction, Inc. is qualified and has the capabilities of performing the work at the prices bid.

13. After reviewing all the information and documentation, SHA determined that Corman had the capability in all respects to perform all the Contract requirements, including the ability to perform at least 50 percent of the Contract with its own forces and having the proper machine shop and fabrication facilities available on a priority basis, 24 hours a day, 7 days a week.
14. A Procurement Officer's Final Decision dated January 20, 1998 was issued by SHA denying Appellant's protest and Appellant noted an appeal with this Board on February 6, 1998.
15. In post-appeal pleadings and at the hearing of the appeal, Appellant argued that Corman was not responsible and that Corman's failure to name an electrical troubleshooter in its bid rendered its bid nonresponsive.

Decision

A. Bidder Responsibility

A responsible bidder is one who "has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance." COMAR 21.01.02.01(77).

It is well established that a procurement officer has broad discretion in determining whether a bidder is responsible, i.e. in this appeal whether Corman has the capability in all respects to perform fully the contract requirements. See Charles Center Properties, MSBCA 1629, 3 MSBCA ¶297 (1992); Allied Contractors, Inc., MSBCA 1191, 1 MSBCA ¶79 (1984). This Board has held that it will not disturb the procurement officer's determination regarding responsibility unless the decision was arbitrary, capricious or clearly erroneous. See, Environmental Controls, Inc., MSBCA 1356, 2 MSBCA ¶168 (1987). The rationale for granting procurement officers such discretion was addressed by this Board in Charles Center Properties as follows:

"Deciding a prospective contractor's probable ability to perform a contract to be awarded involves a forecast which must of necessity be a matter of judgment. Such judgment should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the [procurement] contracting officers involved who should be in the best position to assess responsibility, who must bear the major brunt of any difficulties experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the State's [Government's] behalf. 39 Comp. Gen. 705, 711."

Charles Center Properties, *supra*, at pp. 8-9 citing 43 Comp. Gen. 228, 230 (1963).

In making a determination concerning bidder responsibility, it is proper for a procurement officer to consider information relative to work experience and work ability submitted after the bid

opening. See, Charles Center Properties, supra; Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA ¶82 (1984).

After bid opening a meeting between Corman and SHA was held on November 26, 1997 to discuss issues of bidder responsibility, i.e., how and with whom did Corman plan to perform the Contract requirements. SHA requested additional information and Corman provided such information. The record reflects that SHA reviewed all the pertinent information provided by Corman, which information was sufficient to make a rational judgment concerning the Contractor's responsibility. The Procurement Officer determined that Corman does possess the requisite work experience and capabilities to perform the requirements of this Contract. Based on the record this Board will defer to the Procurement Officer's technical judgment that Corman is qualified in all respects to perform fully the Contract requirements. The record reflects a rational basis for such judgment and we will therefore not disturb the Procurement Officer's judgment.

B. Bid Responsiveness

After Appellant noted its appeal with this Board, in pleadings and at the hearing, Appellant argued that the Corman bid was non-responsive for failure to list or name an electrical troubleshooter in its bid. Appellant points to the following language in the Contract special provisions as requiring bidders to list their electrical troubleshooter:

MINIMUM REQUIREMENTS FOR BIDDERS

In order to be eligible to bid on this contract, the contractor shall have at the time of bid personnel in their company who have a minimum of five (5) years experience determining the cause of problems or "Trouble Shooting" problems on drawbridges and drawbridge machinery, and in performing subsequent repairs as a result of their findings. This contract requires 24 hour contact with the contractors liaison. This experience shall be for drawbridges and drawbridge machinery similar to those owned by the State of Maryland.

* * *

- (b) The Contractor shall submit with the bid documentation that they meet all the requirements necessary to be eligible to bid on this contract. This documentation shall include the location of each bridge, a detailed description of the work and date performed, names of the personnel performing the work, a list of all equipment, and the location of the machine shop, and fabrication facility, etc. Failure to comply with the minimum requirements to bid or failure to provide the necessary documentation of meeting these requirements will be grounds for rejection of the bid.

The Board does not conclude that the above cited "Trouble Shooting" refers only to electrical work as argued by Appellant. Assuming arguendo that it does, the Board does not find that

Corman's bid is nonresponsive for failure to list Simpson Electric in its bid.¹ Appellant agrees that a matter of responsibility "cannot be made into a question of responsiveness by the terms of the solicitation." See, National Elevator Company, MSBCA 1251, 2 MSBCA ¶115 (1985) at p. 4, and National Elevator Company, MSBCA 1252, 2 MSBCA ¶114 (1985) at p. 4. In National Elevator, MSBCA 1252, we observed that:

"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, 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 with the bid as a pre-requisite to a finding of responsiveness. Carpet Land, supra."

National Elevator, MSBCA 1252 at p.4, footnote omitted. Appellant argues, however, that:

"When an invitation for bid requires a specific guaranty of quality, that guaranty must be submitted with the bid documentation as responsive to the Contract. Williams Construction, Inc., [MSBCA 1611] 3 MSBCA ¶287 (1991). In Williams Construction, Inc. the low bid was properly deemed nonresponsive when the low bidder failed to include the identity of a subcontractor to be performing work on the Contract despite language in the IFB that required such information to be submitted with the bid. Id. The facts in the present case are analogous."

However, Williams is clearly distinguishable. In Williams the issue was whether failure to name a subcontractor in the bid was a matter of responsibility or responsiveness. The contract involved certain improvements to a State highway. However, certain of the work required relocation of Washington Suburban Sanitary Commission (WSSC) facilities. As the Board noted in Williams,

"Our decision herein, however, does not solely rest on the above noted factual distinctions between the instant appeal and Chesapeake Bus and Construction Management Associates. In the instant appeal, bidders were required to name the firm proposed for the relocation work in the bid itself. However, deviation from use of a firm on the list of contractors included with the WSSC special provisions was permitted, provided WSSC approved. Such approval or disapproval was to be made by WSSC within ten (10) business days of request by the bidder.

Thus, unlike the situation in Chesapeake Bus and Construction Management

¹Both Appellant and Corman proposed to use subcontractors to perform electrical work rather than employees of their respective companies as set forth in the minimum requirements for bidders. No party protested this potential deviation from the minimum requirements, and thus it is not before the Board for consideration.

Associates, where the IFB sought information from the bidder concerning how it would perform (i.e. what parts, products and services it would use), the instant IFB not only seeks such information but conditions performance on the approval of a nonparty third person, WSSC.

We may not question why SHA included the WSSC provisions in the IFB. However, these provisions were included by SHA in the invitation and when the Dewey Jordan bid was opened, the information concerning whom it proposed to perform the required WSSC facilities relocation work was missing. Therefore, while Dewey Jordan had inserted prices in the bid items for the WSSC relocation work, it had not agreed, in submission of its bid, to use a firm to perform such work that would be approved by WSSC. Accordingly, we find Dewey Jordan did not, by submitting its bid, make an unequivocal and unambiguous commitment to perform the relocation work in exact accordance with the solicitation requirements.”

Williams, supra at p. 9, footnote omitted.

Thus in Williams, the necessity for third party approval led this Board to conclude that a matter of responsiveness rather than responsibility was involved. The procuring State agency in Williams would not be assessing whether the subcontractor on the WSSC relocation work could perform; there was no determination of responsibility to be made, only whether the general contractor bidder had proposed a firm in its bid for the WSSC relocation work that was on the WSSC list. In this appeal, by contrast, responsibility, i.e., capability to perform, is being assessed by the procuring agency. Accordingly, we do not find that the Corman bid was nonresponsive for failure to list or name Simpson Electric in its bid.

Based on the record we conclude that the Procurement Officer properly determined that Corman was a responsible bidder and that its bid was responsive. Accordingly, the appeal is denied.

Wherefore, it is Ordered this 28th day of April 1998 that the appeal is denied.

Dated: April 28, 1998

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2051, Appeal of Covington Machine and Welding Company under SHA Contract No. AW2956114.

Dated: April 28, 1998

Mary F. Priscilla
Recorder

