

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CUSTOMER ENGINEER SERVICES, )  
INC. )  
 )  
Under University of Maryland ) Docket No. MSBCA 1332  
RFP No. 62473 )

August 14, 1987

Responsibility - Evaluation - The procurement officer reasonably determined that the bidder was nonresponsible based on the bidder's poor performance of a similar, recent contract with the University.

Responsibility - A procurement officer has broad discretion in determining whether a bidder is responsible and such a determination will not be disturbed unless it is clearly unreasonable.

APPEARANCE FOR APPELLANT: None  
APPEARANCE FOR RESPONDENT: Andrea Hill  
Assistant Attorney General  
Baltimore, MD

OPINION BY MR. KETCHEN

This timely appeal is taken from a University of Maryland (University) procurement officer's final decision denying Appellant's protest of the award of the captioned contract to Tri-County Office Equipment (Tri-County) and Business Machines of America (BMA). Appellant was low bidder, but the procurement officer for the University determined that Appellant was not a responsible bidder, so he awarded the contract to the next low responsive and responsible bidders. Appellant maintains that its bid was the lowest responsible and responsive bid and that it should have been awarded the contract.

Findings of Fact

1. The University issued Request For Bids (RFB) No. 62473-A on January 20, 1987. The solicitation sought the provision of maintenance service for approximately 2200 miscellaneous typewriters located on the College Park campus. The solicitation was divided by brand of equipment into 4 different groups.
2. Bids were opened on February 20, 1987. Of the 8 bids received, the three lowest were submitted by Appellant, Tri-County, and BMA. The results were as follows:

	Group I	Group II	Group III	Group IV
Appellant	\$22,047.50	\$2,273.49	\$2,877.00	\$ 990.00
Tri-County	\$33,117.70	\$3,055.20	\$4,054.90	No Bid
BMA	\$41,854.25	\$2,817.00	\$3,430.00	\$2,000.00

When each bidders' discount terms are taken into account, Appellant was low bidder for Groups I, II, III, and IV; Tri-County was second low bidder for groups I, II, and III, and BMA was second low bidder on Group IV.<sup>1</sup> Agency Report, Exh. 1-A, B, C.

<sup>1</sup>Appellant gave no discount, Tri-County gave a 4% discount for payment within 30 days of service, and BMA gave a 2% discount. See Exhibit 1-A, B, C. Note: Md. Ann. Code, State Finance and Procurement Article, Section 13-1102 states: "It is the policy of this State that payment pursuant to any authorized written procurement contract shall be made by the State agency involved to the contractor not later than 30 calendar days from the receipt date of a proper invoice."

3. After opening, the bids were then evaluated by the procurement officer, Mr. Ronald Jones, in accordance with COMAR 21.05.02.13(A) and (D) which provide in relevant part that:

"the contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the lowest bid price or the lowest evaluated bid price."

"Upon determination of the lowest bidder, review of the bid for responsiveness, and satisfaction that the bidder is responsible, the procurement officer shall award the contract to that bidder."

4. COMAR 21.02.01.59 defines a responsible bidder as one who "has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which shall assure good faith performance."

5. The procurement officer determined that Appellant was not a responsible bidder because it did not have the capability to provide timely maintenance performed in a workmanlike manner for the volume of repairs generated by the numerous typewriters covered by the contract. This determination was based on Appellant's performance of a similar service contract with the University (No. 58162-A) during the preceeding year, (March 1, 1986 - February 28, 1987), whose provisions were virtually identical to those in the contract now in dispute. The University had many problems with Appellant's performance, and the contract was terminated on April 18, 1986. One week later, Appellant's President, Mr. Carl Davis, met with the procurement officer, and the University agreed to reinstate the contract effective April 25, 1986 on the condition that continued failure to perform the contract requirements would result in immediate termination.

6. Throughout the duration of the contract, the users of the maintenance service continued to be dissatisfied with the service they were receiving from Appellant. This dissatisfaction was evidenced by the numerous letters received by the procurement officer from various employees of the University who were unhappy with Appellant's service.<sup>2</sup> These complaints were due to Appellant's (1) failure to respond to service calls within the time limits established by the contract; (2) failure to repair the typewriters in a timely manner; (3) failure to provide functional loaners; and (4) failure to act in a courteous, service-oriented manner. The record also includes numerous letters sent by the procurement officer to Mr. Davis complaining of Appellant's performance throughout the duration of the contract.

7. The University routinely surveys all users of service contracts. Such a survey was conducted respecting Appellant's contract, and when the results of this survey were compiled, only 2 of the 45 people who responded recommended extending Appellant's contract. Agency Report, Exh. 8.

8. After deciding that Appellant was not a responsible bidder, the procurement officer followed the dictates of COMAR 21.05.02.13 (A) and (D) and awarded the contract on February 25, 1987 to the lowest responsive and responsible bidders, Tri-County and BMA.

9. Appellant received notification that it had been determined nonresponsive and formally protested its nonaward of the contract on February 24, 1987. In its letter of protest, Appellant denied that its performance had been unsatisfactory. Agency Report, Exh. 4.

10. The procurement officer denied Appellant's protest in a final decision issued on April 3, 1987. The procurement officer stated in his letter to Appellant that:

Although the CES bid on the current maintenance contract was the lowest, CES's past performance on a University contract with virtually identical requirements was so poor as to cause the University to determine that CES was not capable in all respects to perform fully the contract requirements of RFP No. 62473-A and, therefore, was not a responsible bidder. Accordingly, the bid was rejected.

<sup>2</sup>See Agency Report, Exh. 7 which includes over 40 such letters, often with accompanying documentation.

11. On April 15, 1987, Appellant received notification of the procurement officer's denial of its protest, and on April 27, 1987, Appellant filed a timely notice of appeal with this Board.<sup>3</sup>

#### Decision

Appellant contends that its bid was the lowest and that it is a responsible bidder and protests the award of the contract to two other bidders. The procurement officer, however, determined that Appellant was not a responsible bidder as defined in COMAR 21.01.02.59, one who has the capability to fully perform all of the contract requirements. The central issue which this Board must decide, therefore, is whether the procurement officer's determination of Appellant's nonresponsibility was proper.

Under Maryland procurement law, a procurement officer has broad discretion in determining whether a bidder is responsible, and such a determination will not be disturbed unless it is clearly unreasonable, arbitrary, an abuse of discretion, or contrary to law or regulations. See Custom Management Corporation and Ogden Food Service Corporation, MSBCA 1086/1090, October 22, 1982, 1 MICPEL ¶28; Solon Automated Services, Inc., MSBCA 1046, 1 MICPEL ¶10 (1982), rev'd sub nom. Solon Automated Services, Inc. v. (University of Maryland et al., Miscellaneous Law No. 82-M-38 and 82-M-42 (Cir.Ct. Baltimore Co., October 13, 1982).

In this case, the procurement officer's determination of Appellant's nonresponsibility was based on his personal experience and review of Appellant's performance during the year preceeding the award of this contract. Appellant had been awarded a contract that was virtually identical to the current one, and throughout the duration of that contract, there were a multitude of documented problems with Appellant's performance. These problems became so serious that the University terminated its contract with Appellant; the contract was later reinstated, but the problems persisted. These problems are evidenced by a record kept by the procurement officer which includes letters from various users of Appellant's services. These users complain, in great detail, and often with accompanying documents to verify these complaints, of the trouble they were having with Appellant's performance. The record also contains the results of a survey regularly conducted by the University in which 95 percent of the users of Appellant's services who responded to the survey stated that they did not think that Appellant's contract should be extended.

The procurement officer stated in his formal denial of Appellant's protest that based on Appellant's unsatisfactory performance on the prior contract, he felt Appellant's performance on the instant contract also would be unsatisfactory. He concluded that Appellant's past performance demonstrated that it did not have the capability to provide maintenance for the volume of repairs required at the College Park campus. Agency Report, Exh. 5.

It is important to note that while the procurement officer stated that his decision was based on past performance, this "past performance" extended throughout the period when he was evaluating Appellant for responsibility on the instant contract, thus giving the procurement officer an excellent opportunity to gauge whether Appellant was responsible at the time when the contract was being considered for award. In other words, while evaluating Appellant for the instant contract, the procurement officer was also monitoring Appellant's performance under the prior year's contract, so he had up to the minute knowledge that Appellant was not performing the contract requirements adequately and would be nonresponsible to perform under the new contract. This is important as we have held that "[i]n determining whether a bidder is responsible, an agency must determine whether the bidder, as of the date of the contract award, will have the capability to perform." Roofers, Inc., MSBCA 1129, April 8, 1983, 1 MICPEL ¶46 at 5; 52 Comp. Gen. 240 (1972); 49 Comp. Gen. 619 (1970). "Hence, it is appropriate for State procurement officers to review performance history in assessing a bidder's responsibility so long as this consideration is limited to current or recent projects." Allied Contractors, Inc., MSBCA 1191, August 16, 1984, 1 MICPEL ¶79 at 7. Here, the procurement officer knew on the date of the contract award that Appellant was not capable of proper performance and thus was not responsible.

<sup>3</sup>This appeal has been decided on the basis of the record as neither party requested a hearing within the specified time limits.

Appellant attempted to refute all of the complaints that had been lodged against it, but this was accomplished in the form of mere denials contained in the letter of protest to the procurement officer. Appellant stated that it always responded to service calls within 24 hours, unless they were placed on Friday afternoons; that its personnel properly repaired all typewriters; that all loaner typewriters were functional; and that its personnel were courteous. Appellant also alleged that the machines often were not repaired because they were in locked rooms and that the University's employees were often rude. In addition, Appellant mentions a survey it conducted that allegedly produced a very favorable response to its performance.<sup>4</sup> However, none of Appellant's denials were supported by credible evidence, and the survey was not provided. In contrast, the evidence of record regarding Appellant's poor performance is extensive. Thus, the procurement officer in his discretion reasonably determined that Appellant is not a responsible bidder for this procurement. Lamco Corp., MSBCA 1227, February 21, 1985, 1 MICPEL ¶96.

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

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<sup>4</sup>See Agency Report, Exh. 4 and Appellant's letter to Mr. Jones dated April 15, 1987 in the Board's record.