

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEAL

Appeal of  
DATA SYSTEMS SUPPLY CO.

Under DGS  
Purchase Order No. P24237

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Docket No. MSBCA 1399

October 19, 1988

Responsibility - The Maryland State Board of Contract Appeals will not disturb a procurement officer's determination based on his discretion and judgment that a bidder is nonresponsible (not capable of performing the contract requirements) unless clearly unreasonable, an abuse of discretion, or contrary to law or regulation.

Responsibility - The procurement officer reasonably determined that Appellant was a nonresponsible bidder based on its failure to fully perform the immediately preceding supply contract and its failure to solve that previous contract's delivery problems Appellant alleged were caused by its supplier.

APPEARANCE FOR APPELLANT:

None

APPEARANCE FOR RESPONDENT:

Allan B. Blumberg  
Assistant Attorney General  
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY:

Leonard Paper Company

OPINION BY MR. KETCHEN

This is an appeal from a Department of General Services (DGS) procurement officer's final decision that Appellant was not a responsible bidder and was not entitled to a small business preference.

Findings of Fact

1. On April 22, 1988, the Department of General Services (DGS) issued its Request for Quotation (RFQ) on Purchase Order Form No. P24237 for the purchase of 12,000 cases of toilet tissue.

2. The RFQ identified the procurement as a small business preference procurement under Md. Ann. Code, State Finance and Procurement Article §11-140 and COMAR 21.11.01.01, entitling qualified small businesses to application of a 5% price preference in determining the low bidder. COMAR 21.11.01.01 B(3) states that the Secretary of the Department of General Services "shall accept the lowest responsive and responsible bid from a small business for a small business set-aside procurement, if the small business bid does not exceed by more than 5% the bid received from the lowest responsive and responsible regular vendor." In this regard, COMAR 21.01.02.62 defines small business as follows:

'Small Business' means a firm which meets the following criteria:

- A. It is independently owned and operated;
- B. It is not a subsidiary of another firm;
- C. It is not dominant in its field of operation;
- D. Its wholesale operations did not employ more than 50 persons, and its gross sales did not exceed \$1,000,000 in its most recently completed year;
- E. Its retail operations did not employ more than 25 persons, and its gross

- sales did not exceed \$500,000 in its most recently completed fiscal year;
- F. Its manufacturing operations did not employ more than 100 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year;
  - G. Its service operations did not employ more than 100 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year; and
  - H. Its construction operations did not employ more than 50 persons, and its gross sales did not exceed \$2,000,000 in its most recently completed fiscal year.

DGS has adopted certain internal policies and procedures governing small business set-aside procurements. In order to qualify for a small business set-aside, DGS further defines a small business entitled to a bidding preference as a business that:

- 1. Owns or leases the premises which it manufactures or stocks its materials, supplies or equipment of the general

- nature as listed on the vendor's application to the Purchasing Bureau.
2. Sells and delivers from this same stock in the normal course of business.
  3. Maintains and operates this same facility on a continuing basis.

3. At the bid opening on May 20, 1988, eight bids were received. The four low bids were as follows:

<u>Bidder</u>	<u>Unit Price Per Case</u>
Leonard Paper Company (Leonard)	\$30.90
Crown Supply Company	\$31.08
Baer Supply Co., Inc.	\$31.67
Date Systems Supply Co. (Appellant)	\$31.93

Of these four bidders, only Appellant claimed a small business preference.

4. Appellant's bid did not exceed by more than 5% the bid of Leonard, the lowest responsive and responsible regular vendor.

5. On June 14, 1988, Appellant received a letter from DGS informing it of a contemplated award to Leonard because (a) Appellant is not a responsible bidder based on its performance on the toilet tissue supply contract then in effect (the 1987 contract) and (b) Appellant functions as a broker and,

functions as a broker and, as such, is not entitled to the 5% small business preference. In the context of this appeal, by broker DGS apparently means an entity that orders supplies from other businesses in fulfilling a State contract but does not itself regularly deal in, stock, or handle the supplies.

6. In its performance under the 1987 contract, Appellant did not stock, sell or deliver the toilet tissue it sold to the State under that contract, although it is not clear whether Appellant stocks and sells this product as a regular dealer. Instead, Appellant subcontracted with the Nationwide Paper Company (Nationwide) which obtained tissue from the manufacturer (Ft. Howard). Nationwide made deliveries from its stock directly to the State. Appellant in its notice of appeal states that it intends to operate in the same manner for the contract at issue except that it intends to substitute the Scott Paper Company as its manufacturer and supplier.

7. The 1987 contract required delivery of toilet tissue in 1,000-case lots to be made on specified dates, approximately every three to four weeks, starting on October 26, 1987. The first delivery was not made until November 4, 1987 and it contained only 535 cases. The second delivery, due on November 9, 1987, arrived three days late and contained only 500 cases. By December 21, 1987 Appellant had delivered only 3,035 cases out of the 4000 cases required by the contract. Appellant did not catch up on deliveries until March 21, 1988. The next delivery, due April 11, 1988, was 465 cases short. Between April 11, 1988 and June 20, 1988, the date required for the last delivery, every delivery required was late

and was less than required by the contract. As of June 20, 1988 only 10,675 cases had been delivered. Delivery of all 12,000 cases was not completed until June 30, 1988.

8. As a result of Appellant's delays in delivery, DGS suffered shortages in its supply and at several points had no tissue at all stocked in its warehouse. DGS was required to buy tissue elsewhere above its contract price to relieve the shortage.

9. In its letter of protest to the procurement officer, Appellant stated that the delivery problems were the fault of its manufacturer, Ft. Howard. Appellant proposed to correct the problem by substituting the Scott Paper Company as the manufacturer. However, the Scott Paper Company informed DGS after bid opening that Appellant is not an authorized distributor of its products, but that Nationwide is.

10. By letter dated July 6, 1988, the DGS procurement officer denied Appellant's protest.

11. Appellant filed a timely appeal with this Board.

#### Decision<sup>1</sup>

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<sup>1</sup>This appeal is decided on the written record. A hearing was not requested by any party within the time allowed by the regulations.

In a competitive sealed bid procurement, the contract is awarded to the responsive and responsible bidder that submits the lowest bid price. Md. Ann. Code, State Finance and Procurement Article (General Procurement Law) §11-110(b)(5). DGS maintains that Appellant was not a responsible bidder eligible for contract award.

A responsible bidder is one "who has the capability in all respects to perform fully the contract requirements and possesses the integrity and reliability that will assure good faith performance". A determination that a bidder is not a responsible bidder may be based on the bidder's performance of previous contracts with the State. Allied Contractors, Inc., MSBCA 1191, 1 MSBCA ¶79 (1984). See also Customer Engineering Services, Inc., MSBCA 1332, 2 MSBCA ¶156 (1987). Such a determination is a matter within the discretion and judgment of the procurement officer and may not be disturbed unless shown to be clearly unreasonable, an abuse of discretion, or contrary to law or regulation. Allied Contractors, supra.

In this appeal, the DGS procurement officer's determination of Appellant's nonresponsibility was based on his personal experience and review of Appellant's performance of the 1987 contract. The 1987 contract was virtually identical to the current one. Throughout the duration of that contract there were a number of documented problems with Appellant's performance. (Finding of Fact No. 8). Appellant blames the delivery problems on its manufacturer, Ft. Howard, which it has changed for its current bid. However, the procurement officer noted that Appellant was not determined to be nonresponsible on the basis of its supplier's

performance. The procurement officer determined that Appellant as the party contracting with DGS was responsible for contract compliance but did not fully perform the requirements of the 1987 contract. In this regard, Appellant took no corrective measures to solve the delivery problems that arose during the performance of the 1987 contract. Based on that performance the procurement officer reasonably determined that Appellant was not a responsible contractor.

Having found that the DGS procurement officer reasonably determined that Appellant is ineligible for award because nonresponsible, we need not address any issue raised by DGS' determination that Appellant is not entitled to a 5% small business preference.

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