



2. Bids were due on July 12, 1989, and timely bids were received as follows:

Hunt Valley Masonry, Inc. (Hunt Valley)	\$31,000
DeBarros Construction Corporation (Appellant)	44,526
Magna Builders, Inc.	49,979
C & D Waterproofing Corporation	68,000
Subterranean Construction Co., Inc.	84,000

3. Hunt Valley's bid contained no Debarment Affirmation as required by Paragraph 18<sup>1</sup> of the Instruction to Bidders. The Debarment Affirmation required the bidder to provide information respecting convictions of or involvement in certain specified criminal activity.

4. Hunt Valley's bid also did not contain the MBE Utilization Affidavit required by Paragraph 19 of the Instructions to Bidders and Section 10 of the General Conditions.<sup>2</sup> The MBE Utilization Affidavit (found at p. 45 of the General Conditions) states in relevant part that "[t]he undersigned...does hereby...acknowledge the Minority Business Enterprise participation goal of Ten Percent (10%) for this contract...and commit to make a good faith effort to achieve this goal."

5. On July 17, 1989, Appellant filed a protest with DGS. The basis for the protest was that Hunt Valley's bid was non-responsive for failure to be accompanied by a Debarment Affirmation and an MBE Utilization Affidavit.<sup>3</sup>

6. The bid proposal form (Standard Form of Proposal) contained in the solicitation documents which both Appellant and Hunt Valley used to submit their bids provided:

Having carefully examined the Instructions to Bidders, the Conditions and the Specification and plans for the subject construction...the undersigned proposes to furnish all labor, materials, and equipment called for by the said document for the entire work, in strict accordance with the Contract Documents....

7. In accordance with COMAR 21.11.03.09, Section 10.01 of the General Conditions provided:

The contractor shall structure his procedures for the performance of the construction services required by this contract to attempt to achieve the

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<sup>1</sup> Paragraph 18 of the Instructions to Bidders provided in relevant part:

A. To satisfy the requirement of COMAR 21.08.04 Debarment-Statutory Violations, the Bidder must complete this Affirmation and submit it with the bid if the bid is in writing and results from a written solicitation and provided that the bid totals \$7500 or more. (Emphasis supplied).

<sup>2</sup> Section 10.03C of the General Conditions provided in relevant part that "each bid or offer submitted in response to this solicitation shall be accompanied by a complete MBE Utilization Affidavit..." (Emphasis supplied).

<sup>3</sup> Appellant's bid contained both documents.

result that a minimum of 10 percent of the total dollar value of the contract is performed directly or indirectly by minority business enterprise. \*\*\* The contractor agrees to use his best efforts to carry out the requirements of this section....

And, as required by COMAR 21.05.08.04, Subparagraph A of Section 10.03 of the General Conditions provided that:

An MBE subcontract participation goal of a minimum of 10 percent of the contract has been established for this procurement. The contractor agrees that this amount of the contract will be performed by minority business enterprises.

8. On or about July 27, 1989, Hunt Valley submitted to DGS an executed Bid/Proposal Affidavit dated July 26, 1989 which contained language substantially identical to the Debarment Affirmation that had been included with the solicitation documents and which DGS reasonably found satisfied the requirements of the Debarment Affirmation. Also on or about July 27, 1989, Hunt Valley submitted to DGS an executed MBE Utilization Affidavit dated July 26, 1989.

9. By final agency decision dated August 1, 1989, the Appellant's protest was denied on the ground that the failure of Hunt Valley to submit the two affidavits with its bid was a minor irregularity pursuant to COMAR 21.06.02.04 that could be waived provided the documents were submitted prior to contract award.

10. Appellant noted its appeal on August 11, 1989. Pursuant to agreement of the parties the appeal was heard on August 16, 1989. No contract has been awarded pending this Board's consideration of the appeal.

#### Decision

Appellant argues that the failure of Hunt Valley to include the Debarment Affirmation and the MBE Utilization Affidavit with its bid renders Hunt Valley's bid non-responsive because the solicitation documents provide that such documents "must" or "shall be" submitted with the bid.

Respecting the failure to submit the Debarment Affirmation, this Board has held on prior occasions that certificates and affidavits that seek information bearing on a bidder's integrity concern bidder responsibility, not bid responsiveness. See Calso Communications, Inc., MSBCA 1377, 2 MSBCA ¶185 (1988) (debarment affidavit); Calvert General Contractors Corp., MSBCA 1314, 2 MSBCA ¶140 (1986) (proposal affidavit and contract affidavit); Maryland Supercrete Company, MSBCA 1079, 1 MSBCA ¶278 (1982) (anti-bribery affidavit). A responsible bidder is defined as 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 21.01.02.01B (77). (Emphasis supplied).

The Debarment Affirmation pertaining to possible criminal violations or convictions involving the bidder goes to the questions of the bidder's integrity and this is clearly intended to address the question of the bidder's responsibility. See Calso Communications, Inc., supra, 2 MSBCA ¶185 pp. 17-22. Where a matter of bidder responsibility is concerned we have held that even where the solicitation documents mandate submission of an item "[a] procurement officer may waive as a minor informality the failure to supply requested documents or information at time of bid opening bearing on responsibility. The bidder may supply such requested information after bid opening but before award of the contract." Calvert General Contractors Corp., supra, 2 MSBCA ¶140 at p. 15. See also Chesapeake Bus and Equipment Company, MSBCA 1347, 2 MSBCA ¶163 (1987). We thus reject Appellant's argument that Hunt Valley's failure to provide the Debarment Affirmation with its bid requires its rejection.

Appellant next argues that Hunt Valley's bid is non-responsive and should be rejected because it failed to include the MBE Utilization Affidavit where the solicitation stated that the affidavit "shall be" included with the bid.

We have previously held that the failure to submit or properly execute an MBE Utilization Affidavit may render a bid non-responsive; i.e. such failure may be interpreted as a refusal by the bidder to commit itself to the solicitation MBE goals and requirements. See Roofers, Inc., MSBCA 1284, 1 MSBCA ¶133 (1986); MAS Contractors, Inc., MSBCA 1345, 2 MSBCA ¶155 (1987); Track Materials, MSBCA 1097, 1 MSBCA ¶30 (1982).

However, in determining whether a bidder has actually failed to legally commit itself to the minimum affirmative action requirements of the solicitation, the entire contents of the bid must be scrutinized. Where some additional statement is elsewhere contained in the bid package to demonstrate the bidder's intent to pursue the required level of minority business participation under an awarded contract the failure to submit or execute the utilization affidavit may be waived and the bid accepted. Thus in MAS Contractors, Inc., supra, we held that the language of Subparagraph A of Section 10.03 of the General Conditions which was incorporated by reference in the bid proposal and by which the contractor agreed to the required level of MBE participation evidenced an enforceable intention to be bound by the bidder's signature on the bid proposal itself. Here, as in MAS, the identical provisions of Subparagraph A of Section 10.03 of the General Conditions which are incorporated by reference in the bid proposal

submitted by Hunt Valley provide that:

An MBE subcontract participation of a minimum of 10 percent of the contract has been established for this procurement. The contractor agrees that this amount of the contract will be performed by minority business enterprise. (Emphasis supplied).

We again hold as we held in MAS that by signing the bid proposal which incorporates such language a bidder agrees to be bound to the required level of MBE participation under an awarded contract. Thus we find that Hunt Valley's bid is responsive despite its failure to include an executed MBE Utilization Affidavit with its bid and deny Appellant's appeal on the grounds that such failure makes the bid nonresponsive.

For the foregoing reasons, the appeal is denied.

