

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ENVIRONMENTAL CONTROLS, )  
INC. )  
Under DGS Project No. MSC-GB8890-MS1 ) Docket No. MSBCA 1356

December 14, 1987

Responsibility - Under Maryland procurement law a procurement officer has broad discretion in determining whether a bidder is responsible. The Appeals Board will uphold a procurement officer's technical judgment that a bidder is not qualified in all respects to perform fully the contract requirements unless unreasonable or contrary to law or regulations.

Responsibility - A procurement officer's nonresponsibility determination is proper and reasonable where the procurement officer determined that the bidder had never furnished HVAC services to a facility similar in size to the contract facility and neither regularly employed nor intended to employ experienced and qualified craftsmen having the technical skills listed in the invitation for bids as being necessary to perform the work.

Responsibility - The experience of company officials may be considered in determining whether a new company meets responsibility criteria specified in the invitation for bids, although it is not clear to what extent the procurement officer here considered Appellant's President's considerable HVAC experience and qualifications.

Responsibility - A bidder's poor performance on other State contracts may be considered in making a nonresponsibility determination.

APPEARANCE FOR APPELLANT: None  
APPEARANCE FOR RESPONDENT: John H. Thornton  
Assistant Attorney General  
Baltimore, MD

OPINION BY MR. KETCHEN

This is an appeal from a Department of General Services (DGS) procurement officer's final decision<sup>1</sup> finding that Appellant was not a responsible bidder entitling it to contract award as the low responsive bidder.

Findings of Fact

1. DGS issued an invitation for bids (IFB) for Project No. MSC-GB8890-MS1 for complete Heating, Ventilation and Air Conditioning (HVAC) inspection, maintenance, and repair services at the Glen Burnie Multi-Service Center located in Glen Burnie, Maryland.
2. Section IV, ¶1 of the specifications for this HVAC maintenance contract provides, in pertinent part, as follows:

<sup>1</sup>The DGS procurement officer's final decision also addressed Appellant's protest concerning the provisions of the solicitation for the Denton Multi-Service Center, HVAC Maintenance Service Contract under Project No. MSC-DN88-MS1. However, Appellant did not note an appeal regarding the Denton Multi-Service Center. Thus the DGS procurement officer's decision as it relates to DGS Project No. MSC-DN88-MS1 became final.

1. SCOPE

- A. The Contractor shall furnish all supplies, materials, labor, supervision, tools, equipment, insurance, and permits necessary to provide total maintenance services on all HVAC equipment and their associated electrical, systematic and pneumatic controls, including domestic hot water heaters.
- B. This work shall include, but not [be] limited to all Air handlers, condenser pumps, chilled water pumps, compressors, exhaust fans, return air Fans, Motors, Boilers, Water Systems, Heat Pump, Cooling Tower, Air Mixing Boxes, and Water Treatment according to industry standards for condenser water and closed systems for Heated Water and Chilled Water.

\* \* \*

(c) SCHEDULED INSPECTION AND ADJUSTMENTS

The contractor shall make regularly scheduled inspections and adjustments to the equipment in accordance with the trade practices and procedures such as recommended by the equipment maintenance procedure. Preventive maintenance inspections shall be performed by qualified factory trained mechanics in the regular full-time employment of the contractor. . . . (Underscoring added).

3. Section IV, ¶3, Item 9 (page IV-5) of the specifications provides:

- 9. Provide all service calls required to keep the equipment operation operational at maximum obtainable efficiency.

(a) EQUIPMENT PERFORMANCE STANDARDS

The contractor shall maintain at all times the standards of operation, efficiency, safety, capacity, etc., of the equipment as designed and installed. It is the intent that interrupted service and depreciation be kept to a minimum through an adequate preventive maintenance program.

\* \* \*

4. The successful contractor, among other things, is responsible for providing as part of its HVAC repair and maintenance services both major and minor overhaul and repair. IFB, Section IV, ¶10 (page IV-6).

5. Section IV, ¶12 of the specifications provides:

12. EMERGENCY SERVICE

Emergency service shall be provided on a twenty-four (24) hour, seven (7) day per week basis at no additional cost to the [owner]. The contractor shall respond within two (2) hours after receiving a request for emergency service, by providing a qualified service technician at the job site requiring service. The contractor must provide one telephone number where a designated representative can be contacted in case of emergency. Service shall be provided as may be required to restore the equipment or system to proper use without additional cost to the State. (Underscoring added).

6. Section IV, ¶19 provides as follows:

19. GUARANTEES

- a. Minor breakdowns and shutdowns, such as electrical trouble, burned out control coils, open circuits, electrical or mechanical adjustments will be repaired or corrected expeditiously.

- b. No breakdowns or shutdowns shall take more than two (2) calendar days to correct after such troubles are reported.
- c. No major breakdowns or shutdowns shall take more than two (2) days to be corrected expeditiously. This includes locating the trouble, obtaining parts, the installation of these parts and placing the equipment back into operation. Every effort shall be made to expedite any and all repairs in accordance with set limits.

7. Section IV, ¶21 specifies bidder qualifications as follows:

21. QUALIFICATION TO BID

- a. Prior to submitting a bid for this contract, the bidder must have no less than five (5) years of successful experience in providing the type of service required by these Detailed Specifications.

The experience of officials gained prior to the formation of a corporation or other business entity can be considered when evaluating responsibility.

- b. The bidder shall furnish with [its] bid the following information:

- 1. The name and address of no less than four (4) concerns and/or similar institutions for which they have provided comparable service. The concerns and/or institutions rendered by the bidder must be of the size, or greater than, the building for which this is submitted.

\* \* \*

- 3. The names of the mechanic and/or mechanics who will service the equipment at this building.

\* \* \*

- 5. Must have in his regular employ experienced and qualified HVAC mechanics, electricians, pipefitters, master mechanics, sheet metal mechanics, and certified welders, etc. (Underscoring added).

8. The IFB bid form by which bidders convey their bids contains an acknowledgment that the bidder has "received clarification on all items of conflict or upon which doubt arose" about the contract's requirements. In this regard, Section I, ¶1 of the IFB requires that a bidder raise any questions or concerns about the contract requirements, including the specifications, no later than seven days prior to bid opening. Although somewhat differently worded, Section I, ¶11 of the IFB requires bidders to protest alleged improprieties in the bid documents apparent prior to bid opening. The record on this appeal does not indicate that DGS received any protest regarding the specifications prior to bid opening.

9. Bids were received and opened on July 15, 1987 with the following results:

	<u>Bid</u>
Appellant	\$42,000.00
York International Corp.	\$48,240.00
Machinery & Equipment Sales, Inc.	\$48,950.00

10. By letter dated July 30, 1987, the DGS procurement officer requested Appellant to furnish additional information regarding at least four facilities for which Appellant had provided comparable services that are similar in size to the Glen Burnie Multi-Service Center.

11. After reviewing the additional information Appellant submitted concerning its qualifications to perform, the DGS procurement officer by letter dated August 28, 1987 notified Appellant of his negative responsibility finding. The DGS procurement officer found that Appellant lacked the experience required to meet the specified IFB responsibility criteria in that Appellant does not have a history of providing comparable services for a facility comparable to the Glen Burnie facility. His determination considered that none of Appellant's present or previous contracts are for complete heating, ventilating, and air conditioning maintenance services. His decision was also based on the fact that Appellant did not regularly employ sufficient technical staff that the IFB indicates is required to successfully perform the contract. He found that Appellant had two HVAC mechanics as employees but did not regularly employ electricians, pipefitters, sheet metal mechanics or certified welders, but intended to secure these skilled services from the local union hall when necessary.

12. In its letter to the DGS procurement officer dated September 4, 1987, Appellant maintains that it meets the definitive qualifications criteria specified in the IFB. It maintains that its President has over twenty-five years experience providing HVAC services to facilities comparable in size to that required by the IFB, although Appellant as a corporate entity has been in business for less than five years.

13. Appellant's President's qualifications include HVAC experience since 1966 operating, repairing, overhauling, and inspecting boilers, heating systems, ventilation systems, air conditioning systems, electrical systems, including electrical and pneumatic controls and valves for such enumerated systems, and experience with associated pumps and plumbing for such systems. Appellant's President has considerable experience as an operating engineer associated with operating, maintaining and repairing all types of refrigeration equipment, air conditioning equipment, boilers, and heating equipment. Appellant's Exhibit 1.

14. DGS received this information concerning Appellant's President's experience and qualifications as part of Appellant's bid prior to reaching its negative responsibility finding as set forth in DGS's letter of August 28, 1987. Tr. 49. DGS' view is that Appellant's President has the personal experience and ability to perform certain HVAC work for which his experience obviously qualifies him. Tr. 51. However, the record of DGS's deliberations concerning Appellant's qualifications does not reflect the extent, if at all, that it considered and weighed in its determination Appellant's President's qualifications as required by IFB, Section IV, ¶21. (See Finding of Fact No. 7).

15. Also on September 4, 1987, Appellant sent a second letter, labeled a letter of protest, to the DGS procurement officer. It reiterated much of the information contained in the first September 4, 1987 letter, but added several additional particulars. First, Appellant claims that it is "certified" and "prequalified" by the State of Maryland, the Maryland Department of Transportation, and the City of Baltimore, and by Federal agencies. However, Appellant's certification and prequalification appears to be as a minority business enterprise. This is not relevant to whether it is capable of performing the instant contract since the IFB did not give a special preference or set aside the contract for minority business enterprises. See generally: Colonial Detective Agency, Inc., MSBCA 1354, December 1, 1987, 2 MICPEL ¶166. Second, Appellant with regard to the Denton Multi-Service Center contract, IFB No. MSC-DN88-MS1, noted its concern that the specifications for that contract required more personnel than necessary to perform the required work. We need not consider this aspect of Appellant's appeal further. As we determined above, the Denton Multi-Service Center contract is not properly before us on appeal. (See footnote 1 of this Decision).

16. The DGS procurement officer denied Appellant's protest in his final decision issued on September 23, 1987. He determined that Appellant was not responsible because it does not possess the requisite qualifications to perform as measured by the IFB qualifications criteria. The DGS procurement officer's reasons are that none of Appellant's current or previous contracts are for complete HVAC maintenance service and Appellant does not regularly employ personnel having all the specified skills set forth in the IFB.

The procurement officer's final decision also discussed Appellant's poor performance of an air conditioning maintenance contract for the State of Maryland Baltimore Data Center for which its contract was terminated. That service contract involved computer equipment that is not allowed to become overheated at the risk of damage to the computers and possible loss of data stored thereon. In performing that contract Appellant did not adequately respond to service calls, obtain necessary parts to repair air conditioning units, or otherwise perform in a workmanlike manner. The procurement officer related the

circumstances of one incident involving the overheating of certain Baltimore Data Center areas where the computers are located. In this instance, an air conditioning unit was malfunctioning. A Data Center employee was able to locate for Appellant a vendor from whom a critical part could be obtained for the air conditioning unit. Although Appellant obtained the part, due to the actions of one of its employees it did not install the part in the air conditioning unit at the Data Center in a timely manner, and, over the objections of Data Center personnel, "hot-wired" the malfunctioning air conditioning unit so as to bypass its safety features. Agency Report, Exhibit 11 and attachments. However, Appellant's performance of the Baltimore Data Center contract was a secondary consideration in the DGS procurement officer's final decision, since this circumstance was not known and thus not considered when he initially made his nonresponsibility determination.

17. Appellant filed a timely notice of appeal with the Board on October 9, 1987.

#### Decision

The issue in this appeal is whether the DGS procurement officer's determination that Appellant is not responsible, i.e., not qualified to perform, is correct. Appellant maintains that its President, who has twenty-five years of training and experience in maintaining HVAC equipment, fully qualifies it to perform. On the other hand, DGS maintains that Appellant is not qualified on two grounds. It does not meet the IFB's definitive responsibility criteria that it have at least five years of successful experience providing comparable HVAC inspection, repair and maintenance services for four similar facilities and it does not presently employ personnel with the specified skills necessary to perform the contract work.

Md. Ann. Code, State Finance and Procurement Article, §11-101(gg) provides:

"Responsible bidder or offeror. — 'Responsible bidder or offeror' means a person 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."

See: COMAR 21.01.02.59.

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 regulations. See: Solon Automated Services, Inc., MSBCA 1046, January 20, 1982, 1 MICPEL ¶10, rev. on other grounds, Solon Automated Services, Inc. v. University of Maryland, et al, Miscellaneous Law Nos. 82-M-38 and 82-M-42 (Cir. Ct. Baltimore Co., October 13, 1982). The rationale for this basic rule that a procurement officer's nonresponsibility finding will stand unless unreasonable or made in bad faith has been expressed in 39 Comp. Gen. 705, at 711, as follows:

". . . The projection of a bidder's ability to perform if awarded a contract is of necessity a matter of judgment. While such judgment should be based on fact and should be arrived at in good faith, it must properly be left largely to the sound administrative discretion of the contracting offices involved, since they are in the best position to assess responsibility, they must bear the major brunt of any difficulties experienced by reason of the contractor's lack of ability, and they must maintain the day to day relations with the contractor on behalf of the [State]. For these reasons, it would be unreasonable to superimpose the judgment of our Office or any other agency or group on that of the contracting officials."

When evaluating a bidder's qualifications in making a responsibility determination, the procurement officer may consider the experience of corporate officials gained prior to the formation of the corporation. Compare Finding of Fact No. 7 with Aquatel Industries, Inc., MSBCA 1192, August 30, 1984, 1 MICPEL ¶82, at 3.

Turning to the specific facts of this appeal, the DGS procurement officer's finding that Appellant was not qualified to perform was based on the fact that Appellant as a corporate entity has never furnished comparable services to a facility similar in size to the Glen Burnie building. He also weighed the fact that Appellant does not regularly employ personnel having all the technical skills listed in the IFB. DGS believes that the lack of certain specified skilled craftsmen directly employed by Appellant who could promptly respond to a HVAC emergency could result in a failure to perform.

Appellant's President, however, possesses considerable experience in all aspects of HVAC maintenance of large facilities. Appellant also employs two HVAC mechanics. However, it does not employ sheet metal workers, electricians, pipefitters, or certified welders. Appellant argues that the latter named skilled craftsmen are not needed to perform the work required by the instant contract, although Appellant prior to bid opening did not protest these express requirements that are set forth in the IFB. However, Appellant contends that if required it can obtain the necessary skilled craftsmen not in its employ from the local union hiring hall.

With regard to the comparable experience criteria, it is not clear how, if at all, the DGS procurement officer considered Appellant's President's considerable experience and qualifications, as the IFB expressly stated would be done. As we have said, the experience of company officials may be considered in determining whether a new company meets responsibility criteria specified in the IFB. Aquatel, supra. Were the DGS procurement officer's nonresponsibility determination based solely on consideration of Appellant's HVAC experience we would have to give serious consideration to sustaining the protest, or, at a minimum, remanding to the DGS procurement officer for further consideration of his determination in light of Appellant's President's extensive HVAC experience. See: 52 Comp. Gen. 977 (1973).

However, the DGS procurement officer's nonresponsibility determination was also based on the insufficiency of Appellant's technical staffing; i.e., the skilled craftsmen required by the IFB are not regularly employed by Appellant. Appellant does not believe that this circumstance would create a performance problem since its intention is to obtain such services if necessary through local union hall hiring practices. DGS's view is that these skilled craftsmen need to be regularly employed by the successful contractor to properly perform and so specified in the IFB. DGS thus requires the successful contractor to respond at any time within two hours notice with the necessary HVAC mechanics and appropriate skilled craftsmen to resolve an emergency.

Where there is a difference of opinion regarding technical staffing required to reasonably perform, we accept the technical judgment of the procuring agency unless clearly erroneous. Compare: Lameco Corp., MSBCA 1227, 1 MICPEL ¶96, February 21, 1985 with Adden Furniture, Inc., MSBCA 1219, January 2, 1985, 1 MICPEL ¶93, at 4. In this regard, Appellant cannot be heard to object after bid opening to the requirement for regularly employed personnel necessary to perform. RGS Enterprises, Inc., MSBCA 1106, April 8, 1983, 1 MICPEL ¶45; Lameco Corp., supra. Based on these considerations, we cannot find that the DGS procurement officer's nonresponsibility determination is improper or so unreasonable as to constitute an abuse of discretion, although we are concerned that his final decision does not indicate that DGS gave any consideration to Appellant's President's extensive HVAC experience and skills.

In addition, subsequent to the time that the DGS procurement officer notified Appellant of his initial nonresponsibility determination, the DGS procurement officer discovered that the Baltimore Data Center, another State agency, had terminated a contract involving air conditioning maintenance services for allegedly inadequate performance by Appellant. The DGS procurement officer indicated in his final decision that this event supported his nonresponsibility determination, although it was not the primary reason Appellant was found nonresponsible.

Poor performance by a company on related contracts certainly can be considered in arriving at a particular determination of whether a potential contractor is responsible. Allied Contractors, Inc., MSBCA 1191, August 16, 1984, 1 MICPEL ¶79, at 7. Here, Appellant emphatically denied that it was at fault in the performance of the Baltimore Data Center contract from which it was dismissed. It emphasized that it fell victim to a service contract for a facility where parts for the HVAC equipment, which it alleged was obsolete, were difficult to obtain. However, we find that the details of Appellant's performance of that contract, to the extent that they are contained in the record of this appeal, support the DGS procurement officer's nonresponsibility determination based on his finding that Appellant's performance was less than the standard required to maintain HVAC systems in large State facilities. This properly could be considered by the DGS procurement officer in reaching his nonresponsibility determination.

Based on the above, we find that the DGS procurement officer's nonresponsibility determination was reasonable and thus did not amount to an abuse of discretion. Nor is there any evidence to suggest that his determination was not made in good faith.

For the foregoing reasons, therefore, Appellant's appeal is denied.