

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of EXCELSIOR TRUCK LEASING)
COMPANY, INC.)

Under MTA Contract No. X0-16-10)

) Docket No. MSBCA 1102

May 6, 1983

Responsiveness — A bid which excepts to the technical requirements of an invitation for bids is non-responsive.

Responsiveness — A bid that is non-responsive because of a material deviation from an invitation for bids requirement may not be cured after bid opening by changes to the bid or by explanation of what was intended.

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APPEARANCE FOR RESPONDENT:

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OPINION BY MR. KETCHEN

This appeal is from a Mass Transit Administration (MTA) procurement officer's final determination rejecting Appellant's bid as nonresponsive because of the exceptions Appellant took to the technical requirements of the invitation for bids (IFB) for three trucks. Appellant contends that its bid should have been accepted since the trucks it offered were equivalent or superior to those specified by MTA.

FINDINGS OF FACT

1. MTA issued an IFB, on April 15, 1982, for one diesel powered stake body truck with crane, one diesel powered dump body truck with crane, and one diesel powered lubrication truck. These trucks were designed to operate on both the highway and the Baltimore Region Rapid Transit System's railroad tracks (hi-rail).

2. Bids were opened on May 25, 1982 with the following results:

Appellant	\$256,813.00
E. M. Groff Equipment Co., Inc. (Groff)	\$317,035.00

3. A letter submitted with Appellant's bid stated that "[t]he cab and chassis and bodies we are quoting are noted on your specification sheets. Exceptions being taken are noted in your specification sheets as well." (Underscoring added.)

4. After reviewing Appellant's bid the MTA Director of Contract Administration (Director)¹ wrote Appellant on June 24, 1982 advising that its bid was being rejected as non-responsive because of material deviations from the specified technical requirements for the hi-rail trucks. The following summarizes the basis for the decision:

- A. Section 11901, Art. 2.02E. of the specifications, applicable to all three hi-rail trucks, specifies that, "the drive train shall include provisions for operating the trucks in the reverse direction at a speed of twenty (20) miles per hour minimum over prolonged distances without damaging the engine or the drive train. If a full reversing gear box is utilized it shall be a completely gear driven assembly." (Underscoring added.)

Appellant excepted to this requirement in its bid. It substituted, instead, a Waterous 40 TMR drive system which is partly gear driven and partly chain driven.

- B. Section 11901, Article 2.02G required that all three trucks have "a hydraulic lock-out...installed on [the] front axle and shall be capable of raising the front tires a minimum of 3" above running rail."

Appellant's bid expressly excepted to this requirement by striking through the word "hydraulic." By interlineation on its bid Appellant proposed an automatic mechanical lock. Descriptive literature submitted for the HABCO, Inc. automatic mechanical lockout proposed by Appellant indicated only a 2" vertical clearance. To attain the required 3" clearance the operator would have to make additional adjustments from the front of, and possibly under, the vehicle each time the equipment is engaged.

- C. Section 11910, Art. 2.02F, applicable to the stake body truck, and Section 11930, Art. 2.02F, applicable to the lubrication truck, required 3/8" steel side and end plates for the truck beds.

Appellant's bid excepted to these provisions and proposed to substitute instead 3/16" formed steel side and end plates.

- D. Section 11901, Article 2.02A applicable to all three trucks, provided that "[e]ngines for all trucks shall be from a single manufacturer." For the stake body truck and the dump body truck, the IFB specified a 210 HP, Model 3208 Caterpillar Tractor Co. (Caterpillar) engine or equivalent. (See IFB Section

¹The Director was authorized to evaluate the bids in this procurement. (Tr 98).

11910, Art. 2.02A; Section 11920, Art. 2.02A). For the lubrication truck, the IFB specified a 175 HP, Model 3208 Caterpillar engine or equivalent.

By interlineation on the specification sheets, Appellant's bid specified an International Harvester Co. (IHC) Model DT 466 engine and IHC F 1954 chassis for both the stake body truck and for the dump body truck. However, for the lubrication truck, Appellant's bid specified a 175 HP, Model 3208 Caterpillar engine mounted on a Ford LN 7000 chassis. Literature submitted with the bid for the lubrication truck described an IHC 9.0 liter engine. A post-bid analysis indicated that the specified Ford LN 7000 chassis was available for the Caterpillar engine but not for the IHC 9.0 liter engine.

- E. Section 11930, Art. 2.02D for the lubrication truck specified "a minimum eighty (80) ampere alternator" as part of a charging system capable of charging the two required truck batteries simultaneously when the engine is at idle. Appellant's bid excepted to the 80 amp. requirement by striking through "eighty (80)" and writing instead seventy-five (75)." In the margin it wrote, "Exception: 75 amp. ILO [in lieu of] 80 amp."
- F. Section 11930, Art. 2.04 for the lubrication truck specified "an engine mounted air compressor and a chassis mounted air receiver."

Appellant excepted to this requirement by striking through the word "engine" and writing instead "underdeck". In the margin, Appellant also indicated its exception by interlinating, "Exception: Hydraulic compressor quoted ILO engine drive due to existing chassis compressor for air brakes. No available mounting space in engine."

5. By letter dated June 30, 1982, Appellant protested rejection of its low bid and the award to Groff at a higher price.

6. In a letter dated July 8, 1982, Appellant presented an extensive technical explanation describing how the hi-rail trucks with the noted exceptions would meet or exceed MTA's requirements. This letter also described a conversation after bid opening with an MTA official in which Appellant explained that it had made a clerical error in its bid for the lubrication truck when it specified a Caterpillar engine to be mounted on a Ford chassis. It said it meant to bid an IHC engine on an IHC chassis. Its bid would then have met the IFB's requirement that the three truck engines be from the same manufacturer. Also, for the first time in this letter, Appellant contended that the specification requirement for a completely gear driven drive system restricted competition.

7. The MTA procurement officer denied Appellant's protest in a final determination issued on June 15, 1982. He found Appellant's bid non-responsive because of the exceptions to the material requirements of the IFB specifications, and for failing to specify truck engines from the same manufacturer.

8. A timely appeal was filed with this Board.

9. On September 21, 1982 the Board of Public Works approved award of the contract to Groff.

DECISION

In competitive sealed bid procurements, Maryland law requires rejection of a bid that does not conform in all material respects to the solicitation's requirements. Md. Ann. Code, Art. 21, §3-101(i) (1981 Repl. Vol., 1982 Supp.); COMAR 21.06.02B(2); COMAR 21.01.02.60; COMAR 21.05.02.13A. A material deviation from an IFB's requirements occurs when the price, quantity, or quality of the goods or services is affected. Quaker-Cuisine Services, MSBCA 1083 (September 7, 1982) at p. 6; compare Prestex Inc. v. United States, 162 Ct. Cl. 620, 320 F.2d 367 (1963); 30 Comp. Gen. 179, 182-83 (1950).

Here, because of extensive exceptions to the specifications, Appellant offered three hi-rail trucks which were patently different from the trucks MTA sought to purchase. By bidding in this manner Appellant necessarily gained an impermissible competitive advantage over other bidders by avoiding the price consequences of the presumably more complex technical requirements for the trucks specified. Since all bidders had a right to assume that the technical requirements specified in the IFB were both fixed and essential to the State's minimum needs, Appellant's attempted deviation necessarily affected price and quality.² Compare The Tower Building Corp., MSBCA 1057 (April 6, 1982) at p. 10; 50 Comp. Gen. 691, 694 (1971); 42 Comp. Gen. 502 (1963); 43 Comp. Gen. 209, 213 (1963); M-S and Associates, Comp. Gen. B-183282, May 14, 1975, 75-1 CPD ¶296; John Grace & Co., Inc., Comp. Gen. B-190439, February 15, 1978, 78-1 CPD ¶131.

Appellant also maintains that its bid was improperly rejected for failing to meet the IFB requirement that engines for all three trucks be from a single manufacturer. Appellant contends that it mistakenly had specified a Caterpillar engine for the lubrication truck. After bid opening Appellant submitted a detailed explanation of this error and requested its correction as a minor irregularity under the Maryland mistake in bid regulations, i.e., COMAR 21.05.02.12. However, these procedures are only available to a bidder to allow it to correct or withdraw a bid that is otherwise responsive to an IFB. They do not give a bidder an opportunity to cure a non-responsive bid by permitting changes to it or by explanation of what was intended. Inner Harbor Paper Supply Co., MSBCA 1064 (September 9, 1982). Compare The Tower Building Corp., MSBCA 1057 (April 6, 1982) at p. 10; W. S. Jenks & Sons, Comp. Gen. B-195861, November 26, 1979, 79-2 CPD ¶373; Aeroflow Industries, Inc., Comp. Gen. B-197628, June 9, 1980, 80-1 CPD ¶399; Redifon Computers Limited, Comp. Gen. B-186691, June 30, 1977, 77-1 CPD ¶463. Whether by its own negligence or by design, Appellant's bid on

²In its letter of July 8, 1982, submitted after bid opening, Appellant asserted that the IFB requirement for a fully gear driven gear box assembly restricted competition. However, this concern was untimely raised since a protest concerning a solicitation provision must be raised before bid opening. COMAR 21.10.02.03A; International Business Machines Corporation, MSBCA 1071 (August 18, 1982).

its face did not meet the IFB requirement that all three truck engines be from the same manufacturer. Appellant's bid thus materially deviated from the IFB requirements and the MTA procurement officer properly rejected it as nonresponsive.

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

