

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of GENERAL ELECTRIC)
COMPANY)
Under MTA Contract No.) Docket No. MSBCA 1316
MTA-23-91-20)

February 24, 1987

Responsiveness - Where compliance with specifications is an issue, Appellant bears the burden of demonstrating that the technical judgment of the procuring agency is clearly erroneous.

APPEARANCE FOR APPELLANT: None
APPEARANCE FOR RESPONDENT: William B. Tittsworth, Jr.
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

This timely appeal is taken from a Mass Transit Administration (MTA) procurement officer's final decision denying Appellant's protest of MTA's determination that its bid was nonresponsive.

Findings of Fact

1. On August 1, 1986, MTA issued an Invitation for Bids (IFB) for the purchase of 32 UHF and 5 VHF portable battery operated radios with associated chargers, speaker/mikes and cases.

2. Pertinent to this appeal are two portions of the IFB specifications. Specifically, the applicable specifications read:

GENERAL SPECIFICATIONS:

Dimensions - 7.62 inch high x 2.73 inch wide x 1.85 in. deep

Other Specifications

Radio must meet Military Standard 810C for shock, vibration, low pressure, high temperature, dust, humidity, fungus, and solar radiation.

3. Sometime prior to bid opening, the Appellant delivered for inspection a sample radio with descriptive literature and manual to Mr. James Stanek, MTA's radio and communication superintendent.

4. Prior to bid opening, no bidder or potential bidder had raised any issue or complaint regarding the IFB specifications.

5. Bids were publicly opened on September 17, 1986. Two bids were received as follows:

General Electric	\$65,240.12
Motorola	\$75,476.41

6. By written protest dated September 22, 1985, Motorola, alleged that Appellant's bid should be rejected as nonresponsive because (1) the product offered by the Appellant failed to meet the specified Military Standard 810C test requirements and (2) the radio/battery combination of the product offered would be 10" in height rather than the 7.62" specified.

7. By memorandum dated September 24, 1986, MTA's Contract Requirements Officer received an evaluation from Mr. Stanek that the product offered by Appellant failed to meet the specified Military Standard 810C test requirements. Mr. Stanek's memorandum further stated that a radio height of 10" rather than the 7.62" specified would be cumbersome to carry on one's belt.¹

8. Appellant's descriptive literature attached to its bid noted that its product met the Military 810C test procedure for "driven rain." This literature did not mention compliance with the Military Standard 810C test requirements set forth in the IFB specification.

9. By letter dated October 15, 1986, the MTA procurement officer reported the apparent discrepancies regarding compliance with test requirements to the Appellant and requested a response within 10 days.

Appellant responded by letter dated October 21, 1986, merely stating that the radio offered met the Military Standard 810C specification and enclosing a duplicate of Appellant's literature originally attached to the bid. No other explanation or supporting documentation was furnished to permit the procurement officer to resolve the allegations of the Motorola protest.

10. By letter dated October 28, 1986, the MTA Contract Requirements Officer notified the Appellant that its bid was found to be nonresponsive. He cited the alleged discrepancies concerning compliance with test requirements and size and the fact that Appellant had failed to submit information that would justify a contrary finding concerning the test requirements.

11. On November 5, 1986, the Appellant filed a written protest of MTA's determination of nonresponsiveness with the procurement officer. Therein, Appellant contended that although its bid submission did not show that its radio met the IFB required Military Standard 810C test requirements, this did not necessarily mean that it did not so comply. Appellant also contended that the oversize deficiency was a minor deviation and that the rejection of its low bid was based on minor technicalities.

¹A report dated September 19, 1986 from MTA's Police Department concerning results of field testing of the Appellant's product by police officers prior to bid opening likewise noted difficulty in carrying the radio.

12. On November 26, 1986, the procurement officer received a detailed technical report from MTA's Director of Maintenance, describing the eight (8) Military Standard 810C tests set forth in the IFB specification and the reasons those tests were specified as material to the product to be supplied. The report noted that the radio bid by Appellant did not meet these test requirements. The report further stated that the excess height of the Appellant's model would add restrictions on freedom of movement of employees handling the units which could be dangerous to maintenance and security personnel in certain circumstances as a result of impaired mobility.

13. The procurement officer denied Appellant's protest by final decision issued on December 10, 1986. The procurement officer concluded that compliance of the offered product with Military Standard 810C test requirements was a material element of the procurement and that the Appellant's radio would not meet or exceed such requirements.

14. By letter dated December 23, 1986, the Appellant appealed the procurement officer's final decision to this Board contending that the descriptive literature attached to its bid shows that its product met the Military Standard 810C specification. In its appeal it also contends that the Military Standard 810C specification is restrictive.² Appellant elected not to comment on the Agency Report and neither party requested a hearing.

Decision

We must deny as untimely Appellant's appeal on grounds that the Military Standard 810C specification was restrictive. This allegation of a deficiency in the IFB was raised for the first time on appeal to this Board. By waiting until the notice of appeal to allege deficiencies in the IFB, Appellant waived its right to protest this issue and have the Board consider the appeal on this ground. COMAR 21.10.02.02, COMAR 21.10.02.03 and COMAR 21.10.02.09; The Trane Company, MSBCA 1264 at p. 7, 2 MICPEL 118 at p. 5 (1985).

The remaining and primary issue before the Board in this appeal is whether the procurement officer erred in his determination that the Appellant's bid was nonresponsive for failure of its product to comply with the test requirements of the Military Standard 810C specification.

A "responsive" bidder is defined in COMAR 21.01.02.60 to mean a person who has submitted a bid under procurement by competitive sealed bidding which conforms in all material respects to the requirements contained in the IFB. See also Section 13-101(i), Division II, State Finance and Procurement Article, Annotated Code of Maryland.

²While not articulated in Appellant's appeal, we assume that the essence of this contention is that the specification was drawn to favor Motorola's product to an unwarranted degree such as to restrict competition.

As this Board noted in Oaklawn Development Corporation, MSBCA 1306 (October 27, 1986) at p. 5, citing Long Fence Company, Inc., MSBCA 1259 (1986) at pp. 6-7, 2 MICPEL 123 at p. 6:

It is a well established principle of procurement law that in order for a bid to be responsive it must constitute a definite and unqualified offer to meet the material terms of the IFB. Free-Flow Packaging Corporation, Comp. Gen. Dec. B-204482, 82-1 CPD 162. The material terms of an IFB are those that could affect the price, quantity, quality or delivery of the goods or services sought by the IFB. Solon Automated Services, Inc., MSBCA 1046 (January 20, 1982). The government must have an unqualified right to performance in strict accordance with the IFB based on the form of the bid at the time of the bid opening. Aeroflow Industries, Inc., Comp. Gen. Dec. B-197628, 80-1 CPD 399. (Underscoring added).

It is also well settled that "responsiveness" must be determined from the face of the bidding documents. The National Elevator Company, MSBCA 1291 (October 1, 1986) at p. 6; Inner Harbor Paper Supply Company, MSBCA 1064 (1982) at p. 5, 1 MICPEL 24 at p. 4.

Equally well settled are the propositions that (1) a procurement officer's determination concerning whether a bidder's product complies with the specifications from a technical standpoint will not be disturbed unless clearly erroneous, and (2) that an Appellant bears the burden of demonstrating that the expressed technical judgment of the procurement officer is clearly erroneous. See Packard Instrument Company, MSBCA 1272, 2 MICPEL 125 (1986); M/A-COM, Inc., MSBCA 1258, 2 MICPEL 112 (1985); Adden Furniture, Inc., MSBCA 1219, 1 MICPEL 93 (1985).

Nothing in the record before us suggests error in the technical judgment of the procurement officer that compliance with the Military Standard 810C specification affected the quality of the goods (radios) being sought and that such specification thus constituted a material term of the IFB. Likewise, no error has been shown in the procurement officer's technical determination that Appellant's product did not comply with the Military Standard 810C specification.

For the above reasons, the appeal is denied.