BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of H.A. HARRIS COMPANY, INC.	)	
	)	Docket No. MSBCA 1392
Under MPA Contract No. 288904	)	

October 21, 1988

Responsiveness - A bid is responsive when it takes no exception on its face with regard to the bidder's intent to comply with RFQ specifications requiring a minimum of work to be performed by the bidder's own personnel since it is unequivocally and unambiguously committing the bidder to that requirement. Responsiveness is determined from the face of the bid document and not from information subsequently obtained through a verification process or other extrinsic evidence.

Responsibility - Statements made by the bidder subsequent to the opening of bids and before award of the contract with regard to its ability to comply with RFQ specifications requiring a minimum of work to be performed by the bidder's own personnel do not affect the bid's responsiveness but can be used to determine the bidder's responsibility since such statements concern the bidder's capability to perform the contract.

Reconsideration - A procurement agency has the inherent right to reconsider a procurement officer's final decision up to the time when an appeal is taken to the Appeals Board or the running of the appeal period in order to correct an error of law or mistake of fact.

Reconsideration - Section 11-137 (c) § (d), State Finance and Procurement Article, provides that a procurement officer's decision on a bid protest is to be reviewed by the procurement agency head and the head of any principal department of which the procurement agency is a part and the reviewing authority's decision to approve, disapprove or modify the procurement officer's decision is the final action of the procurement agency. Section 11-137(f) provides that it is this final action of the procurement agency which may be appealed to the Appeals Board. Under the facts of this case, therefore, it was appropriate for the Secretary of Transportation to reconsider his own decision to approve the Maryland Port Administration procurement officer's final decision and the Secretary's determination to change his decision was a legitimate exercise of his power as the reviewing authority and will not be overturned by this Board since it was not shown to be collusive, arbitrary, or in violation of statute or regulation.

Command Influence - Appellant did not meet its burden of proof to support its claim of command influence; this is not a case where the procurement officer's final decision was usurped by a higher authority but a case where he was overruled.

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APPEARANCE FOR INTERESTED PARTY:	Louis J. Kozlakowski, Jr., Esq. Blum, Yumkas, Mailman, Gutman & Denick, P.A. Baltimore, MD For Jolly Company, Inc.

OPINION BY MR. LEVY

This is an appeal from the Maryland Port Administration (MPA) procurement officer's final decision denying Appellant's bid protest of the proposed award of the captioned contract to the Jolly Company, Inc. (Jolly). Appellant alleges that Jolly's request for reconsideration of Jolly's original denial of award was inappropriate; that the Secretary of Transportation exercised improper command influence over the procurement officer; that Jolly should not have been allowed to correct its bid; and that Jolly has not been determined to be responsive and responsible by the procurement officer. MPA denies all the allegations.

Findings of Fact

1. This appeal arises from the contract award by the MPA, acting as agent for the Maryland Transportation Authority (MTA), for the construction of the Entrance Gate Facility for the Seagirt Marine Terminal.

2. Bids were opened on May 4, 1988. Jolly, the apparent low bidder, took no exception to the Request for Quotation (RFQ) on the face of its bid.

3. Mr. Robert Nelson (Nelson), the MPA chief engineer and procurement officer, conducted a preaward survey meeting with Jolly on May 11, 1988. Nelson requested certain information including Jolly's anticipated use of its own forces to perform the contract work. This latter request was in response to Section SGP-8.02, Supplementary General Provisions of the RFQ, which requires the contractor to perform with his own organization, work of a value of not less than 25 percent of the total original value of the contract. The section requires the contract to perform with his own organization, work of a value of not less than 25 percent of the total original value of the contract. The section requires the contractor to submit with his executed agreement a description of the work which he will perform with his own forces. Section SGP-8.02 also allows a reduction in the percentage of the contractor's own forces, after the contract work has progressed, with the written approval of the procurement officer.

4. Jolly responded to Nelson's inquiry by letter dated May 20, 1988 in which it advised that it would perform 14 percent of the contract work with its own forces. (Agency Report, Exhibit E-1).

5. Nelson sent a memorandum dated May 24, 1988 to Mr. Isaac Shafran (Shafran), Director of Development for MPA, in which he recommended that Jolly not be selected for award. (Agency Report, Exhibit

E-2). His recommendation was primarily based on Jolly's statement that it planned to use less than 25 percent of its own forces and MPA's past experience with Jolly on two contracts at McComas Street. The memorandum provided, in pertinent part, as follows:

> In summary, Jolly will be acting as a broker on this project. Its permanent staff is very limited. Coordination of subcontractors is critical. Jolly's McComas Street performance on subcontractor control was dismal.
>
> It is our opinion that the Seagirt project and its timely completion would be better served by selection of the second low bidder.

6. Mr. Richard Trainor (Trainor), Secretary of the Maryland Department of Transportation (MDOT), sent a memorandum dated May 26, 1988 to Mr. David Wagner (Wagner), Executive Director of MPA (Agency Report, Exhibit E-3), in which he acknowledges receipt of Jolly's May 20 letter to Nelson and Nelson's May 24 memo to Shafran. Trainor advises Wagner that he agrees with Nelson's analysis and concurs in the award to Appellant, the second low bidder.

7. A telephone poll was taken on June 3, 1988 of the members of the MTA in which they voted to award the contract to Appellant. The award was subject to formal ratification at MTA's next meeting on June 20, 1988, as well as approval by the Maryland Board of Public Works.

8. The procurement officer wrote to Jolly on June 3, 1988 (Agency Report E-4) advising that its bid had been rejected and that award was going to be made to Appellant. This decision was based primarily on Jolly's bid being "nonresponsive to the contract requirements", and "from past experience, specifically the McComas Street Terminal project, it was found that your performance was less than responsible."

9. Also on June 3, 1988 the procurement officer wrote to Appellant (Agency Report, Exhibit E-6) advising that its bid had been accepted and that it had been awarded the contract in accordance with paragraph GP-3.01 of the specifications. GP-3.01 provides, in pertinent part, that "[a] notice of award may be rescinded at any time prior to execution of the contract by the Administrator." The letter enclosed copies of the agreement and bonds for execution by Appellant. The letter further advised that "[n]otice to Proceed will be issued subsequent to approval of the contract by the Board of Public Works . . ."

10. On June 6, 1988 Jolly's attorney protested the award of the contract to any other bidder alleging that Jolly was the low responsive and responsible bidder and that Nelson gave no specific basis for his decision in his June 3 letter. (Agency Report, Exhibit E-7).

11. In apparent response to Nelson's June 3 letter, Jolly wrote to Nelson on June 8, 1988 and advised amongst other matters that it was now in a position to perform 26 percent of the work with its own forces. (Agency Report, Exhibit E-8).

12. On June 13, 1988 Nelson issued his final determination to Jolly denying its protest based on a "mixed responsiveness/responsibility issue." (Agency Report, Exhibit E-10). The specific issue was Jolly's post bid indication that it would only use 14 percent of its own forces to perform the contract work. Nelson did not consider Jolly's June 8th assertion that it would use 26 percent of its own forces because the contract was already awarded to Appellant. (Tr. 109).

13. Jolly's attorney wrote to Nelson on June 15, 1988 requesting "reconsideration of your final decision dated June 13, 1988." (Agency Report, Exhibit E-11). Apparently on the same date, Jolly's President, Mr. Mendel Friedman (Friedman) contacted Trainor directly and requested a meeting because he felt he was being treated unfairly and he wanted to explain his position.

14. Trainor scheduled a meeting for Thursday, June 16 with Friedman and other Jolly representatives. Trainor testified he did not consider this a meeting to reconsider the procurement officer's decision but a meeting to "reconfirm what actions had been taken up to date" in an attempt to have Jolly "fade away and not delay the project." (Tr. 185-187). Nelson and Mr. Edward Jones, chief of construction for MPA, were

present along with Trainor. Appellant had not been invited to the meeting and was not present.

At this meeting Jolly indicated that it would now use 30 percent of its own forces on the project. Trainor was informed for the first time about Jolly's June 8 letter in which it had advised Nelson that it would use 26 percent of its own forces (Tr. 190). Trainor was also presented an entirely different picture by Jolly of its performance on the McComas Street projects. Jolly's view was that it had been given extra work orders and that the projects were completed to satisfaction in a timely manner as compared to the dismal picture painted by Nelson over the life of those contracts. Trainor was of the view that Nelson had mislead the MTA. (Tr. 201). Trainor made no decisions at the meeting and advised Friedman he would think about the award over the weekend since the MTA had a schedule meeting for Monday, June 20.

15. Apparently based on Trainor's recommendation, the MTA at its June 20 meeting decided that the award to Appellant should be rescinded and award made to Jolly. This decision was made despite the continued belief by Nelson that Jolly was not responsible and its bid nonresponsive.

16. On June 21, 1988 Nelson advised Appellant that award of its contract did not receive final approval for submission to the Board of Public Works by MTA at its June 20 meeting and that they voted to award the contract to Jolly. (Agency Report, Exhibit E-12).

17. Appellant's attorney wrote to Nelson on June 22, 1988 requesting reconsideration of Nelson's June 21 decision. (Agency Report, Exhibit E-13). Appellant met with representatives of MPA and Trainor on June 24, 1988. Jolly was invited and did not attend. There was no change in MTA's decision.

18. By letter dated June 24, 1988 Nelson advised Jolly that the MTA voted to award it the contract. (Agency Report, Exhibit E-14).

19. Appellant filed a timely protest with the procurement officer on June 28, 1988. (Agency Report, Exhibit E-16). It generally argued that Jolly was not the lowest responsive and responsible bidder and the rescission of the decision to award Appellant the contract was improper.[1]

20. The procurement officer issued his final decision on June 30, 1988 denying Appellant's protest. (Agency Report, Exhibit E-17). He held that the MTA determination that Jolly was a responsible bidder and to award it to the contract was a legitimate action taken in the exercise of MTA's authority to approve the award of contracts.

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[1]We note that the procurement officer's June 3, 1988 notice of award to Appellant was subject to §GP-3.01 of the specifications (Finding of Fact No. 9) and that the contract had not yet been executed by the MPA. Additionally, the award to Appellant was never presented to the Maryland Board of Public Works for approval as required by Maryland procurement law. §12-101, §12-102, Md. Ann. Code, State Finance and Procurement Article, 1988 Vol.; COMAR 21.02.01.04C(1), COMAR 21.02.01.05A(1)&(7).

21. Appellant filed a timely appeal with this Board on July 1, 1988.

Decision

Minimum Work Requirement

The overriding issue of this appeal concerns the manner in which the procurement officer dealt with the minimum work requirement provided for in Section SGP-8.02, Supplementary General Provisions of the RFQ, which provides in pertinent part as follows:

> The Contractor to whom a Contract is awarded shall perform with his own organization and with the assistance of workmen under his immediate supervision, work of a value of not less than 25 percent of the total original value of the Contract.

The procurement officer in his June 3, 1988 letter advised Jolly that its bid had been rejected based primarily on the bid being "nonresponsive to the contract requirements" as well as his determination that Jolly was not responsible. (Finding of Fact No. 8). In his June 13, 1988 final decision the procurement officer advised Jolly that he was denying the protest based on "a mixed responsiveness/responsibility issue." Here he was more specific and advised Jolly that it was not responsive to the bid because it had indicated subsequent to the bid

opening that it only intended to do 14 percent of the contract work with its own forces. (Finding of Fact No. 12). Appellant likewise maintains that the procurement officer was correct in rejecting Jolly's bid as nonresponsive.

The procurement officer has erroneously mixed the concepts of responsiveness and responsibility. Responsiveness in competitive sealed bid procurements concerns a bidder's legal obligation to perform the required service in exact conformity with the RFQ specifications. National Elevator Company, MSBCA 1252, 2 MSBCA ¶114 (1985). To be responsive, a bid must, on its face, unequivocally and unambiguously commit the bidder to perform the requirements set forth in the RFQ. As the Board previously said:

> 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.... 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 bid opening.

Long Fence Co., Inc., MSBCA 1259, 2 MSBCA ¶123 at 6 (1986). This Board has also held that a bid must be determined responsive from the face of the bid document and not from information subsequently obtained through a verification process or other extrinsic evidence. Calvert General

Contractors Corp., MSBCA 1314, 2 MSBCA ¶140 (1986); Inner Harbor Paper Supply Company, MSBCA 1064, 1 MSBCA ¶24 (1982). Thus, information gathered in a preaward survey should have no effect on a bidder's responsiveness. Therefore Jolly's bid was in fact responsive because at the time of the bid opening it contained a definite and unqualified offer to meet the requirements of the RFQ (i.e. to perform 25 percent of the value of the work with its own forces).

Responsibility on the other hand concerns a bidder's capability to perform the contract. If the procurement officer had any doubts as to whether Jolly could perform as required by the RFQ it was solely a matter of responsibility and not responsiveness. Based on Jolly's response to the preaward survey that it would use its own forces on only 14 percent of the contract work and on MPA's experience with Jolly on the McComas Street projects (Finding of Fact No. 5) the procurement officer did have doubt that Jolly would achieve the 25 percent minimum work requirement. Since information concerning a bidder's responsibility may be considered after bid opening but before award, the procurement officer did not err in using Jolly's response to the preaward survey as well as Jolly's past work history as factors in determining that Jolly was not responsible. See National Elevator supra.

Reconsideration

The procurement officer's June 13, 1988 final decision denying Jolly's protest provided Jolly the required language that the decision could be appealed to this Board within ten days from the date the decision

is received. COMAR 21.10.02.08.C.; §11-137(f) Md. Ann. Code, State Finance and Procurement Article, 1987 Supp.[2] (General Procurement Law). On June 15, 1988, prior to the running of the ten day appeal period, Jolly's attorney formally requested reconsideration of the final decision by letter to the formally requested reconsideration of the final decision by letter to the procurement officer. Also at that time, Friedman telephoned Trainor directly and requested to meet with him so he could explain his position because he felt he was being treated unfairly. (Finding of Fact No. 13). Appellant contends that any reconsideration of the procurement officer's decision was inappropriate particularly since an award had been made to Appellant.

This Board has considered the question of reconsideration previously in regard to the reopening or reconsideration of its own decision. In Eagle International, Inc., MSBCA 1121, 1 MSBCA ¶43 (1983), the Board stated that:

> ...this Board has inherent authority to reopen and reconsider an appeal so long as it is done within a reasonable time and before an appeal is taken in the courts....A reasonable time for reconsideration, we believe, is to be measured by the 30 day period following receipt of our decision by the parties and before an appeal is required

[2]Now codified as §15-220(b)(1), Md. Ann. Code, State Finance and Procurement Article, 1988 Vol.

> to be filed under Maryland Rules of Procedure...
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> * * * *
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> In view of the time and expense involved in the review process and the burden imposed on crowded court dockets, it is inconceivable that the standard for reconsideration and reopening could be so narrowly construed as to preclude this Board from reviewing its own decision to correct an error of law or mistake of fact. Certainly, a decision should not be revised at the whim of the Board members or after the rights of the parties have vested. However, where the Board's decision is still subject to revision on judicial review, the concept of finality should not be permitted to override the public interest in reaching what ultimately appears to be the right result.

We believe that this same inherent authority rests with a procurement agency to reopen and reconsider a procurement officer's final decision based on a bid protest. As noted above §11-137(f), General Procurement Law, grants a ten day period after receipt of a procurement officer's final decision in a bid protest in which to file an appeal with this Board. During this period an apparently successful bidder's rights, such as Appellant's, initially cannot be said to have fully vested since

the unsuccessful bidder affected by the procurement officer's final decision has the right to appeal. Thus, the agency has the inherent right to reconsider its decision in order to correct an error of law or mistake of fact, up to the time when the appeal is taken or the running of the appeal period. Therefore, we conclude that under the facts of this case it was appropriate for MPA to reconsider the procurement officer's final decision which denied Jolly's protest.

We will now consider the procedural method utilized in the reconsideration. Although Jolly requested formal reconsideration from the procurement officer and a meeting with Trainor, under the facts of this case, the Secretary could properly entertain Jolly's request for reconsideration. Section 11-137(c)&(d), Md. Ann. Code, State Finance and Procurement Article, 1987 Supp.[3] provides in pertinent part, as follows:

> (c) Duties of officer; decisions - (1) upon the initiation of a complaint under subsection (b) of this section, the procurement officer of the procurement agency involved:
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> (i) shall review the substance of the complaint;
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> (ii) unless clearly inappropriate, shall seek the advice of the State Law Department;

[3]Now codified as §15-218, Md. Ann. Code, State Finance and Procurement Article, 1988 Vol.

(iii) may conduct discussions, and, if appropriate, conduct negotiations, with the person initiating the complaint proceeding;

(iv) may request additional information or substantiation through any appropriate procedure; and

(v) shall comply with any applicable requirements contained in regulations adopted by the appropriate department.

(2) After complying with the requirements of paragraph (1) of this subsection, and consistent with the budget and applicable laws and regulations, the procurement officer shall promptly issue a decision in writing to the reviewing authority:

(i) indicating that the complaint has been resolved by mutual agreement;

(ii) dismissing the complaint in whole or in part; or

(iii) granting the relief sought by the initiator of the complaint, in whole or in part.

(d) Review of the officer's decision - (1) Unless otherwise provided by regulation, the procurement officer's decision shall be reviewed promptly by the procurement agency

head and the head of any principal department listed in §8-201 of the State Government Article of the Code or (equivalent unit of State government) of which the procurement agency is a part.

(2) The reviewing authority may approve, disapprove, or modify the decision or may resubmit the complaint, with appropriate instructions, to the procurement officer who shall proceed under the provisions of paragraph (c)(1) of this section. A decision of the reviewing authority approving, disapproving, or modifying, the decision of a procurement officer is the final action of the procurement agency. (Underscoring added).

It is clear from the above that the procurement officer's decision on a bid protest is to be reviewed by the procurement agency head and the head of any principal department of which the procurement agency is a part and the reviewing authority's decision to approve, disapprove or modify the procurement officer's decision is the final action of the procurement agency. It is the final action of the procurement agency which may be appealed to the Appeals Board.

§11-137(f)[4] provides:

> (a) A bidder of offeror, a prospective bidder or offeror, or a contractor may appeal the final action of a procurement agency to The Appeals Board.

In this case Jolly's request for reconsideration is really of Trainor's decision to approve the procurement officer's denial of Jolly's protest. We believe it would be appropriate for Trainor, as head of a principal department (Transportation) of which MPA is a part and as Chairman of MTA, to reconsider his own decision.

Appellant argues, however, that Trainor never approved the procurement officer's denial of Jolly's bid protest. Trainor testified that he did not review or make any formal decision regarding Nelson's June 13th decision (Tr. 209). On the other hand, the procurement officer testified that he believed his June 13th final decision had the approval of both Wagner and Trainor. (Tr. 125). Whether or not Trainor actually reviewed the denial of Jolly's bid protest, it seems clear that the decision was made with his knowledge and implied approval. Trainor testified that when he agreed to meet with Friedman, he thought the meeting would confirm the agency actions which had been taken up to that time. (Tr. 187). Thus, Trainor appears to have known what was going on and to have given at least tacit approval to the procurement officer's

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[4]Now codified as §15-220(a), Md. Ann. Code, State Finance and Procurement Article, 1988 Vol.

decision. Trainor knew that Friedman wanted to meet with him to explain why Friedman was being unfairly treated. It is apparent that Friedman was seeking reconsideration of the procurement officer's final decision. Whether or not Trainor intended to reconfirm the procurement officer's decision, the meeting with Friedman amounted to a reconsideration and it was appropriate.

Trainor had first made a determination that Jolly was not responsible in his memorandum of May 26, 1988 to Wagner in which he concurred with Nelson's decision to award to the second low bidder. And, as we noted above, Trainor gave his tacit approval again to the procurement officer's June 13th final decision. However, when Trainor met with Friedman on June 16, he learned for the first time that Jolly had previously advised Nelson that it would perform 26 percent of the work with its own forces and would now use 30 percent. Trainor for the first time also heard Jolly's side of the story regarding its performance on the McComas Street contracts. He apparently was persuaded that monthly progress reports which MTA had been receiving showing Jolly's progress on the McComas Street projects to be poor were misleading. Trainor was persuaded that the procurement officer, who remains convinced that Jolly is not responsible, was wrong and that his own determination of nonresponsibility was erroneous.

Trainor's determination of Jolly's responsibility was a legitimate exercise of his power as the reviewing authority to reconsider

a decision within the appeal period.[5] As such it will be given considerable weight and will not be overturned by this Board unless collusive, arbitrary, capricious or in violation of statute or regulation. National Elevator, supra. Based on the established record in this case we find that Appellant has not met its burden of proof to show that the Secretary's reconsidered determination of Jolly as a responsible bidder should be overturned.

Command Influence

While the Appellant argues that the issue of command influence should be considered, we find that the Board has not been presented with a situation where the procurement officer's decision was usurped by a higher authority. As we found above, the Secretary was exercising his own authority pursuant to his inherent power to reconsider the decision that he made pursuant to §11-137. It is clear from the record that the procurement officer was not forced to change his decision. He testified that his decision as to Jolly's responsibility did not change as a result of the June 16th meeting or any other information presented to him. (Tr. 140-143). Furthermore, Appellant has not met its burden of proof in showing that any undue pressure was exerted on the procurement officer to force him to alter his recommendation. What happened, as shown by the facts and permitted by law, is that the procurement officer was overruled.

[5]Although not critical to our decision, we note that Transportation Article §2-103(g) grants the Secretary the power to exercise or perform any power or duty of any unit in the Department of Transportation.

Finally, we note that no formal determination of responsiveness and responsibility was made in writing as required by COMAR 21.06.01.01 and COMAR 21.01.02.27. With regard to responsiveness, as we found above, Jolly's bid was responsive from the outset and any determination of nonresponsiveness was mistaken. As to responsibility, it is apparent that Trainor made at least an implicit determination that Jolly is responsible by his recommendation to MTA on June 20, 1988. See Whitco Industrial Corp., B-202810, 81-2 CPD ¶120. We will not elevate form over substance and we will allow the Secretary to correct this deficiency by making the appropriate written determinations for the record.

For the above reasons, the appeal is denied. However, the matter will be remanded to MPA in order for the formal determinations required by law to be made and placed in the record.