

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of)
H.L. FREY CORPORATION)
)
) Docket No. MSBCA 2055
)
Under Towson University)
RFB No. R7506)
)

April 22, 1998

Responsiveness - Where the submission of a bid sample constitutes part of a bid, failure to supply a conforming sample renders a bid non-responsive.

APPEARANCE FOR APPELLANT None

APPEARANCE FOR RESPONDENT Stanley Turk
 Assistant Attorney General
 Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals from an agency final decision which denied its bid protest regarding Respondent's determination that Appellant was not a responsible bidder concerning the captioned procurement of packaged terminal air conditioning ("PTAC") units for student residences and Appellant's assertion of alleged improprieties in the solicitation.

Findings of Fact

1. On July 8, 1997, Towson University issued Request For Bid No. R7506 (RFB). The RFB was for approximately 66 PTAC units over a one-year period, with two one-year renewal options. The PTAC units were to be used as replacements for existing units in University dormitories, which, in part, had been provided by Appellant, and were to be compatible with existing openings. Under the previous contract, service was not provided by the vendor, but through the Sears Corporation.
2. The RFB required, in addition to furnishing the PTAC units, that the vendor also provide 24-hour service at a local service facility. The specifications for the PTAC units specifically provided:
 The local factory representative shall have enough warehouse area to accept all of the new units and store them, without additional charge, until they are

required at the University. At this time they will be delivered to the University within one day if required. The new units must be available for inspection at the local warehouse. At this same location, there shall be a service area with minimum of four service benches to insure 24-hour service. All major repairs shall be serviced at this location. (emphasis in original).

3. The RFB also included the following language:
 8. **Samples.** The State reserves the right to request and be furnished samples at no expense to the State, prior to or after the award, for the purpose of quality and specification evaluation. Samples shall be returned, upon request, at the Contractor's expense. The State does not guarantee that samples returned will be in the same condition as when submitted.
4. Bids were due on July 29, 1997. Prior to the close of the bidding period, potential bidders had the opportunity to request further information relating to the solicitation and responses to questions received were formally provided by addendum. During this period, Appellant never challenged the sample requirement or the warehouse/service facility requirement, nor made any protest of any alleged improprieties in the solicitation prior to the opening of bids on July 29, 1997.
5. Two bids were received. Appellant submitted the apparent total low-bid of \$197,868. Appellant's bid referenced PTAC units from three different manufacturers.
6. In accordance with the terms of the RFB, on August 4, 1997, the University by FAX requested that Appellant provide information including several possible dates for a visit to the local service/warehouse area, manufacturers' specifications/descriptive literature, and a sample of each PTAC unit Appellant intended to supply.
7. On August 15, 1997, the University wrote to Appellant requesting a response to its August 4, 1997 request for information.
8. By memorandum dated August 22, 1997, Appellant supplied manufacturers' equipment brochures but refused to schedule a service area/warehouse visit or send a sample until the University had made an evaluation of the three PTAC units it offered in its bid and selected one.
9. By FAX and letter dated August 25, 1997, the University again asked Appellant to provide dates and times for an inspection and provide samples. However, Appellant declined to provide the requested samples and inspection times, challenging instead the propriety of the solicitation by letter dated August 28, 1997 with regard to the necessity for "Field Tours or other items listed in your August 25, 1997 Memo."
10. By letter dated September 17, 1997, the University again requested an appointment to visit the service area/warehouse and requested sample units for inspection and approval. The University also requested Appellant to answer a number of questions in order to assist the University to determine which of the three offered PTACs it might select. Appellant responded on September 29, 1997, again declining to provide the requested dates for inspection and a sample. Answers to the questions set forth in the University's letter were provided.
11. On November 7, 1997, the University wrote to Appellant giving Appellant five days to allow the University to conduct an inspection of the service area/warehouse and to provide sample units to the University. This letter also requested Appellant to answer in more detail the

- questions the University set forth in its September 17, 1997 letter concerning the various units offered by the Appellant.
12. Appellant responded by letter dated November 24, 1997. Appellant declined to provide the requested dates and samples. Appellant also declined to provide more detailed answers to the questions presented asserting that its previous answers were complete. In this letter Appellant argued that the University should select a PTAC unit before Appellant would comply with the request for a sample "and remaining Elements of the Documents [RFB]."
 13. By letter dated November 26, 1997, Appellant was notified that its failure to respond to the University's requests rendered it "non-responsive/non-responsible."
 14. By letter dated January 2, 1998, Appellant submitted a protest to the University's Procurement Officer relating to the propriety of the solicitation by taking issue with the RFB requirement that a sample be provided at the expense of the contractor asserting that the University should first select from one of several possible PTAC units offered by Appellant with its bid. Appellant also complained that the inspection of its premises should be contingent upon the University's evaluation of the PTAC units Appellant proposed to provide.
 15. By final decision dated February 20, 1988, the University denied the protest. The decision noted that Appellant "failed to provide the requested further information, sample, or visit to its warehouse/service area." This appeal followed and is decided on the written record.

Decision

The post-bid correspondence set forth above reflects that Appellant disagreed with certain requirements of the RFB. Specifically, after bids were opened, Appellant questioned the RFB requirements of a sample and a warehouse/service facility. In its September 29, 1997 letter, Appellant complained that the specifications were "Proprietary," that the University wanted a "Free" sample, and that a visit to the facility by the University took "Valuable Time from the schedule of the Vendor." In its November 24, 1997 letter, Appellant also complained that the University had published a "Restrictive Document" based upon a customized proprietary PTAC.

The requirement for a warehouse/service facility and sample, however, are plainly set forth in the RFB and would have been apparent to bidders before the opening of bids. To be considered timely, these complaints must have been brought prior to bid opening. COMAR 21.20.02.03A. Where the grounds for protest are apparent prior to bid opening, a protest filed after bids are opened is untimely and not entitled to further consideration and this Board lacks jurisdiction to consider the merits of the dispute. See J&J Reproduction & Drafting Supplies, Inc., MSBCA 1970, 5 MSBCA ¶409 (1996); Giant Food Stores, Inc., T/A Martin's Food Markets Nos. 36, 58 & 76, MSBCA 1764, 4 MSBCA ¶357 (1994)(proposals); International Bus. Machines Corp., MSBCA 1071, 1 MSBCA ¶22 (1982).

In the present appeal, the record reflects that Appellant made no attempt to challenge the propriety of the specifications prior to the July 29, 1997 bid opening. The first time Appellant advised the University of any complaint relating to the requirements of the RFB was in its August 22, 1997 memorandum challenging the University's request for a sample and a visit to the facility. However, these are matters which must be raised prior to the opening of the bids and cannot now

be considered by this Board.

Even if this Board was not precluded from considering the instant appeal on timeliness grounds, we would have to deny the appeal. Under the General Procurement Law and COMAR, a competitively bid contract may not be awarded to the apparent low bidder unless it [the bid] is “responsive” to the solicitation and the bidder is “responsible.” Section 13-103(e), State Finance and Procurement Article (1997 Supplement); COMAR 21.05.02.13A. To be considered responsive, a bid must conform “in all material respects to the requirements contained in the invitation for bids.” Section 11-101(s), State Finance and Procurement Article (1995 & 1997 Supplement); COMAR 21.01.02.01B(78). Whether a bid is responsive depends upon the contents of the bid received by the procuring unit. Whether a bidder is responsible depends upon the conduct of the bidder. Based on the record in the present appeal we will not disturb the decision of the University Procurement Officer that Appellant's bid was not responsive and that Appellant was not responsible. The record does not reflect that such decision was arbitrary, capricious, without basis in fact or otherwise improper or unlawful.

It is well established that failure to supply a conforming sample renders a bid non-responsive. Both this Board and the United States Comptroller General have held that where the submission of a bid sample constitutes part of a bid, failure to submit such a sample compels denial of the appeal on such grounds. See, e.g., Merjo Advertising and Sales Promotions Co., MSBCA 1942, 5 MSBCA ¶393 (1996); Gentex Corp., 51 Comp. Gen. Dec. 476, B-173681 (1972).

The requirement for a sample was not inherently unreasonable. The government is entitled to physical samples in order to evaluate characteristics, such as workmanship, compatibility and facility of use. See General Microwave Corp., 51 Comp. Gen. Dec. 583, B-174730 (1972). For example, a PTAC which was not compatible with existing openings, i.e., did not fit, would have to be rejected and would result in a delay in the installation of the units. Without the sample, the University could not determine which if any of the offered equipment met its needs. Thus, the request for a sample was reasonable. Moreover, the sample requirement imposed very little burden on the contractor. The record reflects that the cost of a sample unit would have been less than \$1,000, and the unit could have been used in fulfilling the contract. We do not find there was an undue burden upon Appellant to present a sample in this procurement where Appellant's total bid was \$197,868.

To be responsible, a contractor must have “the capability in all respects to perform fully the contract requirements. . . .” COMAR 21.01.02.01B(77), and it is within an agency's discretion to gather information relating to a bidder's capability to perform in connection with a determination of responsibility.

It is appropriate for a procuring authority to request such information necessary to evaluate a bidder's capability to perform a contract after bid opening. National Elevator Co., MSBCA 1252, 2 MSBCA ¶114 (1985). Failure to supply such information is sufficient grounds for a determination that a contractor is not fully responsible under COMAR 21.06.01.01B which provides in relevant part that:

B. A procurement officer may find that a person is not a responsible bidder or offeror for:

- (1) Unreasonable failure to supply information promptly in connection with a determination of responsibility

In this appeal the record reflects that the University made repeated requests for information regarding Appellant's intended warehouse/service facility. Despite these requests from the University, this information which we find reasonably relates to a determination of Appellant's responsibility was never provided.

A procurement officer has broad discretion in determining whether a bidder is responsible, and such a determination will not be overturned unless shown to be unreasonable, an abuse of discretion, or contrary to law or regulations. Charles Center Properties, MSBCA 1629, 3 MSBCA ¶297 (1992); National Elevator, citing Lamco Corp., MSBCA 1227, 1 MSBCA ¶96 (1985); Allied Contractors, Inc., MSBCA 1191, 1 MSBCA ¶79 (1984). Based on this record we will not disturb the finding by the University Procurement Officer that Appellant unreasonably failed to supply the information necessary for the University to make a determination of responsibility and, therefore, was determined to be non-responsible.

Accordingly, for the foregoing reasons the appeal is denied.

Wherefore, it is Ordered this 22nd day of April, 1998, that the appeal is denied.

Dated: April 22, 1998

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2055, Appeal of H. L. FREY Corporation under Towson University RFB No. R7506.

Dated: April 22, 1998

Mary F. Priscilla
Recorder