BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HELMUT GUENSCHEL, INC.	)	
	)	Docket No. MSBCA 1434
Under University of Maryland at Baltimore RFP No. 72696H	)	

June 26, 1989

Bid Protests - Timeliness - A vendor need not submit a timely proposal to protect its right to continue with an appeal where it has already filed a timely protest prior to the time set for receipt of proposal but either is not satisfied with the reply or it has not received a reply from the procurement officer.

Bid Protests - Timeliness - A party who has filed a timely protest prior to bid opening is entitled to an answer prior to bid opening even if it means postponing the date or time for receipt of bids.

Bid Protests - Timeliness - Bid protests based on alleged grounds of protest which are apparent in the solicitation prior to bid opening are to be filed with the agency procurement officer before bid opening pursuant to COMAR 21.10.02.03A.

Bid Protests - Specifications - In reviewing a protest concerning an agency's technical specifications, the Board may not substitute its judgment for that of the agency as to the agency's minimum needs. The Board may consider, however, whether the specifications specifying an agency's minimum needs unreasonably restrict competition in contravention of Maryland procurement law.

Bid Protests - Specifications - A technical specification submission of a prototype at the vendor's expense does not unduly restrict competition if there is a reasonable basis for requiring a prototype to meet the agency's minimum needs under the particular circumstances involved.

Bid Protests - Specifications - The absence of a provision for progress payments or up-front money does not make the specifications unduly restrictive of competition if there is a reasonable basis for the decision not to allow such payments and the specifications meet the agency's minimum needs under the particular circumstances involved.

Ambiguity - Where a bidder is presented with a patent ambiguity and fails to exercise its duty to inquire prior to bid, the bidder becomes responsible for any adverse impact of its erroneous interpretations.

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Opinion By Mr. Levy

This is an appeal of the procurement officer's final determinations denying Appellant's bid protest and supplemental protest in a procurement by the University of Maryland Dental School (University). Appellant objects to two basic provisions of the Request for Proposals (RFP); the requirement that vendors provide a prototype of their respective units at their own cost, and the University's refusal to pay up-front money or progress payments.

Findings of Fact

1. This is a procurement by the University of customized dental operatory cabinets. It is part of a major renovation project of all of the Dental School's clinical areas.

2. This procurement began in the fall of 1988 when the University had discussions with several potential vendors, including Appellant. These early discussions dealt with the idea of procuring these cabinets through the general contractor doing the renovation work utilizing plans and specifications to be supplied by the University. This idea was abandoned in favor of a direct procurement of the cabinets by the University utilizing a negotiated

procurement method with each vendor supplying its own individual design. This change in approach to the procurement was conveyed to Appellant by letter of January 3, 1989.

3. RFP No. 72696H was advertised in the Maryland Register on December 30, 1988. The proposal due date was January 20, 1989.

4. A pre-proposal conference was held January 13, 1989 where 5 vendors, including Appellant, attended.

5. On January 16 Appellant sent identical letters of protest to Mr. Robert Rowan, Director of Facilities Management, Mr. Thomas McLaughlin, Director, Office of Procurement and Supply, and Dr. John Toll, Chancellor of the University. The protest raised the following issues:

A. The requirement that bidders manufacture a full size prototype free of charge strikes a blow against small business in a financially discriminatory way. This creates an entrance fee to compete in the $20,000 to $30,000 range.

B. The same entrance fee idea is also a de facto elimination of minority business.

6. As a result of questions raised and issues discussed at the January 13, 1989 pre-proposal conference, Addendum No. 1 to the RFP was issued on January 19, 1989 which provided, in pertinent part, as follows:

1.(a) Proposal due February 6, 1989

* * * *

3. It remains the University's position that we will not pay for any costs connected with developing, producing, or delivering a prototype for evaluation purposes.

* * * *

11. UMAB is willing to pay for finished goods in inventory if there is a delay due to a University schedule change. The University will reserve 10% of the total contract price pending final approval of the product. UMAB will not agree to pay up-front money or progress payments.

7. Addendum No. 3 to the RFP issued February 1, 1989 again changed the due date for proposals to February 13, 1989.

8. On February 3, 1989 the Director of the Office of Procurement and Supply, Thomas McLaughlin, issued the agency's final decision which denied Appellant's January 16 protest. His decision pointed out that an entrance fee was not required to compete. Only the finalists who remain after a two-phase evaluation process will be required to submit a prototype at their expense. He pointed out that it is a business decision that each vendor needs to make. He also disagreed with Appellant that the prototype cost is a blow to small business and a "de facto elimination of minority business." He concluded that the University has made a business decision to proceed with the "value engineering" approach outlined in the RFP rather than the independent design approach sought by the Appellant.

9. Appellant submitted a supplemental protest letter to the procurement officer on Friday, February 10, 1989. Specific exception was taken to the following language of Addendum No. 1: ".... UMAB will not agree to pay up-front money or progress payments." Since the RFP provides for a three phase installation schedule between December 1989 and February 1991 the Appellant construed the specifications to mean that "no bidder will be paid until the entire job is completed in 1991 (or later)." Appellant argued that this effectively eliminated all small and medium-sized bidders from the process.

10. On Monday, February 13 three proposals were received by the University. Appellant did not submit a proposal.

11. On the day proposals were received Appellant filed an appeal with this Board raising issues from its original protest as well as from its supplemental protest, which the University had not yet responded to. The appeal raises the following issues:

A. The RFP violates § 13-205 of the State Finance and Procurement Article (Annotated Code of MD, 1988 Supp.)[1] by reducing or eliminating competition in the bidding process. By not paying up-front money or progress payments, small and medium sized vendors are eliminated from the process.

B. The RFP contains invalid and discriminatory standards. Not only is § 13-205 violated but the RFP also discriminates against small and mid-level firms so as to undermine the percentage preference established under §14-206 of the State Finance and Procurement Article.[2]

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[1] **§ 13-205. Drafting specifications.**

A unit:

(1) shall draft specifications to encourage maximum practicable competition without modifying the requirements of the State; and

(2) may not draft specifications to favor a single prospective bidder or offeror.

[2] **§ 14-206. Percentage preference established.**

(a) "Percentage preference" defined. - In this section, "percentage preference" means the percent of the lowest responsive bid submitted by a responsible bidder who is not a small business by which a responsive bid by a small business may:

(1) exceed the lowest bid; and

(2) be awarded a procurement contract under this subtitle.

(b) Established. - Subject to the approval of the Board, the Secretary of General Services, the Secretary of Transportation, and the Chancellor of the University of Maryland System each:

(1) shall establish a percentage preference, not to exceed 5%, for each industry; and

(2) may vary the percentage preference among industries to account for their particular characteristics.

C. The RFP is improper for failing to use a cost-reimbursement basis. Under COMAR 21.06.03.03B(1),[3] a cost-reimbursement contract is appropriate under the present circumstances.

D. The RFP is improper because it will result in an escalation of bids to cover the expense of prototype production and the long-term carrying of costs.

12. On March 2, 1989 the University answered and denied Appellant's supplemental protest. While the procurement officer admits that the payment terms could have been clarified by providing more detail he does not agree with Appellant "that no bidder will be paid until the entire job is completed in 1991" or that they "would preclude payment to a successful bidder until his specific portion of the job is finished". He makes it clear that it is the University's intent to pay for the work at the end of each of the three phases. He further argues that Appellant waived its right to challenge the payment terms since it chose not to submit a timely proposal.

Decision

While Appellant's notice of appeal to this Board raises four specific issues for our consideration (Finding of Fact No. 11), it is clear from the record that there are two overriding issues. The first is Appellant's objection to the requirement in the RFP that vendors be required to provide a prototype of their respective units at their own cost without reimbursement from the University. The second issue is the University's refusal to pay up-front money or progress payments for the cabinets.

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[3] COMAR 21.06.03.03
B. Application.
(1) Generally, a cost-reimbursement contract is appropriate when the uncertainties involved in contract performance are of such magnitude that the cost of contract performance cannot be estimated with sufficient certainty to realize economy by use of any type of fixed-price contract. A reimbursement contract necessitates appropriate monitoring by State personnel during performance so as to give reasonable assurance that objectives are being met.

Before addressing these issues, however, we must address a preliminary matter raised by the University. The University argues that Appellant waived its right to continue with this appeal when it failed to submit a proposal on the due date. The University bases its argument on the fact that this was a negotiated procurement which it distinguishes from a procurement by sealed bid. The former method it argues "allows for vendors to take exception to certain real or perceived terms in the RFP and to resolve those issues through subsequent negotiation". It further argues that Appellant is really attempting to negotiate contract terms and conditions more favorable to itself indirectly through this Board rather than directly with the University under the negotiation process. The University believes that Appellant appropriately should have negotiated its concerns with the prototype costs and payment terms rather than taken this appeal.

The University cites no authority for its position. Likewise, we can find no support for the proposition that a vendor must submit a timely proposal to protect its right to continue with an appeal where it has already filed a timely protest prior to the time set for receipt of proposals but either is not satisfied with the reply or it has not received a reply from the procurement officer. We have held in a competitive sealed bid procurement that a party who has filed a timely protest prior to bid opening is entitled to an answer prior to bid opening even if it means postponing the date or time for receipt of bids. William F. Wilke, Inc., MSBCA 1162, 1 MSBCA ¶61 (1983). We are not aware of authority which requires a bidder to submit a timely bid to protect itself if the procurement officer fails to render his decision timely. We likewise are not aware of authority which requires a vendor to file a proposal to protect itself if the procurement officer fails to render a decision on a timely protest in a negotiated procurement. Of course, the vendor, if it does

not submit a proposal, will be out of the competitive negotiation process in the event the procurement officer renders an unfavorable decision and an appeal is unsucessful. But the failure to submit a timely proposal by itself does not relieve the procurement officer from his duty to render a final decision on an otherwise timely protest filed before the due date for receipt of proposals nor does it prevent Appellant from taking timely appeals of any unfavorable procurement officer decisions. Accordingly, we find that Appellant has not waived its right to appeal the procurement officer's final decisions in this case.

We turn then to Appellant's first overriding issue on appeal which we noted above was its objection to the need to provide a prototype at the vendor's expense. RFP, Section II provides in pertinent part, as follows:

> F. Those vendors determined by the evaluation committee to be responsible will be required to deliver a complete non-working prototype of Type III operatory at a designated location on the UMAB campus as a part of the evaluation....Finalists will deliver their prototypes on or before May 7, 1989. The final date will be determined after discussion with the "short list" proposers....Any incurred expenses in developing, building, delivery, and removal from UMAB of the prototype are the responsibility of the vendor.
>
> G. The University will not be responsible for any costs incurred by any vendor in preparing and submitting a proposal or the prototypes.

The University's position was reiterated in Addendum No. 1 on January 19, 1989 which provided in part: "It remains the University's position that we will not pay for any costs connected with developing, producing, or delivering a prototype for evaluation purposes."

While Appellant argues in its Comments On Agency's Report (p. 16-17) that the prototype requirement is ambiguous, it does not point to any ambiguity. It only points to concepts it does not agree with such as the concept of

"value engineering". We find, therefore, no ambiguity with regard to the University's position on this requirement. The University's position could not be more clear. It will not pay costs associated with the prototype requirement.

Appellant's real argument is that the prototype requirement unreasonably restricts competition. To support this Appellant argues that the cost of supplying the prototype ($20,000 to $30,000 against projected sales of $1.2 million) is prohibitive for Appellant and other small and mid-sized businesses. Appellant also questions whether this is the type of project that requires a prototype since the project could be adequately described by drawings without the use of "value engineering" and the need to supply architectural and/or engineering services by the offerors.

In Admiral Services, Inc., MSBCA 1341, 2 MSBCA ¶159 (1987), at 2-3, we stated the following:

> The primary issue is whether the specifications as written unreasonably restrict competition. Under Maryland procurement law, the procurement officer has broad discretion in drafting specifications to meet the State's minimum requirements when weighed against the State policy of fostering the maximum practicable competition. And "we will not substitute our judgment for that of the procuring agency in the absence of a clear showing that it acted unreasonably or otherwise abused its discretion...Where there is a difference of expert technical opinion, we will accept the technical judgment of the procuring agency unless clearly erroneous."...We have also stated that "the drafting of specifications is primarily a function of the State's procurement agencies who are uniquely knowledgeable as to what will solve the State's minimum needs in a given instance...In reviewing an agency's specifications, therefore, this Board is limited to a determination as to whether the specifications unreasonably restrict competition and cannot substitute its judgment as to technical requirements for that of the procuring agency."...(citations omitted)

We find that the prototype requirement does not unreasonably restrict competition since Appellant has not demonstrated that the University has acted unreasonably or otherwise abused its discretion in requiring the offerors to provide a prototype at their own expense. The University has demonstrated that the need for a prototype satisfies its minimum needs. The University argues and we agree that requiring a prototype is a reasonable requirement because of the project's nature. The prototype is necessary for the dentists and professors who are the conceptualizers and ultimate users of this state-of-the-art unit to be able to analyze how the vendors have incorporated the necessary features into their designs. Prototypes also are necessary in order to test for human performance logic and other required aspects and features such as radiation safety. As Dr. John Hassler, Associate Dean for Clinical and Hospital Affairs at the University, stated at the hearing, "[i]t would not be possible for we dentists to look at shop drawings and make an intelligent decision and we are the end users and in my opinion a prototype was critical to this process" (T. 117).

The using agency has the primary responsibility for determining its minimum needs, and for drafting specifications which reflect those needs. Bill Conklin Associates, Inc., Comp. Gen. Dec. B-210927, 83-2 CPD ¶177; Admiral Services, Inc., supra. This Board will not question an agency's decision concerning its needs and the best method of accommodating them absent clear evidence that those decisions are arbitrary or otherwise unreasonable. We recognize that agencies should formulate their needs so as to maximize competition. However, burdensome requirements which may limit competition are not unreasonable so long as they reflect the State's legitimate

minimum needs. Bill Conklin Associates, Inc., supra. Appellant has not met its burden of demonstrating that the University's prototype requirement did not reflect its minimum needs or otherwise was unreasonable.

As far as the cost of the prototype is concerned all bid and proposal preparation requires some pre-award expense that will not be reimbursed, if at all, unless the firm wins the competition. Where an agency has shown that a particular requirement constitutes part of its minimum needs, as the University has done here, that requirement is not unreasonable merely because it necessitates some pre-award expenditures by the offerors. Romar Consultants, Inc., Comp. Gen. Dec. B-206489, 82-2 CPD ¶339.

We note also that Mr. Guenschel's testimony often reflected the notion that the way the University was proceeding with this procurement was not the usual way in which he was accustomed to dealing. In reply to this we note what we said in Admiral Services, Inc., supra at 3:

> In this regard, however, we observe that new systems for performing work or changes in the method of accomplishing tasks that previously have been performed by a commonly understood and well recognized method frequently encounter opposition. Although such opposition may in some instances be well-founded, a new method of accomplishing work should not be rejected out-of-hand because it has never been done before and the personnel involved are more comfortable with the old method...

From all of the above we conclude that the prototype requirement did not make the solicitation unduly restrictive of competition. Appellant's failure to submit a proposal was the result of its own business judgment that the risk of losing the competition was not worth the cost of preparing a proposal which included a prototype at its expense and was not the result of an improper obstacle to competition.

Appellant's second overriding issue is it's objection to the contract payment terms; i.e., the University's refusal to pay up-front money or progress payments. This issue itself appears to consist of two distinct issues; i.e., (1) the language of Addendum No. 1 that "UMAB will not agree to pay up-front money or progress payments" creates an ambiguity, and (2) Appellant's general objection to the concept of the absence of up-front money or progress payments.

It is not entirely clear which of these two subissues Appellant raised in its supplemental protest. Neither in its supplemental protest of February 10, 1989 nor in its appeal to this Board does Appellant formally raise the issue of an ambiguity needing clarification. It is not until its Comments On the Agency Report that Appellant clearly makes the possible ambiguity an issue. Up to this point Appellant had just made its interpretation of the Addendum No. 1 language that the University would not make payment until 1991 when all three phases of the work would be complete. Appellant's real concern, therefore, would appear to be with the concept of the absence of up-front money and progress payments since small and medium-sized vendors, as well as minority firms, could be eliminated. In other words competition could be restricted.

One could reasonably argue that there is no ambiguity in the Addendum No. 1 language at all. The language is clear and succinct that no progress payments will be made. As noted above Appellant does not even raise the issue of an ambiguity until after the University responds to the protest (which is after this appeal was filed) and states that it meant to say something other than Appellant's interpretation with regard to the contract payment terms. It just happens that the University's interpretation would be more

favorable to the Appellant. Therefore, it appears that it is the concept of no progress payments that Appellant objects to in its supplemental protest and subsequent appeal, and not an ambiguity in need of clarification.

For the same reasons that we noted above with regard to the prototype costs, we also find here that the absence of up-front money or progress payments did not make this solicitation unduly restrictive of competition. Appellant again has not demonstrated that the University has acted unreasonably or otherwise abused its discretion. The University recognizes that "vendors may inflate their prices to us slightly as a result, but that is a business decision on our part" and that decision is that it was not in the best interest of the State to lay out money prior to receiving the requested goods. (March 2, 1989 procurement officer's decision). The University has the primary responsibility for determining its minimum needs and for drafting specifications which reflect those needs. Bill Conklin Associates, Inc., supra. This Board will not question an agency's decision concerning its needs and the best method of accommodating them absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Bill Conklin Associates, Inc., supra. The Appellant has not met its burden of demonstrating that the University requirement for payment upon completion of each phase did not reflect it's minimum needs or otherwise was unreasonable.

Even if we would conclude that the quoted language from Addendum No. 1 did create an ambiguity concerning when payments would be made, we would still find that Appellant could not prevail. The rules for contract interpretation with regard to ambiguities are well established. If an ambiguity exists we must determine if it is obvious and therefore patent or not so obvious and therefore latent. If patent it then becomes encumbent upon the Appellant to seek clarification of the ambiguous language prior to the receipt of proposals

or be held responsible for the adverse impact of its interpretation. American Building Contractors, Inc., MSBCA 1125, 1 MSBCA ¶104 (1985). As we noted above Appellant did not request clarification of the language of Addendum No. 1. It just made its own interpretation and objected to the concept of the payment methods in its supplemental protest. It would appear therefore that Appellant is responsible for the impact of its interpretation if we would determine that the ambiguity was patent.

The only area of concern which needs to be addressed is to determine if Appellant's eleventh hour supplemental protest of February 10, 1989 put the University on notice that a patent ambiguity existed in the language of Addendum No. 1 which would have required it to hold up the receipt of proposals until a clarification could be made. Under the facts of this case we believe that it did not. Proposals were due at the University on Monday, February 13, 1989 at noon (Addendum No. 3). On Friday afternoon February 10, 1989 Appellant filed its supplemental protest setting forth its objections to the concept of the payment terms of the RFP. There was no clear request made for clarification of an ambiguity. Certainly a quick reading of the supplemental protest did not point out that there was an ambiguity since its emphasis was on the objection to the lack of progress payments. Only a person who was totally familiar with the details of the RFP and knew precisely what the payment terms of the RFP stated might recognize that Appellant's statements were possibly raising an ambiguity as to when payments were to be made. We think it unreasonable to conclude that a person reading the supplemental protest should be charged with recognizing the existance of an ambiguity which needed immediate attention. Since Appellant itself did not realize that a possible ambiguity existed until after its appeal had been filed, the University should not be charged with the

responsibility of immediately recognizing Appellant's supplemental protest as raising an ambiguity. Additionally, the issue of progress payments had been discussed with Appellant as early as November, 1988 (Tr 20); it was discussed at the pre-proposal conference (Tr 28-30) and at a meeting in late December, 1988 Appellant was told of the planned phased installation and that payment would be made at the end of each phase (Tr 124-125). All of this coupled with the eleventh hour filing of the supplemental protest only allows us to find that Appellant does not meet the criteria of reasonable diligence required to obtain clarification of a patent ambiguity and the University was not put on notice that an ambiguity existed requiring immediate attention. American Building Contractors, Inc., supra. We also note that Appellant's counsel stated at the hearing (Tr 139-140) that the supplemental protest did not raise new issues but amplified issues raised in the original protest.

Based on the above we conclude that if we were to determine that a patent ambiguity existed in the Addendum No. 1 language, then Appellant was under an obligation to seek timely clarification prior to receipt of proposals. Appellant failed to, therefore, it is charged with the adverse impact of the interpretation it made.

If we were to conclude that the quoted language from Addendum No. 1 created a latent ambiguity then Appellant must now be held responsible for the adverse impact of its interpretation. Since Appellant did not submit a proposal on the due date there is no reason to determine if Appellant could have prevailed. This is a consequence of Appellant's decision not to submit a proposal. If Appellant had submitted a proposal then a latent ambiguity could have been dealt with during the negotiation process or perhaps even after a contract had been entered into.

From all of the above we conclude that the contract payment terms did not make the solicitation unduly restrictive of competition and if the RFP language with regard to payment terms was ambiguous Appellant is stuck with the adverse impact of its interpretation.

As noted in Finding of Fact No. 11, Appellant's appeal raised four specific issues. Of the four issues, three of them (A, B & D) have been addressed and resolved by our discussions above. The remaining issue for our consideration is: "C. The RFP is improper for failing to use a cost-reimbursement basis. Under COMAR 21.06.03.03.B (1) a cost-reimbursement contract is appropriate under the present circumstances." However, this issue is not timely. This matter was not raised initially with the University procurement officer as required by COMAR 21.10.02.02 & 03A[4]. By waiting until the filing of its notice of appeal to raise the issue of the applicability of a cost-reimbursement type contract, Appellant waived its right to protest and have this Board consider its appeal on this ground. The Trane Company, MSBCA 1264, 2 MSBCA ¶ 1189 (1985); Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶ 116 (1985).

For all of the above reasons Appellant's appeal is denied.

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[4]COMAR 21.10.02.02 provides:

A. An interested party may protest to the appropriate procurement officer against the award or the proposed award of a contract subject to this title, except a contract for architectural services or engineering services.
B. The protest shall be in writing and addressed to the procurement officer.

COMAR 21.10.02.03A provides:

A. A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing or the closing date for receipt of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt of proposals following the incorporation.