

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF INITIAL)
HEALTHCARE, INC.)
Under Contract No. MAA-MC-2002-014)

) Docket No. MSBCA 2267
)
)

March 11, 2002

Responsibility - A determination by the procurement officer that the bidder is responsible is a discretionary decision that will not be overturned unless the procurement officer acted arbitrarily or capriciously or the decision is clearly erroneous.

APPEARANCE FOR APPELLANT

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APPEARANCES FOR INTERESTED PARTY
(Personnel Hygiene Services, Inc. (PHS))

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OPINION BY BOARD MEMBER HARRISON

This appeal arises out of two final procurement officer's decisions resolving two separate protests concerning the award of the same MAA contract. Appellant has appealed both final decisions to the Board.

Findings of Fact

1. The captioned appeal concerns the second MAA solicitation for a competitively bid contract to provide feminine sanitary dressing disposal services at Baltimore/Washington International Airport (BWI).¹
2. The Contract requires the contractor to install and provide service to collection and disposal

¹An earlier solicitation was canceled for lack of competition and because a bidder was not able to submit a timely bid due to the inaction of the State.

- units located in the women's restrooms on the various piers at BWI. The IFB contains a list of the women's restrooms located on each pier at the airport, the number of stalls in each restroom that contain units that must be serviced, and the required schedule (i.e., weekly or twice weekly) on which the contractor is required to service the units.
3. The bid form for the Contract is structured to match the way in which the work under the Contract is to be performed. The bid form requires the bidder to provide a "Price Per Unit" for each restroom, then to multiply that price times the number of "Units" in each restroom, then to multiply that price times the annual "Frequency" of service required for that restroom. The last entry on each line establishes an annual price for each restroom at the airport. The total bid price on which award is to be based is obtained by adding the annual prices for all restrooms in the airport for the three-year term of the Contract, plus an extra work allowance of \$30,000.00.
 4. Bids were opened on July 31, 2001. Two bids were submitted for the Contract: a bid of \$501,680 by PHS and a bid of \$573,324 by Appellant. The bids were reviewed by Carol Stock, who at the time was Acting Manager of Maintenance Contractual Services in MAA's Division of Procurement.
 5. When Ms. Stock reviewed the low bid of PHS it was apparent that the bid form had not been completed in the requested format. Multiplying PHS's number for "Price Per Unit" times the "Units" times the "Frequency" did not equal the annual price entered for each restroom. Ms. Stock thereupon sent PHS a letter stating that the MAA was rejecting its bid as non-responsive.
 6. By letter dated August 3, 2001, from Ms. Lindy Reef to Ms. Stock, PHS timely protested MAA's rejection of its bid. Ms. Reef stated that PHS had interpreted the bid form to require the "Price Per Unit" to be an annual price for each unit rather than a price per service. Ms. Reef asserted that this was a reasonable interpretation of the bid form given the headings on the form, and because there was no multiplication sign between the first two items on each line. She explained that PHS's intended price of \$6.4423 per unit for each service could be obtained from the bid form by dividing the annual prices per unit by the frequency of service. According to Ms. Reef the only mistake on PHS's bid form was that the price per unit was stated as an annual price rather than a per service price. It was Ms. Reef's contention that PHS's total annual price for each restroom (the price on which payment is based) and PHS's total price bid of \$501,680 were both correctly stated.
 7. When the MAA considered PHS's protest in light of the law applicable to asserted mistakes in bids, it appeared that PHS's bid would be eligible for correction. However, since Appellant was considered to be an interested party to the protest, Ms. Stock sent Appellant a letter offering it the opportunity to provide input concerning the protest. Appellant responded by letter dated November 27, 2001. Appellant asserted that the problem with PHS's bid form did not constitute a mistake and, even if it did, the intended correct bid was not clear from the face of the bid.
 8. Appellant also asserted in this November 27, 2001 letter that PHS should not be awarded the Contract because of new issues raised for the first time in Appellant's letter. As required by the IFB, PHS had submitted with its bid an affidavit signed by Sandrine Letendre, its sales manager, affirming, among other things, that PHS was a Massachusetts corporation registered to do business in Maryland, that it was in good standing with the Maryland State Department of Assessments and Taxation, and that it had paid all taxes due the State and

filed all required returns and reports.

However, in its letter of November 27, 2001, Appellant stated that the authority of PHS as a foreign corporation to do business in Maryland was terminated on November 18, 1996 when, the public record reflects, its foreign corporation registration was forfeited because PHS failed to file a personal property tax return. Appellant went on to state in its letter that PHS had continued to do business in the State without being registered as a foreign corporation and without filing subsequent personal property tax returns, and that, as a consequence, PHS could not obtain the necessary license, insurance or bonds to perform the Contract, and could not warrant, as required by the bid affidavit, that it was qualified to do business in Maryland and that it was not in arrears with respect to the payment of monies owed the State. Appellant also argued that the fact that PHS had misrepresented its status indicates that it lacks the integrity and reliability to perform the Contract.

9. By letter dated December 6, 2001 to Carol Stock from PHS, PHS responded to the assertions in Appellant's November 27 letter. PHS did not dispute Appellant's assertion that its foreign corporation registration had been forfeited because it had failed to file personal property tax returns. PHS said that its failure had been inadvertent, and to the best of its knowledge had occurred because it had relied on its accountants to file the required returns, and that it had no document in its record indicating notification that its returns were overdue or that its registration had been forfeited. With its letter PHS submitted documentation to MAA indicating that PHS was current on all other tax obligations to the State, at least for the last three tax years, including withholding taxes, retail sales tax, unemployment insurance tax, and corporate income tax. PHS also submitted documentation showing that it had filed a Foreign Corporation Requalification Form with the State Department of Assessments and Taxation together with its back personal property tax returns for three years,² and that it had paid all necessary fees, including the penalty fee provided for by law, to reinstate its foreign corporation registration.
10. By letter dated December 12, 2001, Appellant responded to PHS's letter of December 6. Appellant reiterated the arguments from its November 27 letter, and also argued that PHS's status at the time of bid submission made it ineligible to bid.
11. Suzette Moore, the MAA chief procurement officer, considered Appellant's November 27 letter to be a protest. By two letters dated December 28, 2001, Ms. Moore issued final decisions on both PHS's and Appellant's protests. Ms. Moore determined that a mistake was evident on the face of PHS's bid form, and that the MAA should correct this mistake according to the provisions for such corrections set forth at COMAR 21.05.02.12. Ms. Moore therefore sustained PHS's protest, rescinded the MAA's rejection of PHS's bid, and corrected its "Price Per Unit" to \$6.4423. Ms. Moore's decision did not change the total contract price bid by PHS, and thus did not change the relative competitive positions of PHS and Appellant.

Ms. Moore denied Appellant's protest concluding that Appellant's protest was untimely. However, Ms. Moore's decision went on to state that even if the protest had been timely it must be denied on its merits. She noted that the issues raised by Appellant to

² It appears from the record that Maryland will only seek payment of unpaid personal property taxes for the most recent three tax years.

include misrepresentation of status regarding tax payment and registration were responsibility issues, and that information establishing a bidder's responsibility may be submitted to and considered by the procurement officer after bid opening and prior to award. She advised that PHS had submitted documentation to MAA indicating that it had reinstated its registration to do business in Maryland as a foreign corporation, and that it had brought current its personal property tax filings. Ms. Moore noted that, prior to award, MAA would confirm that PHS was current on all of its state tax obligations and that it had the necessary licenses, insurance and performance bonds required by the Contract, just as it does prior to award of any contract. Ms. Moore also determined that because PHS took immediate steps to remedy the problem when it was brought to its attention, paid the penalty provided by law for failing to be registered, and documented [for the past three tax years] that it had never been arrears in any of its other state tax obligations, the failure to file personal property tax returns and forfeiture of its foreign corporation registration did not indicate a lack of integrity and reliability sufficient to deny PHS award of the Contract.

12. Appellant's appeal of both decisions to this Board followed on January 14, 2002.
13. The appeal was heard on March 1, 2002. The issue concerning the propriety of the correction of PHS's bid was withdrawn at the hearing of the appeal and will not be further discussed. Remaining for resolution are the following issues.
 - A. Was Appellant's protest that PHS was not a responsible bidder as set forth in its letter of November 27, 2001 timely filed with the MAA?
 - B. Is PHS's submission of an incorrect bid affidavit a matter of responsibility that may be corrected prior to award?
 - C. Was the procurement officer arbitrary or capricious when she determined that PHS's incorrect bid affidavit, forfeiture of foreign corporation registration and failure to file personal property tax returns did not, in and of themselves, indicate a lack of integrity and reliability sufficient to deny PHS the Contract?
 - D. Is a bidder whose foreign corporate registration in Maryland has lapsed or been forfeited eligible to bid on a Maryland public procurement?

Decision

In its November 27, 2001 letter, Appellant not only responded to the issue that the MAA raised in its October 26 letter seeking Appellant's input, but also raised new issues challenging PHS's right to be awarded the contract because of incorrect statements on its bid affidavit. The procurement officer considered this letter to be a protest, and issued a final decision resolving it. Before dealing with the merits, the procurement officer found Appellant's protest to be untimely. Was the protest timely?

COMAR 21.10.02.03 requires a protest to be filed not later than 7 days after the basis for the protest is known or should have been known, whichever is earlier. This time requirement is mandatory, and must be strictly construed; if a protest is not timely filed it may not be considered by the Board. A.D. Jackson Consultants, Inc., MSBCA 1817, 4 MSBCA ¶366 (1994). Because this is a requirement imposed by law, it cannot be waived by a State agency. Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 40-41 (1984).

Bid opening was on July 31, 2001, and by letter dated August 2, 2001, Appellant was advised that it would be awarded the contract. However, as the procurement officer noted, Appellant knew when it received MAA's letter of October 26 that the MAA was considering correcting the mistake in PHS's otherwise low bid and awarding PHS the contract. When Appellant learned this it was obligated promptly to make whatever investigation it chose into PHS's corporate status. Compare Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983) (when appellant received letter putting him on notice something was wrong, he was obligated to review agency file within the seven day protest period). Indeed, if the bids were available for review at bid opening, the fact that PHS's bid was low may have triggered the requirement for such investigation. Appellant, however, was advised by letter dated August 2, 2001 that it would be awarded the Contract.

The information in Appellant's November 27 letter was available on the State Department of Assessments and Taxation website, and Appellant apparently obtained the information from that source. Thus, had Appellant undertaken an investigation of the facts within the seven day appeal period, it would have discovered this information. While this requires a dissatisfied bidder to review information not specifically set forth in the agency file or in the competitors bid we believe such a review is covered by the "knew or should have known" language of COMAR 21.10.02.03.

We reject Appellant's argument that whenever a protest is based on information that a protestor discovers through its own investigation, the time for filing a protest should start running whenever the protestor decides to make its investigation. Under this interpretation a contractor could wait until weeks or months after bids are opened, even until the day before a contract is to be presented to the Board of Public Works for approval for award, to make an investigation, so long as it protests within 7 days of finding the information. This interpretation of the law does not comport with the rationale for a timely protest in Kennedy Temporaries v. Comptroller of the Treasury, supra, where the Court noted that a bid protest has consequences for both the agency, which has an interest in getting its contract awarded, and the would-be successful bidder, who "certainly has an interest in knowing promptly (and within the time limit established by the regulation) whether he may be called upon to defend his bid." We believe the most reasonable interpretation of the "should have known" provision of COMAR 21.10.02.03 is that a contractor is obligated to make whatever investigation it chooses within the 7 day period if it has reason to believe the contract will be awarded to someone else.

In its appeal, Appellant asserts that the MAA waived the seven-day filing requirement by setting a deadline in its October 26 letter for submission of comments by Appellant, and then extending that deadline to November 27. However, the MAA's October 26 letter only requests Appellant's comments on PHS's protest and the MAA's possible response. It does not purport to waive or extend the time for Appellant to file its own protest on entirely different grounds. In any event, it is clear that under Kennedy Temporaries, supra the MAA did not have the power to waive the seven-day deadline required by law. Thus, because Appellant's protest of November 27 was not timely filed, the Board lacks jurisdiction and the appeal must be dismissed. COMAR 21.10.02.03 C; Aquaculture Systems Technologies, L.L.C., MSBCA 2141, 5 MSBCA ¶470 (1999).

However, even if Appellant's protest is considered timely, it was properly denied on its merits. All of the issues raised by Appellant in its protest are issues relating to PHS's responsibility.

A responsible bidder is one who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance. St. Fin. & Proc. Code Ann. §13-206; COMAR 21.01.02.01(77). A determination of responsibility need not be made by the agency until the time of award, and a bidder may therefore submit information establishing its responsibility after bid opening but prior to award. Maryland Supercrete Company, MSBCA 1079, 1 MSBCA ¶27 (1982); Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA ¶82 (1984); DeBarros Construction Corporation, MSBCA 1467, 3 MSBCA ¶215 (1989).

The Board has repeatedly held that the submission of bid affidavits and the information contained in them, as well as proof of licenses and certificates required by the IFB, are matters that go to the determination of a bidder's responsibility, and may be submitted or corrected after bid opening. Calvert General Contractors, MSBCA 1314, 2 MSBCA ¶140 (1986) at pp. 15-16; Niedenthal Corp., MSBCA 1783, 4 MSBCA ¶353 (1994) at p.5; Civic Center Cleaning Co., Inc., MSBCA 1357, 2 MSBCA ¶169 (1988) at p.7; Roofers, Inc., MSBCA 1284, 2 MSBCA ¶133 (1986), aff'd Court of Special Appeals, No. 779, (Sept. 19, 1986).

Appellant alleges that PHS's inaccurate bid affidavit and lapse in foreign corporation registration require its bid to be rejected as non-responsive. However, responsiveness concerns a bidder's legal obligation to perform the contract in conformity with the specifications. National Elevator Company, MSBCA 1252, 2 MSBCA ¶114 (1985) at p.4. As the Board has noted, to implicate responsiveness a matter must "alter [the bidder's] commitment to perform the work at a stated price or in accordance with the requirements of the solicitation . . ." Maryland Supercrete Co., supra at p.7. The fact that PHS's bid affidavit was inaccurate does not make PHS's bid non-responsive. Because a matter of responsibility is involved, PHS may submit an accurate affidavit prior to award.

Appellant also argues that the lapse or forfeiture of PHS's foreign corporate registration makes PHS ineligible to submit a bid in the first instance. The Board disagrees. PHS's registration as a foreign corporation in Maryland, and whether it has paid all of its State obligations prior to award, go to whether it can be awarded and perform the contract, not to whether it has committed itself to perform in accord with the requirements of the specifications nor whether it is eligible to submit a bid. The record reflects that MAA will confirm that potential awardees are current on their tax obligations after bid opening and prior to award. As far as Appellant's assertion that PHS was not eligible to submit a bid we note that the contract specifications clearly contemplate situations in which a foreign corporation must register to do business in this state after bidding (IFB at SP-21, SP-1.25),³ and that St. Fin. & Proc. Code Ann. (SF) §13-222 gives an agency the discretion to allow a contractor to provide for payment of unpaid tax obligations prior to award. Certain other obligations i.e., the need for a proper license and insurance and a performance bond are also issues of responsibility and are confirmed by MAA prior to award.

³Sp-1.25B provides that : If the bidder is not currently registered, the bidder shall register and provide a copy of its Qualification Acknowledgment upon request from the Administration.

It is true that the IFB in conformance with SF §13-222 required a bidder to submit the bid affidavit with its bid. However, the fact that an agency requires information necessary to make a responsibility determination to be submitted with the bid does not and cannot convert this into a responsiveness issue; the bidder may still submit this information establishing its responsibility post-bid but pre-award. Niedenthal Corp. *supra* at pp.5-6; Control Systems Service, Inc., MSBCA 2 MSBCA ¶189 (1988) at p.4.

PHS has taken the necessary steps to make sure that it can validly do business in Maryland and that all of its State tax obligations are up to date at least for the last three tax years. The record reflects that prior to award, the MAA will confirm that PHS is current on its taxes and has all of the necessary licenses, insurance and bonds.

A determination by the procurement officer that a bidder is responsible is a discretionary decision that will not be overturned unless the procurement officer acted arbitrarily or capriciously or the decision is clearly erroneous. Covington Machine and Welding Co., MSBCA 2051, 5 MSBCA ¶436 (1998) at p.5. Here the procurement officer determined that, in light of all of the circumstances, the fact that PHS did not file personal property tax returns, that its foreign corporation registration therefore lapsed, and that its bid affidavit was therefore inaccurate, was not sufficient to indicate that PHS lacked the integrity and ability to perform the contract. There is a reasonable basis for this decision, and nothing to indicate that it was arbitrary or capricious.

According to the documentation submitted to the MAA, PHS acted promptly to bring itself into compliance with the law by following the procedure in the law for requalification as a foreign corporation, and paying the required fee and penalty. The required fee and penalty totals \$250.00. Maryland will only seek payment of back taxes for personal property owed for the most recent three tax years. PHS submitted documentation to MAA that it had brought its personal property tax returns up to date, at least for the three previous years for which Maryland would seek payment, and, further that for at least the last three tax years all of its other state tax obligations are current and never have been in arrears, including its corporate income tax, payroll taxes and unemployment taxes. PHS asserted that its failure to file personal property tax returns and lapse of foreign corporation registration were inadvertent, not intentional. While neither this Board nor the procurement officer could know with certainty if this is true, the fact that all of PHS's other obligations were up to date for the past three tax years lends credence to this assertion and provides a reasonable basis for the procurement officer's determination that it is true.

Accordingly, the Appellant's appeal of the final agency determination sustaining the PHS protest, having been withdrawn, is dismissed as moot and the appeal of the final agency denial of the Appellant's protest of November 27, 2001 is dismissed with prejudice. So Ordered this 11th day of March 2002.

Dated: March 11, 2002

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
Chairman

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 as 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 2267, appeal of Initial Healthcare, Inc. under Contract No. MAA-MC-2002-014.

Dated: March 11, 2002

Mary F. Priscilla
Recorder

The part of the Maryland Code that actually governs the situation here is the Corporations and Associations Article, not the Business Regulation Article. Under that provision of the law, before doing business in Maryland PHS is required to register or qualify as a foreign corporation. Corp. & Assoc. §7-301 *et seq.* provides certain penalties for a foreign corporation that fails to register or qualify; none of them include becoming ineligible to bid on a state contract. Indeed, §7-305 specifically states that failure of a foreign corporation to comply with the requirements of the Code does not affect the validity of its contracts.

There is also nothing in the terms of the MAA's Invitation for Bids or the Contract which suggests that PHS was ineligible to bid if it was not registered as a foreign corporation at the time of bid opening. Indeed, as noted, SP-1.25 of the contract acknowledges that there may be situations in which a foreign corporation bidding on a contract is not currently registered.

There is nothing in the procurement law that suggests that a foreign corporation, which is not registered to do business in Maryland, is ineligible to submit a bid. Whether PHS is registered as a foreign corporation and can thus validly do business in Maryland is an issue that goes to its ability to perform the contract, not whether it has agreed to comply with the requirements of the contract.
