

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF
KMA CONTRACTING, INC.

Under DGS Project No. ND-000-981-001

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Docket No. MSBCA 2140

October 13, 1999

Responsibility - Discretionary Determination - The Board will uphold a discretionary determination of a procurement officer unless the de-termination is unreasonable and thus constitutes an abuse of discretion.

APPEARANCE FOR APPELLANT

Donald E. Brand, Esq.
Bel Air, MD

APPEARANCE FOR RESPONDENT

John H. Thornton
Assistant Attorney General
Baltimore, MD

OPINION BY BOARD MEMBER STEEL

This matter comes before the Board through the appeal of KMA Contracting, Inc. (hereinafter "KMA") from the decision of the Department of General Services to reject its bid on the grounds that the contractor was non-responsible for failure to be promptly responsive to questions posed by the procurement officer following receipt of bids.¹

Findings of Fact

1. On May 3, 1999, DGS issued Invitation for Bids No. 001IT810561 (ITB) for DGS project No. ND-000-981-001, construction of modifications, pursuant to the Americans with Disabilities Act, to three buildings at the Savage Mountain Youth Facility in Lonaconing, Maryland. The modifications included a new ramp and parking at the dormitory building, a new ramp and restroom in a classroom, and restroom modification in the kitchen building.
2. A prehearing conference was held, but the record does not reveal whether or not the Appellant attended.
3. At bid opening on June 16, 1999, Appellant was low bidder for the project with a total bid price of \$33,795. The second low bidder was MAR/K enterprises, Inc. ("MAR/K") with a bid of \$47,476. Appellant's bid was approximately 33% below the Architect's estimate of \$50,535 and approximately 30% below the bid of MAR/K.

¹ Respondent also filed a motion to dismiss on grounds that the Appellant had alleged that it had not filed a protest. This motion is denied for the reasons set forth in the opinion.

4. The Procurement Officer, Mr. Robert Langton, was concerned that KMA might be unable to perform the project for the price bid. Therefore, on the afternoon of June 16, 1999, he sent KMA a fax transmission requesting that KMA "complete the attached Project Schedule of Values and Subcontractor listing form and forward a letter to the Procurement Officer expressing your complete understanding of the projects plans specifications and bid documents and that you confirm your bid price and the bid for this project. . . . as soon as possible but no later than June 11, 1999." [Sic].
5. Upon receiving the June 16 fax on the 16th, Mr. Mike McGuire of KMA called Mr. Langton by telephone and inquired about the deadline for response, and Mr. Langton indicated that he had intended the deadline for response to be June 21, 1999.
6. In that telephone call, Mr. Langton indicated his concern about the fact the bid was so low, and that a breakdown of the division of work was required so that the Procurement Officer could make a responsibility determination. According to the Agency Report and his testimony, Mr. Langton indicated that if the review of the information would disclose any discrepancies, he would request more information from KMA to clarify the discrepancy, or KMA would have the opportunity to request withdrawal of its bid due to mistake. He further indicated that the information was required to determine what percent of the job would be performed by the General Contractor (pursuant to General Conditions Section 9.03D) whether a subcontractor had been suspended or debarred, and to check for subcontractor evaluations and SHA contractor performance ratings.
7. General Condition 9.03 stated:

A. The contractor shall, as soon as practicable and before the execution of the contract, notify the architect and the Department in writing, of the names of subcontractors proposed for the principal parts of the work and for such others as the Construction Division or the architect may direct. Contractor shall not employ any subcontractor that the architect or the Department may object to as incompetent, unfit, or unsatisfactory.

* * *

D. The contractor shall not subcontract the contract as a whole or by trades or other portions in an amount of more than 75% of the monetary value of the contract. The remaining 25% shall be executed by the contractor with labor and materials directly purchased and paid for by the contractor. Costs of bonds, insurance, overhead, supervision, mobilization, etc. shall not be claimed as a portion of the 25% mentioned above. The execution of work by a subsidiary of the contractor will not be considered direct employment unless the Procurement Officer agrees otherwise.

8. On the morning of June 17, 1999, Mr. McGuire faxed back to Mr. Langton the Project Schedule of Values and Subcontractor Listing form with the values and percentages for each discrete division of work filled in. The form did not contain information about subcontractors. Mr. McGuire had crossed out a note at the bottom of the form stating, "This submission is in compliance with 9.03 of the General Conditions." He further wrote by hand at the bottom of the form: "This schedule of values is submitted as a courtesy and is subject to change."
9. At 4:49 p.m. on June 21, 1999, Mr. Langton faxed KMA another copy of the June 16 fax which was revised to reflect the correct deadline of June 21, and had a handwritten message

from Mr. Langton stating "please forward the remaining information."

10. At 8:37 a.m. on June 22, 1999 Mr. McGuire faxed the following response to Mr. Langton:

KMA Contracting, Inc. believes its offer to perform the services requested in the above referenced project number is complete. This is based on the documents in KMA's possession on June 16, 1999 and confirmed with our submission at 10:30 AM on that date. If you have any question, please call.

11. Mr. Langton forwarded the information furnished by KMA to Burrey Moser Gehr Architects, LLC ("BMG"), the Project Architect, who wrote to the DGS Project Manager (no copy was ever sent to Appellant):

We have received a copy of the schedule of values of the apparent low bidder and have found some differences from what we would have expected for this project. Examples include:

- Lack of dollars for finishes that would include painting and VCT flooring in two areas.

- For the amount of concrete which we assume includes all formwork and stone base material, the cost does not appear to be adequate.

- Another example would be the galvanized pipe railing which is normally expensive due to galvanizing process.

- There is no mention of toilet accessories being provided, the materials and installation would be \$200-\$300 alone.

- Door hardware, frames and doors for only \$1,200 does not indicate that the material called for would be provided.

BMG cannot recommend approval unless the contractor certifies that his proposal includes all the items indicated on plans and specs and that he has not missed any items. Also, we are concerned that the unit prices requested for additional work may have been taken to be included as part of the base bid work and therefore increasing the price.

This clearly was not in accordance with the specifications.

12. On June 22, Mr. Steve Gilliss (A DGS architect and project manager) had a telephone conversation with Mr. McGuire in which he discussed the project and indicated that Mr.

Langton still had some concerns. Mr. McGuire indicated that he understood that his bid had been low, that he had omitted two doors, but that he intended to perform at the price bid, partly because he had a contingency figure that would cover the price of the doors. When told that Mr. Langton still had some concerns, he asked Mr. Gilliss to ask Mr. Langton to call. Apparently the invitation was conveyed, but Mr. Langton did not call Mr. McGuire.

13. According to the Agency Report (which was adopted by Mr. Langton as true from the stand), Mr. Gilliss reported to Mr. Langton on his conversation with Mr. McGuire.² It is assumed that the invitation for Mr. Langton to telephone was conveyed, but Mr. Langton did not call Mr. McGuire.
14. On June 24, Mr. Langton notified KMA by letter that he found KMA to be "not responsible" for failure to comply with COMAR 21.04.01.01B(1) due to KMA's failure to timely submit information requested by Mr. Langton to allow him to make a responsibility determination. The letter stated:

On June 16, 1999, I sent you a letter by fax requesting that you complete and submit the Project Schedule of Values and Subcontractor Listing and that you confirm your understanding of the project and your price. This information was to be used by me to make a responsibility determination. My request was due in part to the fact that your bid was extremely low, 33 % lower than the Architect's estimate and 31% lower than the next lowest bid. My letter asked you to submit the requested information no later than June 21.

On June 17 you faxed me a Project Schedule of Values and Subcontractor Listing which was incomplete, in that it failed to list sub-contractors, and which raised further questions about your ability to perform the project. For example, the Schedule of Values showed \$5,000 for plumbing but said "(not part of spec)." Plumbing was included in the specifications.

Steve Gilliss, a DGS architect, reviewed your Schedule of Values and discussed your bid with you by telephone. The project Architect, Burrey Moser Gehr Architects LLC , also reviewed the Schedule of Values. Both Mr. Gilliss and the Architect questioned your ability to perform for the price bid.

On June 21, I contacted you and told you that I still needed the information you failed to send me the first time. You responded with another fax in which you said: KMA...believes its offer...is complete." The June 21 fax said further: "No sub-contract information is available at this time since KMA does not select sub-contractors until confirmation of contract award is given by D.G.S."

² Mr. Gilliss followed up his conversation with Mr. Langton by writing a letter on June 28, 1999 reiterating that he was still concerned about the low bid, in that amounts allotted for Concrete, Doors and Finishes were too low for the work required.

On June 24, I rejected your bid under COMAR 21.06.01.01B(1) for failure to provide me with information necessary for finding KMA to be a responsible bidder for the project. You submitted a letter of protest that day.

You were given adequate opportunity to provide information reasonably requested by the Department for the purpose of making a determination of your ability to perform the project as bid. You failed to furnish the information in a timely manner. Under COMAR 21.06.01.01 B(I) I was permitted to reject your bid. I see no reason to change that determination just because, as you said in your letter of June 24, you now wish "to respond directly to the facts of this matter." I needed a meaningful response by June 21.

15. On June 28, Mr. McGuire faxed a letter to Mr. Langton stating "Let there be no misunderstanding of my position in the matter of being accused of 'none responsive bidder'. I do contest that unilateral judgment" [Sic]. This letter was treated by Mr. Langton as a protest, and a procurement Officer's decision denying the protest was issued on July 1, 1999. KMA timely appealed to this Board, *inter alia* stating that "I don't know that it matters, but Langton took this as a 'protest' letter. It was not, and I don't know how he could have jumped to that conclusion." The Board finds that KMA's June 28, 1999 letter did constitute a protest under COMAR 21.10.02.01B(2). The Appellant brought a timely appeal on that protest, and the Board therefore considers the Procurement Officer's decision denying the protest.
16. On September 20, 1999 this contract was awarded³ in the face of the protest to the next low bidder.

Decision

This case involves the broad discretion allotted to a procurement officer in determining whether or not a bidder is "responsible", i.e., whether the bidder has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance. COMAR 21.01.02.01(77). State Finance and Procurement Article §13-206(a) requires that a procurement officer reject a bid from a bidder who is not responsible, i.e., does not have the apparent ability to meet the requirements of the IFB.

SF §13-206(c)(2)(i) (as well as COMAR §21.06.01.01.B) provides that a procurement officer may determine that a bidder is non-responsible for any "reason indicating that the person does not have . . . the capability in all respects to perform fully the requirements for a procurement contract." Thus, where the Procurement Officer has reached a determination regarding responsibility based upon a reasonable application of the specified criteria, this Board must uphold that decision. Custom Management Corporation, MSBCA 1086, 1090, 1 MICPEL

³ Award is defined as the transmission by the procurement agency, "after all required approvals have been obtained, of: (a) the executed contract; or (b) written notice of award to the selected vendor." COMAR 21.01.02.01(8). On September 20, 1999, the Departmental Procurement Review Board of the Department of General Services approved the award of the contract which is the subject of this appeal to MAR/K Enterprises, Inc., the next low bidder, in the face of the protest of Appellant.

¶28 (1982). This case thus turns on a determination of whether the Procurement Officer made a reasonable application of the specified criteria.

A procurement officer has an affirmative duty to verify before award that a bidder is responsible. COMAR 21.04.02.14D. In this instance, the Procurement Officer rejected Appellant's bid, according to his decision (see finding of fact 14), because KMA failed to provide subcontractor information as requested, because the architect and project manager had concerns that KMA would be able to perform⁴, and because Mr. McGuire had included on 9 the form the notation that the plumbing specifications had not been included in the bid package.

The Respondent argues that DGS was permitted to reject KMA's bid under COMAR 21.06.01.01B which states that a procurement officer may reject a bid on the ground that the bidder is not responsible for "unreasonable failure to supply information promptly in connection with a determination of responsibility..." Thus the Board must determine whether the Procurement Officer's findings that Appellant "did not timely furnish information", and that therefore it was "not responsible", were reasonable under the facts of this case.

It is clear that DGS had legitimate reasons for questioning KMA's bid and seeking information as to KMA's ability to perform as promised. The Procurement Officer, concerned about the fact that the KMA bid was considerably below the architect's estimate and the next low bid, properly requested additional information designed to inform him whether or not Appellant had considered all facets of the project. On June 16, a few hours after bid opening, he faxed a form to Appellant. With this form, the procurement officer included a cover sheet, with the following paragraph:

IMPORTANT MESSAGE: As the apparent low bidder for the above referenced DGS Project, we ask that you complete the attached Project Schedule of Values and Sub Contractor listing form and forward a letter to the Procurement Officer expressing your complete under-standing of the projects [sic] plans specifications and bid documents and that you confirm your bid price and bid for this project. Please forward the requested information by Fax as soon as possible or no later than June 11, 1999.

Upon receipt of the fax, Mr. McGuire telephoned Mr. Langton and Mr. Langton clarified that the date upon which his response was due was June 21, 1999. It appears from the Agency Report and the testimony at the hearing that in this brief conversation the parties did not extensively discuss either the lowness of Appellant's bid, or the substance of the faxed request from Mr. Langton.

Mr. McGuire filled out the form and faxed it to DGS on the next morning, June 17:

⁴ This factor would not be applicable to Mr. Langton's stated reason for rejecting the bid, COMAR 21.06.01.01B(1), unreasonable failure to supply information promptly. . . " BMG, in fact, stated that before it would approve, the Contractor would have to certify that it could do the work. That the Appellant did.

**PROJECT SCHEDULE OF VALUES
 AND SUB-CONTRACTOR LISTING**

DIVISION #	DIVISION	CONTRACTOR/ SUB-CONTRACTOR	% of Contract	Total Dollar Value
1	Gen. Repts.		12.2	51500
2	SITEWORK		10.6	25600
3	CONCRETE		14.8	50000
4	MASONRY		1.8	5000
5	MECHS		16.5	55500
6	FINISH CARPET		.8	7000
7	TELE. & POST. PAINT	UNLISTED - SEC. 10.3		
8	DOORS		2.2	12000
9	FINISHES		2.8	9000
10	PAINT CONCR.		2.6	8500
15	PLUMBING (NOT PART OF SPEC.)		14.8	50000
	PROJECT WARRANTY		0.5	22300
	UNIT PRICE #1		.9	3200
	UNIT PRICE #2		1.6	5200
	UNIT PRICE #3		1.2	4200
	UNIT PRICE #4		.4	1500
	TOTAL		100%	257750

THIS SCHEDULE OF VALUES IS SUBMITTED AS A COURTESY AND IS SUBJECT TO CHANGE.

AMZM
 6/11/79

This is a form normally used much later in the contract award process: after award and usually in preparation for the preconstruction conference. It is thereafter used as the basis for pay requisitions. Mr. McGuire understood that the form was asking him to name his subcontractors. Since only a few hours had elapsed since the bid opening, and because this was a relatively small project, Mr. McGuire was not ready to commit to who he would use as his subcontractors, a commitment not normally required until General Condition 9.03 was complied with, i.e., pursuant to 9.03 D, after award of the contract.

It had been Mr. McGuire's experience with the Department of General Services, and the State of Maryland, that he first would be notified of award; then he would be expected to identify his subcontractors, so that the State could determine whether the subcontractors were debarred or unsuitable for other reasons before the notice to proceed date. Thus, since he had not yet contracted with subcontractors for the job, he left that column blank on the form, and crossed out

the note at the bottom of the form which reads, "Note: This submission is in compliance with 9.03 of the General Conditions". He reiterated this position in his letter submitted to Mr. Langton several days later: "No sub-contractor list is available at this time since KMA does not select subcontractors until confirmation of contract award is given by D.G.S."

After he received the form by fax on June 17, Mr. Langton forwarded the form to Mr. Gilliss, the project manager, and the architect who had estimated the project. Mr. Langton did not convey any concern to Mr. McGuire about his failure to fill in the "subcontractor" column.

Mr. Langton testified at the hearing that he was seeking information about what pre-bid quotes Mr. McGuire had received from subcontractors for the various work that Mr. McGuire would contract out, not identification of the subcontractors Mr. McGuire had committed to use⁵. It is also likely that he was aware that KMA would probably itself perform much more than the 25% minimum work required to be performed by the general contractor. Mr. McGuire believed that he had satisfied Mr. Langton's request on June 17. However, Mr. Langton apparently did not believe that Mr. McGuire had satisfied the request contained in his fax of June 16, and refaxed it, with the addition of a handwritten notation correcting the due date to June 21, and adding, "Please forward the remaining information. RL" Mr. McGuire again looked at the fax, and replied by fax that KMA believed that its offer to perform the services was complete, intending to convey that he stood by his bid price.

Mr. Langton did not communicate with Mr. McGuire thereafter until he rejected his bid. Mr. Langton testified that he had not gotten in touch with Mr. McGuire from the time of receiving the June 21 letter (confirming the bid price) until he rejected the bid because he was very heavily involved with other projects, and didn't have time to communicate with him.

On June 23, Mr. McGuire had a conversation with Mr. Gilliss about the bid and acknowledged that he had forgotten to account for the price of two doors, but believed that that error was covered by the amount claimed for contingencies. Mr. Gilliss informed him that Mr. Langton had some concerns, but didn't identify those concerns. Mr. McGuire asked if Mr. Langton was there and could come to the phone (he wasn't) and then suggested that Mr. Gilliss ask Mr. Langton to call him if he needed to discuss anything further. Mr. McGuire was left with the impression that Mr. Gilliss "had his doubts, but he was going to proceed."

Mr. Langton testified, "The only thing I asked for was where he came up with the quotations." However, he acknowledged that the form which Mr. McGuire filled out asked who his subcontractors would be. However, without contacting Mr. McGuire to inform him that he only wanted information about subcontractor quotes (not subcontractor identification)⁶ he sent on

⁵ Mr. Langton stated that he was concerned that Mr. McGuire had simply guessed at the cost of the various work items.

⁶ See, *Chesapeake Bus and Equipment Company*, MSBCA 1347, 2 MICPEL ¶163 (November 2, 1987) See also, *Allstate Power Vac. Inc.*, MSBCA 2008, 5 MICPEL ¶420 (June 17, 1997). In that case the Procurement Officer properly found nonresponsible the apparent low bidder because he did not, as required by the IFB, submit a form within 5 days, and in fact did not respond at all until after the bid was rejected, despite requests for the required information. In the instant case, the contractor is trying to respond, and has done as an experienced contractor would reasonably have done, given the context of this request for information.

June 24 a notice to Mr. McGuire that he had not promptly supplied information in connection with its bid, and that therefore he had determined that KMA was not a responsible bidder and would not be considered for award of the project.

An additional reason listed for the Procurement Officer's determination was that the

Project Schedule of Values and Subcontractor Listing [] was incomplete, in that it failed to list sub-contractors, and which raised further questions about [KMA's] ability to perform the project. For example, the Schedule of Values showed \$5,000 for plumbing but said "(not part of spec.)" Plumbing was included in the specifications.

In fact, Mr. McGuire was correct in his representation. He was highlighting to Mr. Langton the fact that Section 15, which is a standard specification section, was not included in the bid documents. He listed prices and percentages for this section, despite the fact that it was not included in the specifications, because plumbing items were included in the contract drawings and KMA had therefore included the prices for plumbing in its bid.⁷ Therefore, the Board finds that these reasons⁸ for Mr. Langton's rejection of the bid were erroneous, and/or unreasonable.

While the Board believes that the Procurement Officer acted responsibly in initiating inquiry of the Appellant because of the low value of the bid in comparison to the engineer's estimate and the next low bid, where, as here, he has determined that the responses to his inquiry will be determinative whether or not the bid is rejected, the Procurement Officer must be clear in his requests for information. In this instance, it was not made clear to Mr. McGuire that what was being sought was subcontractor quote references, not a commitment as to who would be hired as subcontractors, pursuant to General Conditions 9.03, which is not required until after award.

Further, Mr. Langton acknowledged that a non-responsibility determination in this instance would affect the way that bids submitted in the future would be evaluated, if only insofar as additional requests for information might again be made earlier than would normally be required. KMA was found non-responsible for failure to provide information promptly pursuant to 21.06.01.01B(1), yet it should have been clear from the responses provided by KMA that the Procurement Officer had not made himself understood, and a follow-up conversation with Mr. McGuire prior to issuance of the rejection letter would have been reasonable. This is particularly

⁷ Counsel for Respondent acknowledged that the bid documents as sent to potential bidders and attached as Exhibit A to the Agency report were incomplete, and stopped at Division 10 of approximately 15 categories: "It is unusual considering the size of the plumbing contract in relation to the total bid it would be unusual to have a set of specifications and have no plumbing specifications. The . . . spec book provides basically the boiler plate and it also provides the minimum requirements of quality manufacturer, etc. None of that was in these specifications. It's noted on the drawing. Not as complete as it would be had it been included."

⁸ In the appeal to the Board, Appellant expressed the belief that Mr. Langton had rejected his bid because of Mr. McGuire's prior association as consultant with a troubled contractor, Reedwood Contracting Company. The Board finds that Mr. Langton made no assumptions of KMA's competency as a result of Reedwood's problems. Mr. Langton knew that Mr. McGuire had experience with Americans with Disabilities Act construction, believed from his experience with Mr. McGuire that he was a decent contractor, and testified that prior project managers had spoken highly of Mr. McGuire. In fact, Mr. Langton testified that Mr. McGuire never gave him the impression that he could not do the job.

so when Mr. Langton had made it clear to Mr. McGuire that if the review of the information would disclose any discrepancies, he would request more information from KMA to clarify the discrepancy, and/or that KMA would have the opportunity to request withdrawal of its bid due to mistake.

The Board therefore finds that the record fails to demonstrate that the Appellant unreasonably failed to supply information. The record reflects that the information requested was in fact provided. While there is a question concerning whether the procurement officer requested information regarding which subcontractors the Appellant proposed to use, based on 9.03 of the General Conditions, award had not yet occurred, and therefore the Appellant was not legally required to identify subcontractors. The Procurement Officer testified that he was not seeking who the subcontractors would be, but what subcontractor quotes were relied upon. However, when the form was returned with the statement that subcontractors would not be provided until the bidder was awarded the contract, instead of clarifying his request, the Procurement Officer simply rejected the bid.

The Board is aware that the project has been awarded to the next lowest bidder, and in all likelihood is nearly completed. However, in light of the fact that there does appear to be some future ramification to the finding that this Appellant was non-responsive for failure to promptly reply to a request for information from the procurement officer, the Board sustains the appeal.

Wherefore, it is hereby Ordered this day of October, 1999 that the appeal is sustained.

Dated:

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
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 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 2140, appeal of KMA CONTRACTING, INC., Under DGS Project No.ND-000-981-001 .

Dated:

Mary F. Priscilla, Recorder

