

in any event, dictates award to it as the lowest responsive bidder. MTA, however, contends that the procurement officer's decision had a reasonable basis and that Appellant's appeal, accordingly, is without merit.

Findings of Fact

1. On July 20, 1984, MTA issued an IFB for Contract No. MTA 5-9-5 for the rehabilitation of twenty-five (25) GMC Model T6H-5306A transit coaches and twenty-five (25) Flexible Model 53096-8-1 transit coaches.¹

2. Award of separate contracts was to be made to the lowest responsive and responsible bidder for each type of transit coach.

3. Paragraph 2 of the IFB's General Provisions provided, in pertinent part, as follows:

* * *

f. In the event a Bidder believes that the MTA's specifications are unfairly restrictive, the matter shall be promptly brought to the attention of the Director of Contract Administration. Such matters will be submitted to the address in Article 3 in writing with specific details in order that the matter may be fully considered and appropriate action taken by the MTA prior to the closing time set for bids.

4. Paragraph 6 of the IFB's Special Provisions entitled "Qualification of Bidders" provided as follows:

To qualify for award of this contract bidder must have had at least two (2) years satisfactory experience in the rehabilitation of transit coaches comparable to those on this contract. Further, the bidder must be a remanufacturer with an in-house manufacturing operation of sufficient capacity to assure a steady supply of replacement components. A bid may be rejected at the discretion of the MTA, if the bidder is deemed to have inadequate experience and resources to perform the contract. The MTA shall have the right to conduct a pre-award survey of one or more bidders.
(Underscoring added).

This definitive responsibility criteria was not objected to prior to bid opening by any prospective bidder.

5. The IFB Technical Specifications required the successful contractor(s) to conduct major mechanical rehabilitation of the MTA transit coaches described. The successful contractor(s) were to completely dismantle the delivered coaches and repair or replace, when necessary, all components of the transit coaches as described in the technical specifications of the

¹Addendum No. 1 changed the IFB requirement from the rehabilitation of 35 GMC transit coaches and 15 Flexible transit coaches to the rehabilitation of 25 GMC transit coaches and 25 Flexible transit coaches.

contract document. These components were to include: (1) understructure, suspension, and running gear; (2) body; (3) heating system; (4) electrical system; (5) power plant; (6) air conditioning system; (7) finish; and (8) testing.

6. Of the seven bids timely received and opened on September 26, 1984, three were rejected as nonresponsive. The results of the remaining four responsive bids were as follows:

	<u>Item No. 1</u> <u>25 GMC Buses</u>	<u>Item No. 2</u> <u>25 Flxible Buses</u>
Appellant	\$1,782,000.00	\$1,766,900.00
Body Rite Repair Co.	\$2,018,462.50	NO BID
Coach Build- ers, Inc.	\$2,052,430.00	\$1,947,430.00
Flxible Corp.	NO BID	\$2,570,700.00

7. A completed "Contractor's Questionnaire, Pre-award Evaluation Data" form was submitted with Appellant's bid as required by the IFB. This form demonstrated to MTA that Appellant's prior experience consisted primarily of the rehabilitation of school buses. The questionnaire indicated, however, that Appellant had received one contract to rehabilitate ten transit coaches in 1983 for \$50,000 and another to rehabilitate ten transit coaches in 1984 for \$60,000. The small dollar amounts involved indicated limited experience in major transit coach rehabilitation work. Less than two years experience also was evidenced on the form. Appellant's questionnaire, however, indicated that it had hired both mechanics and paint and body repair personnel from a defunct firm that had done major transit coach rehabilitation work in 1981 and 1982. Uncertain, therefore, as to Appellant's relevant experience level, the MTA procurement officer requested Appellant to provide additional information establishing that it had at least two (2) years satisfactory experience rehabilitating transit coaches comparable to the GMC and Flxible transit coaches.

8. Appellant provided additional information concerning its qualifications in a meeting with the MTA procurement officer and MTA officials on October 8, 1984 and by letters dated October 5, 10, 16, 17 and 22, 1984. MTA also received copies of resumes of Appellant's employees. Further, in the meeting with the MTA procurement officials on October 8, 1984, Appellant, for the first time, objected to the definitive responsibility criteria as being overly restrictive. (Tr. 90). Appellant's objection to the definitive responsibility criteria was reiterated in its October 10, 1984 letter.

9. On October 25, 1984, the MTA procurement officer informed Appellant that it was a nonresponsible bidder and thus ineligible for award since neither Appellant nor its officers and employees possessed the requisite experience to satisfy the definitive responsibility criteria. The procurement officer determined that Appellant had never totally rehabilitated a single transit coach comparable to an MTA transit coach and that it was not currently performing such work. In addition, the MTA procurement officer informed Appellant that its objection to the restrictiveness of the IFB's responsibility criteria was untimely.

10. Appellant filed a protest on November 3, 1984 contending that (1) its protest regarding the restrictiveness of the IFB's experience criteria was timely; (2) it met the experience requirement of the specifications; and (3) award to Appellant as the low bidder was in the public's best interest.

11. The MTA procurement officer denied Appellant's protest in his final decision issued on November 30, 1984 finding that Appellant was not a responsible bidder since it did not meet the definitive responsibility criteria. Appellant did not demonstrate that it had two years satisfactory experience rehabilitating comparable transit coaches or equipment of at least equivalent or greater complexity. Further, Appellant did not have a sufficient number of personnel with the quality and length of experience to satisfy the definitive responsibility criteria. The procurement officer also determined that Appellant's protest of the restrictiveness of the definitive responsibility criteria was untimely since it was submitted after bid opening.

The following paraphrases the basis for the MTA procurement officer's nonresponsibility determination:

- a. Appellant, formed in October 1982, has not totally rehabilitated one comparable transit coach nor is it currently performing such work.
- b. Appellant's primary experience has consisted of the rehabilitation of school buses, including work on school bus sub-systems and paint and body repair work. However, work required to rehabilitate a school bus is not comparable to the work required to rehabilitate a transit coach due to the greater complexity in design and structure of a transit coach.
- c. Appellant's work on transit coaches does not meet the two year requirement for satisfactory work on comparable transit coaches. Appellant's work under two contracts awarded in June 1983 and April 1984, at an average price of \$5500 per transit bus coach, did not require major rebuilding, installation and repair work comparable to the work that will be required by MTA's contract at an approximate price of \$75,000 per transit coach. Appellant's work in August 1983 installing a modified engine cradle, engine, and transmission in one RTS-04 and four RTS-03 GMC coaches is not comparable since the instant contract does not include work on RTS type coaches, and the time period was less than the two years of experience required.
- d. Appellant's personnel lack the requisite two years of experience rehabilitating comparable transit coaches. The experience of Appellant's vice president in supplying tools and parts to another company involved in refurbishing transit coaches, and his position as the president and general manager of an auto and truck parts and repair business does not give him the requisite comparable experience. Further, examination of the resumes of Appellant's mechanical personnel did not

demonstrate that Appellant had a sufficient number of personnel with comparable transit coach experience to perform the contract satisfactorily.

12. Appellant filed a timely notice of appeal with this Board on December 17, 1984.

13. On Tuesday, February 5, 1985, Appellant's expert reviewed the IFB's Technical Specifications and the resumes of Appellant's personnel. (Tr. 41). He also undertook a two hour tour of Appellant's facility and interviewed its personnel. (Tr. 53). The expert, however, did not observe Appellant's personnel in the performance of rehabilitation work on comparable transit coaches. (Tr. 53). Based on this investigation, Appellant's expert concluded that Appellant is capable of rehabilitating the MTA transit coaches on a schedule that would permit timely performance under the IFB's requirements. (Tr. 49). However, he made no determination as to whether Appellant had experience meeting the IFB's definitive responsibility criteria. (Tr. 42). The expert also concluded that Appellant's experience in rehabilitating school buses would not qualify it to rehabilitate MTA transit buses. (Tr. 59-60).

Decision

The central issue in this appeal is whether Appellant is a responsible bidder under the definitive responsibility criteria established by the IFB. Under Maryland law, the determination of a bidder's responsibility² is the duty of the procurement officer who is vested with a wide degree of discretion and business judgment in making that determination. Louise T. Keelty, Esq., MSBCA 1195 (September 26, 1984); Board of Education of Carroll Co. v. Allender, 206 Md. 466, 112 A.2d 455 (1954); see also Keco Industries, Inc. v. United States, 203 Ct.Cl. 566, 576, 492 F.2d 1200 (1974). The rationale for granting procurement officers such leeway has been addressed as follows:

"Deciding a prospective contractor's probable ability to perform a contract to be awarded involves a forecast which must of necessity be a matter of judgment. Such judgment should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the contracting officers involved who should be in the best position to assess responsibility, who must bear the major brunt of any difficulties experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the State's [Government's] behalf. 39 Comp. Gen. 705, 711. * * * "

43 Comp. Gen. 228, 230 (1963). In this regard, a procurement officer's finding of nonresponsibility will not be disturbed unless it is shown that the determination was made in bad faith or lacked a reasonable basis. Compare

²COMAR 21.01.02.59 provides:

"'Responsible bidder or offeror' means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which shall assure good faith performance."

Solon Automated Services, Inc. v. University of Maryland, et. al; Miscellaneous Law No., 82-M-38 and 82-M-42 (Cir. Ct. Baltimore Co., October 13, 1982) (and cases cited therein); Louise T. Keelty Esq., supra, at p. 7; Amco Tool & Die Co., 62 Comp. Gen. 213 (1983), 83-1 CPD ¶246; RIOCAR, Comp. Gen. Dec. B-180361, May 23, 1974, 74-1 CPD ¶282; 49 Comp. Gen. 553 (1970). Consistent with this principle, the quality and sufficiency of the information presented relative to compliance with an IFB's definitive responsibility criteria necessarily is reserved for the procurement officer's judgment and a nonresponsibility determination based on application of those specified criteria will be upheld unless determined to be unreasonable. Louise T. Keelty, Esq., supra; E. C. Campbell, Inc., Comp. Gen. Dec. B-204253, February 2, 1982, 82-1 CPD ¶76; The Mark Twain Hotel, Comp. Gen. Dec. B-205034, October 28, 1981, 81-2 CPD ¶361; Haughton Elevator Division, Reliance Electrical Co., Comp. Gen. Dec. B-184865, 55 Comp. Gen. 1051 (1976), 76-1 CPD ¶294; Westinghouse Air Brake Company, Comp. Gen. Dec. B-191537, February 15, 1979, 79-1 CPD ¶109; Gould, Inc. and Fuji Electric Co., LTD., Comp. Gen. Dec. B-190969, August 4, 1978, 78-2 CPD ¶86.

In reaching his nonresponsibility determination, the MTA procurement officer reviewed the data submitted with Appellant's bid in addition to extensive information submitted by Appellant after bid opening. The MTA procurement officer also relied on the technical analysis of Mr. James F. Buckley, the MTA Director of Maintenance who has had extensive experience in the major rehabilitation of transit coaches. (Tr. 65, 68). The experience level of Appellant's personnel was considered in addition to the firm's previous experience as an entity doing similar work. Compare Haughton Elevator Division, Reliance Electrical Co., supra; 36 Comp. Gen. 673 (1957). Further, the type of buses which Appellant previously had rehabilitated during its existence as a firm as well as the nature and scope of the rehabilitation work were considered. After reviewing the information provided by Appellant, the MTA procurement officer concluded that Appellant did not have a sufficient number of personnel meeting the IFB's definitive responsibility criteria to perform the contract in a timely and satisfactory manner.

Although MTA personnel did not visit Appellant's facility, there was no legal or regulatory requirement that this be done. Further, MTA's decision not to make a facility inspection certainly was reasonable given the plethora of information it received indicating that Appellant was not a responsible bidder.

Appellant's position before us is that the MTA procurement officer incorrectly exercised his discretion and subjective business judgment in finding Appellant nonresponsible based on the information presented to him by Appellant. Since Appellant contends that both its experience as a firm and the experience of its personnel meet the definitive responsibility criteria, it maintains that the MTA procurement officer's finding was unreasonable. We disagree.

Here Appellant presented evidence through an expert witness who had reviewed the IFB, evaluated the backgrounds of Appellant's employees, visited its facility for a two hour period, and had interviewed some of Appellant's employees. The sole thrust of his testimony was that Appellant was qualified to perform the work. He made no determination that Appellant had experience equivalent to the IFB's definitive responsibility criteria and testimony was not elicited from him, nor was any other evidence presented, that the

MTA procurement officer's nonresponsibility determination was founded on an unreasonable basis from either a technical or business standpoint based on application of the definitive responsibility criteria. Although Appellant's witness concluded that Appellant had the capability to perform satisfactorily, the specific issue before the Board is whether the MTA procurement officer's nonresponsibility determination was reasonable based on the application of the definitive responsibility criteria and not whether Appellant has shown that it was a responsible bidder generally. Accordingly, the conclusion of Appellant's witness that Appellant could perform satisfactorily is not sufficient to invalidate the MTA procurement officer's reasonable determination that Appellant did not meet the IFB's definitive responsibility criteria and thus was a nonresponsible bidder. Compare Allied Contractors, Inc., MSBCA 1191 (August 16, 1984), p. 16; Gorin v. Board of County Commissioners for Anne Arundel Co., 244 Md. 106, 223 A.2d 337 (1966).

Appellant next argues that the IFB's definitive responsibility criteria restricted competition contrary to UMTA Circular C4220.1A,³ if applied literally to require bidders to have two calendar years of satisfactory experience while in existence as a firm. Further, Appellant maintains that the IFB's definitive responsibility criteria were vague and ambiguous.

Even though the MTA procurement officer did not require Appellant to have two calendar years of experience while in existence as a firm in order to meet the IFB's definitive responsibility criteria, Appellant was aware of the two year requirement prior to bid opening. Further, the issue of whether the IFB's definitive responsibility criteria was vague or ambiguous also was apparent. State bid protest procedures require that such alleged improprieties in a solicitation, apparent prior to bid opening, be raised prior to bid opening by protest to the procurement officer. COMAR 21.10.02.02A; COMAR 21.10.02.03.⁴ Here, Appellant neither sought clarification nor filed a protest raising the restrictiveness or ambiguity of the specifications until after bid opening. Accordingly, this aspect of the protest is dismissed as untimely. Dasi Industries, Inc., MSBCA 1112 (May 5, 1983).

Finally, Appellant contends that it is in the public's best interest to award the contract to it as the low responsive bidder. The public's interest, however, is best served when State agencies faithfully adhere to Maryland's

³UMTA Circular C4220.1A provides, in pertinent part, as follows:

"All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition consistent with this Circular. Procurement procedures shall not restrict or eliminate competition. Examples of what are considered to be restrictive of competition include, but are not limited to: (1) placing unreasonable requirements on firms in order for them to qualify to do business . . . ;"

⁴COMAR 21.10.02.03 provides, in pertinent part, that "[p]rotests based upon alleged improprieties in any type of solicitations which are apparent before bid opening . . . shall be filed before bid opening"

procurement law and regulations. In this regard, Maryland procurement law directs that in competitive sealed bid procurements award is to be made to the low responsive and responsible bidder. COMAR 21.05.02.13A.⁵ Here, the MTA procurement officer reasonably determined that Appellant was not a responsible bidder for this procurement. Appellant thus is not eligible for award and the public interest would not be served by ignoring its status and awarding it a contract in contravention of law.

For the foregoing reasons, therefore, the appeal is denied.

⁵COMAR 21.05.02.13A provides, in pertinent part, as follows:

"The contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the lowest bid price or lowest evaluated bid price. . . ."