

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MACKE BUILDING SERVICES,)
INC.)
Under Towson State University) Docket No. MSBCA 1283
RFP No. 461)

July 1, 1986

Multi-Step Sealed Bidding - Multi-step sealed bidding is a two phased process in which bidders submit unpriced technical offers or samples, or both, to be evaluated by the State and a second phase in which those bidders whose technical offers or samples, or both, have been found to be acceptable during the first phase have their price bids considered.

Multi-Step Sealed Bidding - Responsiveness - The concept of strict responsiveness is not present in step one of a multi-step sealed bidding procurement. To be acceptable the unpriced step one technical offer need only comply with the basic or essential requirements of the specifications. However, whether a technical offer is acceptable is a matter entirely within the discretion of the procurement officer. Accordingly, a determination that an offer is unacceptable will not be disturbed unless clearly unreasonable.

The determination that Appellant's technical offer was not acceptable was not clearly unreasonable where Appellant failed to provide detailed information specifically requested by the RFP concerning how the services requested (janitorial services) were to be performed.

APPEARANCE FOR APPELLANT	None
APPEARANCE FOR RESPONDENT	Christine Steiner Assistant Attorney General Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals a Towson State University (University) procurement officer's decision upholding the determination of a University procurement evaluation committee that Appellant was nonresponsive to a Request for Proposal (RFP) for providing cleaning services at the University and not a responsible offeror.

Findings of Fact

A hearing was not requested pursuant to COMAR 21.10.07.06 and Appellant elected not to comment on the Agency Report as provided in COMAR 21.10.07.03D. Accordingly, the Board makes its findings of fact based upon the written record before it consisting of the Agency Report and its attachments, Appellant's notice of appeal and Appellant's technical offer in response to the RFP¹ as follows:

1. Located on 306 acres in Towson, Maryland, the University campus consists of 33 buildings — residence and lecture halls, and academic, administration, student union, library, maintenance, power plant and multi-purpose types of buildings. The gross square footage of the buildings is 2,327,789 of which approximately 1,578,794 square feet requires daily cleaning.

2. The University currently spends approximately 1.3 million dollars on cleaning services annually. In fiscal year 1987, in addition to the cleaning needs of the University population, the University will expect approximately 9,000 visitor days by outside groups using rooms which must be cleaned every day. Moreover, the University rents facilities for concerts, banquets, meetings and trade shows, all of which require special cleaning considerations. The current cleaning services vendor is Appellant who has provided cleaning services to the University since July 1983 operating with between 100-135 employees during the past three years.

3. In mid 1985, the University decided to issue a comprehensive RFP which was to be more detailed than the 1983 solicitation and designed to both address known problem areas and to anticipate new problems. To this end, the RFP, which took several months to prepare, set forth minimum man-hour requirements, required bidders to submit detailed building inventories of equipment and staffing levels and also incorporated minimal daily cleaning routines to be performed in each building during each shift along with a detailed description of all periodic cleaning responsibilities.

4. On January 24, 1986 the RFP for a three year contract was prepared for advertisement in the next issue of the Maryland Register and sent to potential bidders.

5. The RFP appraised bidders that the procurement would be conducted pursuant to the multi-step competitive sealed bid process outlined in COMAR 21.05.02, and described this method as involving:

[A] two-phased process requiring interested bidders to submit an unpriced technical offer to be evaluated by the University's five person evaluation committee. Upon receiving the recommendations of this committee, the procurement officer will review the competitive bids from all bidders whose technical offers were found to be acceptable. In order for a bidder to be classified as acceptable, his/her bid must be considered "responsive" and he/she must be considered "responsible" as defined in COMAR 21.01.02.60 and 21.01.02.59.

¹Appellant's technical offer in response to the RFP was obtained by the Board pursuant to its request under COMAR 21.10.07.05.

(RFP, ¶III).

The RFP specified that technical offers would be evaluated by the University's evaluation committee on certain specific criteria listed in the RFP. (RFP, ¶IV A). These specific criteria in order of decreasing relative importance consisted of a written narrative plan in sufficient detail to permit evaluation, including staffing and supervisory levels for each building; comparable jobs; related experience; resumes of managerial staff; ability to provide backup support; wage rates to determine capability to attract and retain personnel; estimated annual cost of supplies; and inventory of equipment. The RFP provided that responses to the written narrative plan requirement based solely upon generalized company procedure manuals or training documents would be considered nonresponsive. The RFP also notified prospective bidders that only those vendors whose technical responses qualified them as "responsive" and "responsible" would be eligible to submit financial offers.

6. After the RFP was advertised and distributed, and in response to telephone questions from prospective bidders and questions that arose during the pre-bid conference of February 10, 1986, Addenda 1 through 3 were prepared and forwarded to prospective bidders in order to clarify the intent of the RFP and in relevant part amplified the University's concern with specific vendor methodology.

7. Technical offers pursuant to phase one of the process were due Friday, February 28, 1986. Seven companies responded, including Appellant.

8. During the week of March 3-10, 1986, the University's evaluation committee, consisting of the University's Contract Services Manager, Assistant Director for Auxiliary Enterprises and Manager for Contractual Services, met to discuss their review of each technical offer. Following this review, requests for clarification of their offers were sent to three firms deemed provisionally qualified. These firms provided responses that clarified their offers to the satisfaction of the evaluation committee. On March 4, 1986, Appellant was asked by the Manager for Contractual Services (via telephone call) to supply the attachments that had been referenced in Part III of its offer but were missing from the submission. These attachments² were provided the committee the next day.

9. As a result of their evaluations, the evaluation committee recommended to the procurement officer that three offerors were deemed "responsive" and "responsible" and should be requested to submit financial proposals [bids] and that the other four offerors including Appellant were not deemed to be "responsive" or "responsible" and should be eliminated from the procurement. The procurement officer agreed with the recommendation of the evaluation committee and authorized the committee to so notify the various vendors. Accordingly, by letters dated March 21, 1986, those offerors whose response was deemed "responsive" and "responsible" were notified to submit a financial proposal [bid] by April 7, 1986. By letter dated March 24, 1986, those offerors not deemed "responsive" or "responsible" were notified that they were eliminated.

²The attachments consisted of customer reference lists, position descriptions, sample inspection reports, and company training program materials.

10. Appellant protested its elimination by letter dated April 1, 1986 which stated in pertinent part:

We are in receipt of your letter dated March 24, 1986, that indicates your review board has decided to view Macke Building Services, Inc. as "non-responsive" and "not responsible" for providing cleaning services at Towson State University.

We wish to officially protest this decision for the following reasons:

1. We are the incumbent contractor, and have provided services continuously since July 1983.
2. While we have experienced certain difficulties during the term of our contract, communication between designated University officials and Macke Building Services management members, indicated that the services we have provided have adhered to contract specifications and have been well within acceptable parameters.
3. Having had the opportunity of providing services since 1983, Macke Building Services is intimately aware of the requirements and special considerations inherent in an undertaking of this magnitude, and to view our technical understanding of the contract and noted specifications as less than complete, is erroneous.

11. Following a debriefing of Appellant by the procurement officer and the evaluation committee on April 10, 1986, the procurement officer wrote Appellant denying its protest as follows:

After careful review of your company's letter dated April 1, 1986 protesting the decision that you were not "responsive" or "responsible", and after our debriefing meeting held on April 10, 1986, as the Procurement Officer of Towson State University, I find the following:

Your first reason for protest stated:

"We are the incumbent contractor and have provided services continuously since July 1983."

Being the incumbent contractor is not relevant to the Request for Proposal.

Your second reason for protest stated:

"While we have experienced certain difficulties during the term of our contract, communication between designated University officials and Macke Building Services management members, indicates that the services we have provided have adhered to contract specifications and have been well within acceptable parameters."

Service provided during the present contract has never been questioned and is not relevant to the Request for Proposal.

Your third reason for protest stated:

"Having had the opportunity of providing services since 1983, Macke Building Services is intimately aware of the requirements and special considerations inherent in an undertaking of this magnitude, and to view our technical understanding of the contract and noted specifications as less than complete, is erroneous."

We could not assume that the Macke Company was aware of the requirements and considerations inherent in an undertaking of this magnitude. The Request for Proposal asked for specific answers to specific questions which were not answered.

12. The Appellant's response which was judged deficient contained in large measure merely standardized statements regarding company policy and procedures; the response did not as requested (see Finding of Fact No. 5) contain a plan of operation in sufficient detail to permit evaluation, including staffing and supervisory levels for each building. Moreover, the response failed to supply any details on back-up capabilities and did not provide information on supply costs.

13. On April 24, 1986, Appellant noted a timely appeal to this Board.

Decision

Multi-step sealed bidding is defined in COMAR 21.05.02.17 as:

". . . a two-phase process in which bidders submit unpriced technical offers or samples, or both, to be evaluated by the State and a second phase in which those bidders whose technical offers or samples, or both, have been found to be acceptable during the first phase have their price bids considered."

In connection with multi-step sealed bidding, this Board has noted that:

Under step one of a multi-step procedure, a request for Technical Proposals (RFTP) is issued. The procurement officer then reviews proposals submitted in response thereto in order to ascertain whether they are acceptable, reasonably susceptible of being made acceptable, or unacceptable. Wood, Two Step Formal Advertising, George Washington University Government Contracts Monograph No. 12 (1979); compare COMAR 21.05.03.03B. Where a Technical Proposal is reasonably susceptible of being made acceptable, additional clarification and supporting data may be sought by the procurement officer. Thereafter, all offerors whose Technical Proposals have been deemed acceptable are issued invitations to bid the work described in their accepted proposals. This constitutes the second step of the procedure.

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The concept of strict responsiveness is not present in step one of a multi-step procurement. To be acceptable, a Technical Proposal need only comply with the basic or essential requirements of the specifications rather than all specification details as in a competitive sealed bid. Page Airways, Inc., Comp. Gen. Dec. B-185166, 76-2 CPD ¶95 (1976), p. 4. Whether a proposal is acceptable is a matter entirely within the procurement officer's discretion and his determination cannot be overturned absent a showing that it was arbitrary, capricious or not made in good faith. Compare Struthers Electronics Corp., Comp. Gen. Dec. B-186002, 76-2 CPD ¶231 (1976); Columbus McKinnon Corporation, 46 Comp. Gen. 34, 41 (1966).

* * *

The overall determination of the relative desirability and technical adequacy of proposals is primarily a function of the procuring agency and it enjoys a reasonable range of discretion in the evaluation of proposals and in the determination of which proposal is technically acceptable. Compare RCA Corporation, Comp. Gen. Dec. B-183101, 75-2 CPD ¶302 (1975), p. 4. This function, after all, involves the exercise of judgment by the procuring agency's specialists and technicians. A technical determination of this type cannot be ignored by this Board in the absence of a clear showing of unreasonableness. Beilers Crop Service, MSBCA 1066 (September 16, 1982), p. 6.

Neoplan USA Corporation, MSBCA 1186 (June 25, 1984) at pp. 24, 25, 27; 1 MSBCA (MICPEL) ¶76 at pp. 19, 20, 21. The evaluation committee and procurement officer herein found that the Appellant's technical offer or proposal was not "responsive" or "responsible." This terminology used to describe the rejection of Appellant's unpriced technical offer may not be completely appropriate since the concept of strict responsiveness is not present in step one of a multi-step procurement and responsibility³ as a concept (in a procurement by multi-step sealed bidding as distinct from a procurement by competitive negotiation⁴) is generally thought to apply to capability to perform as distinct from the acceptability or not of a written offer. Nevertheless, it is clear that the agency action, despite the terminology employed, constituted a rejection of Appellant's technical offer for its failure to comply with certain basic or essential requirements of the

³The Agency Report suggests that the evaluation committee and the procurement officer found Appellant to be nonresponsible because it did not provide a sufficiently detailed response to the RFP to enable the University to assess its capability to perform the contract requirements as required by the definition of a responsible bidder or offeror under COMAR 21.01.02.59 which provides in relevant part that a responsible bidder or offeror be ". . . a person who has the capability in all respects to perform fully the contract requirements. . . ." We need not discuss the issue of Appellant's responsibility, however, in view of our determination that no error lies in the University's rejection of Appellant's technical offer.

⁴In a procurement by competitive negotiation only firms who submit proposals that are acceptable or potentially acceptable are deemed to be responsible offerors. COMAR 21.05.03.03C.

specifications. (Findings of Fact Nos. 5, 12). We note that the evaluation committee made judgments that certain offers were capable of being made acceptable and sought formal clarification from these vendors evidencing the understanding of the procuring agency that strict responsiveness was not required in the multi-step sealed bidding process. We also note the informal contact with Appellant to supply missing exhibits referenced in Part III - Attachments of its proposal as likewise evidencing the committee's understanding that strict competitive bid responsiveness was not required. We, therefore, conclude that the University did not despite the use of the terms responsive and responsible apply criteria of strict responsiveness and that Appellant was not prejudiced by the method of evaluation which in fact looked to whether an offer was acceptable, reasonably susceptible of being made acceptable or unacceptable.

Review of the record before us does not suggest that the University's determination that Appellant's technical offer was unacceptable due to the failure to address specific criteria was clearly unreasonable. The grounds specified in Appellant's protest (i.e., incumbency, satisfactory performance of services and familiarity with the undertaking) do not overcome the failure to provide responses to information requested by the RFP sufficient to demonstrate that its offer was either acceptable or capable of being made acceptable.

Accordingly, we deny the appeal.

