

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of McGregor Printing Corporation)
)
Under DGS Request for Quotation) Docket No. MSBCA 1697
No. Q31872)
)
December 30, 1992

Bid Protest; Responsibility vs Responsiveness - Where an RFQ requires bidders to obtain an affidavit from a third party in which the third party makes specific promises materially affecting performance the affidavit is the equivalent of a performance specification. Thus the affidavit involves a matter of bid responsiveness and must be provided by the bidder prior to bid opening to make its bid responsive.

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APPEARANCE FOR RESPONDENT: Michael P. Kenney
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OPINION BY MR. MALONE

This is a timely appeal from a Department of General Services (DGS) Procurement Officer's final decision that the bid of the low bidder in this Request for Quotation (RFQ)¹ was responsive, and that the Paper Manufacturer's Affidavit of Recycled Content was a responsibility issue which could be provided at anytime up to award.

Findings of Fact

1. DGS issued RFQ 31872 for stock computer paper with a bid due date of October 6, 1992.
2. The RFQ required that the paper meet the following specifications: "Recycled white paper: (ground wood free) at a minimum all papers bid and supplied under this contract must be composed of 50% recovered paper material and 10% post consumer waste material as defined by the EPA. Submit samples with bid. must have a minimum brightness of 78."
3. The RFQ further stated that a, "Mill certification from must be completed and notarized." The RFQ materials included this

¹ RFQ is equivalent to IFB (Invitation for Bid). COMAR 21.01.02.01(76).

certificate as a DGS stock form affidavit for completion by bidders. The certificate was to be completed and sworn to by a mill representative of the bidders source of manufacture of the actual paper stock itself. By executing the certificate the mill representative certified that the paper supplied to the bidders would meet a stated total recycled content, amount of post consumer content, target brightness and that DGS and the paper manufacture further "agreed that representatives of the State of Maryland, Dept. of General Services, Division of Printing and Publication shall have access to the mill and purchase - production records at anytime during working hours for the purpose of verifying the actual percentage and use of recycled materials in the paper(s) furnished to the State of Maryland." The provision for DGS inspection of the manufacturer's records is not recited in the body of the RFQ; only on the mill certificate. The certificate further names the specific mill source of the manufacturer in the affidavit.

4. The mill certificate is a new form used in paper supply procurements. The DGS required this certificate in order to have a guarantee from the manufacturer that the paper meet the RFQ and that DGS could verify the papers content by a review of the manufacturers records. DGS could have sent the paper for testing to an outside lab to determine if the paper met the specifications but wanted an alternative method to verify the paper quality.

5. Appellant timely protested an award to Shade Computer Forms Co. (Shade) on the basis that its bid was non-responsive since Shade failed to supply the required certification prior to bid opening. DGS reviewed the protest and denied it taking the position the certificate was a matter of responsibility not responsiveness and that the certificate could be supplied at anytime prior to award. Shade had submitted the DGS certification form, unsigned, with the notation "See Attached Mill Certificate." Shade attached its own version of a "Manufacturer Certification" signed on 11/19/91 by its paper manufacturer P.H. Glatfelter Co. This certificate did not provide a statement as to; target

brightness nor an agreement as to DGS' access to mill plant and purchase - production records nor a statement as to the EPA definition of recycled paper, nor a statement as to the specific paper mill to be used. Shortly after the Procurement Officer's decision on the protest Shade provided DGS with three State form certificates completed, signed and notarized by the bidders mill representatives. One of the certificates provided from P.H. Glatfelter Co. dated 10/26/92 gave a target brightness range of 77.5 to a maximum of 79.5.

6. In Appellant's appeal to this Board it included an analysis of responsibility addressed in the Procurement Office's decision.

Decision

Maryland Annotated Code, State Finance and Procurement Article § 11-101(g) and COMAR 21.01.02.01(77) define a responsible bidder as 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.

Maryland Annotated Code, State Finance and Procurement Article § 11-101(s) and COMAR 21.01.02.01(78) define responsiveness as a bid submitted in response to an invitation for bid that conforms in all material respects to the requirements contained in the invitation for bids (IFB).

A bid to be responsive must constitute a definite and unqualified offer to meet the material terms of the IFB. See Long Fence Co., Inc., MSBCA 1259, 2 MICPEL ¶ 123 (1986); CAM Construction Company of Maryland, Inc., MSBCA 1393, 2 MICPEL ¶ 195 (1988). Where the intent of the IFB is to seek information for a determination of a bidder's responsibility the bid may be accepted under the condition that the responsibility items be provided before award. A matter of responsibility cannot be converted into one of responsiveness by virtue of the language of the IFB. See National Elevator, MSBCA 1252, 2 MICPEL ¶ 114 (1985).

However, the requirement for a mill certificate in this case was clearly material. DGS was seeking a guarantee from a third party signatory as to the quality of the paper and a means to

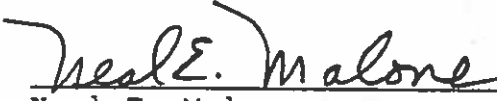
independently and objectively verify the papers quality. The quality of the paper is central to the demands of the IFB. It is uncontested that the mill representative in providing this certification in the required format not only guaranteed the quality of the paper supplied but also made the plant and records available for verification. Without this certificate the State has no writing to enforce these terms upon the bidders actual source of supply. Most of the bidders who responded to this RFQ were not paper manufacturers. The bidders here were paper converters working from the stock of its mill suppliers. DGS had no practicable method of verifying the paper quality without having an independent laboratory perform tests. However, with the mill certificate DGS now had another tool to use to verify the quality of the paper.

The capability to provide access to plant and records of the manufacturer could not be given by the bidder since the bidder must seek this permission from its third party supplier. Unless the bidder was also a manufacturer (and none were in this appeal) the bidder could not have had the capability of providing access to the source nor a guarantee from the manufacturer of quality nor a statement of the specific mill to be used to supply the paper. These requirements could only be agreed to by the manufacturer itself.

DGS reliance on CAM, supra, is misplaced. In CAM, supra the IFB sought that a bidder provide a "certificate of attendance at a Department of Environment approved training program for the control of sediment and erosion before beginning the project." (Under scoring added). CAM, supra at page 5. The certificate there went to "ability to comply with the erosion and sediment control standards which are elsewhere contained in the bid package...." CAM, supra at page 8. Here the access to records and the plant, identification of mill source and guarantee of quality by the third party mill representative did not go to the bidders ability (or capability) to perform. These requirements were not contained elsewhere in the IFB, but only in the mill certificate.

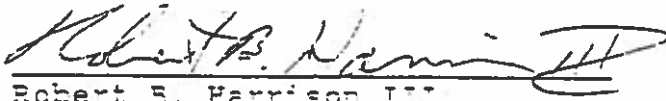
The failure of Shade to provide the mill certificate in the form required results in a non-responsive bid. See Williams Construction Company, Inc., MSBCA 1611, 3 MICPEL ¶ 287 (1991). The certificate was the equivalent of a performance specification requiring guarantee of quality, verification of quality and the listing of a specific source all of which materially affects the supply of paper. DGS in an attempt to insure that the bidder supply exactly what the IFB required it to supply, created a new material requirement to the IFB in the form of the mill certificate. Accordingly, the appeal is sustained.

Dated: 12/30/92



Neal E. Malone
Board Member

I concur:



Robert E. Harrison III
Chairman



Sheldon H. Press
Board Member

In Williams, supra, the IFB required listing of the firm proposed to perform Washington Suburban Sanitary Commission (WSSC) facilities relocation work and conditioned performance of such work on the approval by WSSC of such firm. The Board held that failure to list such a firm made a bid nonresponsive.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1697 appeal of McGregor Printing Corporation under DGS Request for Quotation No. Q31872.

Dated: *December 30, 1992*

Mary L. Priscilla

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Recorder