

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
N.B.R., INCORPORATED)
Under DGS Project No.) Docket No. MSBCA 1830
SSC-94-04)

July 28, 1994

Determination of Responsibility of Bidder - Where Procurement Officer determined that referenced projects provided with IFB were insufficient because they were neither similar in scope nor in complexity, and bidder did not supply sufficient references, he did not abuse his discretion in determining that the bidder was not responsible pursuant to definitive responsibility criteria set forth in IFB. Procurement Officer did not abuse his discretion in declining to consider experience of "joint venturer for purpose of bidder responsibility where contract was in fact bid "alone" and not by "joint venture", and officials of "joint venturer" were not officials of bidder.

Appearance For Appellant: Mr. Ali Nademin
N.B.R., Incorporated
Washington, D.C.

Appearance For Respondent: David E. Beller
Assistant Attorney General
Baltimore, MD

Opinion By Board Member Steel

Appellant (N.B.R.) appeals the decision of the Department of General Services (DGS) to reject his bid for carpet installation after DGS determined that the bidder was not a responsible bidder under Md. Code Ann., State Fin. and Proc. (hereinafter SF)13-206. Neither party requested a hearing, and Respondent requested that the Board render its decision on an expedited basis.

Findings of Facts

1. This appeal arises in connection with the invitation for bid (IFB) on installation of carpeting at the Department of Human Resources (DHR) building at 311 West Saratoga Street in Baltimore City, IFB DGS SSC-94-04 Carpet Replacement, which was issued on February 2, 1994. The IFB called for installation of approximately 15,000 square yards of carpet

and of approximately 24,700 linear feet of vinal cove base molding, as well as the movement of large quantities of furniture, equipment, and computers. The bid due date was March 2, 1994.

2. The Procurement Officer conducted a pre-bid meeting at which he emphasized to all potential bidders the importance of the bidder qualification provisions, set forth in Section IV of the IFB:
 - a. The Contractor and each of his Sub-Contractors shall demonstrate to the procurement Officer's satisfaction that they are responsible by showing evidence of three years of successful experience within the last five years to ensure successful completion of a commercial carpet installation of the type and size required in these specifications.
 - b. The Contractor shall submit Appendices A & B with his bid. This information shall consist of, but not be limited to, at least five references each for the Contractor and each of his sub-contractors that clearly indicates their ability to successfully complete projects similar in scope, size, square yardage, quality, time frame, dollar amount, and the movement of computers, furniture, equipment, materials, and supplies.
 - c. The experience of officials gained prior to the formation of a corporation or other business entity can be considered when evaluating responsibility. The Department the right to reject any bid if the Contractor fails to satisfy the department that he is responsible, is otherwise not qualified to execute the contract, or if his bid is non-responsive.¹
3. N.B.R. timely submitted the apparent low bid in the amount of \$404,250.00.
4. With its bid N.B.R. submitted information regarding its qualifications, and those of its sub-contractors. In summary, N.B.R. indicated that it was incorporated in Delaware in 1991, and is headed by Mr. Ali Nademin. Mr. Nademin has 25 years of experience in planning, designing and procuring goods for the District of Columbia Government, and administering D.C

¹Appellant did not change these requirements pre-bid and is thus precluded from doing so now by the provisions of COMAR 21.01.02.03A, requiring that alleged improprieties in a solicitation that are apparent before bid opening must be pled before bid opening. In any event, it does not appear that these requirements are burdensome or unnecessary in light of the stated purposes of the IFB.

Government projects; two years of experience in bidding for commercial carpet and floor coverings; and one year of experience in supervising awarded carpet projects. Also referenced were Mr. Van Nostrand, Vice President and a "computer expert", as well as two individuals who were neither employees nor officers of N.B.R., Mehrdad Farahmand, and Goli Adib. According to the submission, Mr. Farahmand and Ms. Adib are officers of a separate entity known as First American Carpet, which had entered into a "Non-Equity Cooperative Agreement" with N.B.R. on August 23, 1993 "for the sole purpose of bidding on Government carpet projects."

5. Neither this "Non-Equity Cooperative Agreement" nor attached minutes of the most recent Board Meeting, establish Mr. Farahmand and Ms. Adib as Officers of N.B.R., or bind them in any way to perform the contract in question.² Further, the bid was submitted by N.B.R. alone, not as a joint venture with First American Carpet.
6. N.B.R. additionally submitted six references for the purpose of establishing that N.B.R. had experience in performing similar projects.
7. The Procurement Officer notified N.B.R. by letter dated May 9, 1994 that its bid was rejected because DGS had determined that N.B.R. was not a responsible bidder because 1) three of the references submitted related to projects performed by First American Carpet, not N.B.R., 2) two references were relevant, but insufficient because they involved projects that were commenced in late 1993 and had not yet been completed and neither project was similar in scope or complexity (e.g., neither required movement of furniture or computer equipment); and 3) the two relevant projects referenced did not satisfy the requirement of references for five projects.

²In fact, it is noted that by the terms of the Non-Equity Cooperative Agreement, the agreement expires on August 22, 1994.

8. On May 19, 1994 N.B.R. protested the agency's rejection of its bid alleging that DGS should have considered a substitute reference,³ and should have considered the experience of the First American Carpet personnel in evaluating the responsibility of N.B.R.

9. By letter dated June 9, 1994 (and apparently received by N.B.R. on June 16, 1994) the Procurement Officer denied the protest.

10. N.B.R. timely filed a Notice of Appeal on June 27, 1994 challenging the Procurement Officer's decision denying the protest.

11. The second lowest bid of \$439,549.00 was submitted by Carpet Land. The Board of Public Works has approved award of the contract to Carpet Land, conditioned on the outcome of this appeal.

DECISION

SF \$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." N.B.R. alleges that the Procurement Officer was arbitrary and capricious in his decision that N.B.R. was not responsible. We disagree.

A requirement such as that set forth in IFB Section IV that the contractor, as well as any subcontractor, demonstrate at least three years of experience at successfully completing a contract of this size and complexity constitutes definitive responsibility

³ One of the initial references submitted was defunct and could not be contacted by the Procurement Officer. N.B.R. supplied a substitute name, Remax Sought. The Procurement Officer was advised by Remax that the prime contractor for its carpet contract was First American Carpet, and that the reference had no knowledge of the capabilities and/or performance record of N.B.R.

criterion which must be strictly followed as a matter of "elementary fairness" to all prospective bidders. Custom Management Corporation, MSBCA 1086, 1090, 1 MICPEL ¶28 (1982). Where, as here, the Procurement Officer has reached a determination regarding responsibility based upon a reasonable application of the specified criteria, this Board must uphold that decision. Id.

Appellant argues that the Procurement Officer should have imputed to N.B.R. the experience of First American Carpet. The Procurement Officer declined to do so on the grounds that neither Mr. Farahmand nor Ms. Adib are officers or officials of N.B.R., that N.B.R. bid on the contract alone and not as a joint venture with First American Carpet, and that nothing in the "Non-Equity Cooperative Agreement binds First American Carpet, Mr. Farahmand or Ms. Adib to this or any other project. As stated by the Procurement Officer in his final decision,

The commercial carpet experience accumulated by American Carpet and its officers cannot qualify N.B.R. as a responsible bidder. Project SSC-94-04 was bid by N.B.R. alone, and not as a joint venture with American Carpet. . . . American Carpet co-presidents Farahmand and Adib are not officials of N.B.R., and therefore, their experience cannot be considered when evaluating the responsibility of N.B.R.

Telephone conversations with four of the companies revealed that N.B.R. was not the contractor for the referenced projects, the contact persons . . . all indicated that the prime contractor was American Carpet. None of these companies had any knowlege of the capabilities and/or performance record of N.B.R., Inc.

The Board finds that this determination was not an abuse of the Procurement Officer's discretion.

N.B.R. submitted only two references regarding its own experience and capability, Frostburg State University and the Department of the Army. Neither project involved movement of computer equipment, and one of the projects (Fort Lee/Army) is not yet completed. As noted by the Procurement Officer in his decision of June 9, 1994,

Only two of the references submitted by N.B.R. were able to address N.B.R.'s experience and capabilities: The Department of the Army, which is presently under contract with N.B.R. for installation of carpet at Fort Lee, Virginia; and Frostburg State University, where N.B.R. installed carpet in 1993. These two references fall short of the five expressly required by the IFB, and the time spent by N.B.R. to perform these projects falls short of the "three years of successful experience within the last five years" required by the IFB.

Finally, the Procurement Officer found that those references supplied by N.B.R. did not satisfy the IFB requirement that a bidder show through its experience and references that it had successfully performed projects similar in complexity, size and duration to that contemplated by the IFB over three of the last five years:

Furtherfore, neither the Fort Lee nor the Frostburg projects qualify as experience "of the type and size required in these specifications." Contract SSC-94-04 requires installation of 15,512 square yards of carpet tile in a six month time frame. In contrast, N.B.R. installed approximately 8,200 square yards at Fort Lee. According to the contact persons reached by DGS, neither project involved the movement and replacement of computers and related equipment, which is a critical component of the work required by Contract SSC-94-04.

The Board finds that the Procurement's Officer's decision was amply supported by the reports from the two references, as well as by the statements made by N.B.R. on the face of the bid documents.

This Board has consistently held that a Procurement Officer has broad discretion in determining whether a bidder is responsible. Lamco Corporation, MSBCA 1227, 1 MSBCA ¶96 (1985); Allied Contractors, Inc., MSBCA 1191, 1 MSBCA ¶79 (1984). Granting broad discretion to Procurement Officers is permitted because:

[d]eciding 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 [Officer] 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 behalf. 39 Comp. Gen. 705, 711.

43 Comp. Gen. 228, 230 (1963).

This Board concludes that the Procurement Officer's discretionary determination that Appellant was not a responsible bidder was not unreasonable nor contrary to law or regulation. Therefore, the appeal is denied.

It is therefore, Ordered this 28th day of July, 1994 that the appeal is denied.

Dated: 7/28/94

Candida Steel
Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
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 1830, appeal of N.B.R. Incorporated under DGS Project No. SSC-94-04.

Dated: *July 28, 1994*

Mary F. Priscilla
Mary F. Priscilla, Recorder