

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of NATIONAL ELEVATOR)
COMPANY)

) Docket No. MSBCA 1251

Under Coppin State College)
Bid No. 85-1)

October 17, 1985

Responsiveness - A bidder was improperly rejected as nonresponsive for failing to furnish information with its bid concerning its ability to perform an elevator maintenance and repair services contract. The IFB required that such information be submitted only if requested by the State.

Responsibility - Information bearing on a bidder's capability to perform an elevator maintenance and repair services contract relates to responsibility and cannot be made into a question of responsiveness by the terms of the solicitation.

Responsibility - Evaluation - A determination that a bidder with only two experienced employees was nonresponsive because it does not have an organization capable of performing the elevator maintenance and repair services contract was not unreasonable or an abuse of discretion, or contrary to law or regulations.

Responsibility - Where the bidder did not provide information from which it could be determined that the bidder had performed elevator maintenance and repair services at institutions with elevators comparable in number, size, and complexity, the procurement officer's determination that the low bidder was nonresponsive was not unreasonable, an abuse of discretion, nor contrary to law or regulations.

Timeliness - Appellant's failure to protest that it was improperly restricted from competition was waived since this allegation concerned an impropriety in the terms of the solicitation that was not raised prior to bid opening with the procurement officer pursuant to COMAR 21.10.02.03A.

APPEARANCES FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

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OPINION BY MR. KETCHEN

This appeal arises from a Coppin State College (CSC) procurement officer's final decision rejecting Appellant's bid in the captioned procurement because Appellant was determined not to be a responsive and responsible bidder. CSC contends that Appellant's bid was nonresponsive since it failed to provide bidder qualification information with its bid and, additionally, Appellant was not responsible because it did not meet specified bidder qualification requirements. Appellant contends that the specification describing bidder qualification requirements was not material to a determination of whether Appellant was a responsible bidder.

Findings of Fact

1. CSC issued Invitation for Bids (IFB) No. 85-1 on April 13, 1985 for elevator maintenance, inspection, and repair services, including emergency services, for nine passenger elevators and two freight elevators located in various buildings on the CSC campus.

2. The 11 elevators to be serviced are in constant use and carry a heavy volume of passengers and freight. The elevators, which were installed at different times, vary in size and age. Elevator maintenance services on the CSC campus require familiarity with a wide range of elevator makes, models, and sizes.

3. The IFB specifications require the contractor to provide emergency services on a 24 hour basis and within one hour of notification of a problem, set limitations on the length of time an elevator may be out of service for repairs, and require the contractor to maintain an inventory of spare and replacement parts. IFB Specifications, Paras. 9, 11 and 16.

4. Paragraph 2 of Section IV 2 of the IFB specifications, entitled "Qualifications of Bidders," provides as follows:

A. The Company shall have had approximately three years successful experience in fully maintaining elevators and dumbwaiters. Upon request of the State, bidder shall be able to show evidence of his reliability, ability, and experience, by furnishing:

1. A list of personnel who will perform under the contract, showing the length and type [of service] of such personnel, and
2. The names and addresses of other concerns and/or similar institutions for which prior comparable services were rendered by the bidder.

B. Ability to meet the foregoing experience requirements and the adequacy of the information submitted will be considered by the Department of General Services [sic] [Coppin State College] in determining the responsibility of the bidder. (Underscoring added).

5. Bids were opened on April 19, 1985 with the following results:

Appellant	\$16,300
Consolidated Standard	17,000
General Elevator	19,200
Otis Elevator	20,400

6. Appellant did not provide material with its bid relating to its qualifications; however, in response to CSC's request, by letter dated May 23, 1985, it furnished the information.

7. Appellant is a new company having been incorporated in July 1984. It is engaged in installing, servicing, repairing, and maintaining passenger and freight elevators, escalators, and dumbwaiters. Appellant presently has two employees, its President, Bruce H. Pope, and its Vice President, Herlen E. Bess who manage the company. Mr. Pope has twelve years experience in installing and maintaining passenger and freight elevators, escalators and dumbwaiters. Mr. Bess has thirteen years experience in the elevator industry, including experience in servicing and repairing elevators and is a certified elevator inspector. Appellant further states that it is licensed by the State of Maryland.

8. Although Appellant did not list any employees, other than Mr. Pope and Mr. Bess, who would perform the contract's maintenance, inspection, and repair services at the time of bid opening, it stated that it employs mechanics and helpers through the International Union of Elevator Constructors Local No. 7.

9. The information submitted by Appellant either with its bid or after bid opening did not demonstrate that it provides elevator maintenance repair and inspection services to facilities comparable to the CSC facilities.

10. In response to oral notification that it would not receive the contract, Appellant filed a letter of protest dated June 6, 1985 objecting to CSC's proposed determination not to make an award to Appellant as the low responsive and responsible bidder.

11. The CSC procurement officer denied Appellant's protest in his final decision issued on June 28, 1985. He determined that Appellant's bid was nonresponsive because it did not contain a list of employees who were to conduct the elevator maintenance, repair, and inspection services, as required by Section IV 2.A.1 of the IFB specifications, and did not identify other concerns or similar institutions for which comparable services had been provided, as required by Section IV 2.A.2 of the IFB specifications. Further, after discussion with Appellant following bid opening, the CSC procurement officer concluded that Appellant did not meet the definitive responsibility criteria set forth in the IFB and thus had not demonstrated to the CSC procurement officer's satisfaction that it was capable of performing the required work. The CSC procurement officer's determination was based on his finding that Appellant's firm does not employ a sufficient number of qualified repairmen to maintain, repair and inspect the CSC elevators and did not demonstrate that it had performed elevator maintenance services for concerns or institutions comparable to CSC.

12. On July 12, 1985, Appellant filed a timely notice of appeal with this Board.¹

Decision

Appellant initially alleges that its bid should not have been rejected as nonresponsive on the grounds that its bid did not include (1) a list of personnel who will perform under the contract showing the length and type of service of such personnel, and (2) the names and addresses of other concerns or similar institutions for which prior comparable services were rendered by the bidder. We agree.

The IFB specifically indicated that information regarding Appellant's personnel and experience need be furnished only if requested by CSC following bid opening. Further, information sought here by the IFB bidder qualification clause relates to the determination of bidder responsibility, or capability to perform the contract, and cannot be made into a question of responsiveness by the terms of the solicitation. Aquatel Industries, Inc., MSBCA 1192 (August 30, 1984) p. 5. Compare Carpet Land, Inc., MSBCA 1093 (January 19, 1983). Accordingly, it was appropriate to determine Appellant's qualifications based on material that it was permitted to submit after bid opening. Aquatel Industries, supra, p. 4.

Appellant next contends that "[detailed Specification iv.2 is not in and of itself central to the bid and not decisive of the ability or responsibility of The National Elevator Company." We disagree.

A bidder's capability to perform the contract work is expressly a matter required to be considered by a procurement officer in determining a bidder's responsibility. The contract is to be awarded to the low responsive bidder only following a determination that the bidder is responsible. COMAR 21.05.02.13.²

¹The hearing originally was scheduled for September 20, 1985 but rescheduled for October 3, 1985 at Appellant's request with CSC's agreement. In accordance with Appellant's request of October 2, 1985 withdrawing its request for hearing, concurred in by CSC, the appeal is decided on the record.

²COMAR 21.05.02.13, in pertinent part, provides:

"A. General. 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. . . .

* * *

D. Award. Upon determination of the lowest bidder, review of the bid for responsiveness, and satisfaction that the bidder is responsible, the procurement officer shall award the contract to that bidder."

A responsible bidder is one ". . . who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which shall assure good faith performance." COMAR 21.01.02.59. In this regard, we have stated:

"A procurement officer has broad discretion in determining whether a bidder is responsible. Custom Management Corp., et al, MSBCA 1086/1090, October 22, 1980, at pp. 6-7. Determinations of this type will not be disturbed by this Board unless they are shown to be clearly unreasonable, an abuse of discretion, or contrary to law or regulations. Solon Automated Services, Inc., MSBCA 1046, January 20, 1982, p. 22, rev. on other grounds, Solon Automated Services, Inc. v. University of Maryland, et al, Misc. Law Nos. 82-M-38 and 82-M-42 (Cir. Ct. Baltimore Co., October 13, 1982).

Allied Contractors, Inc., MSBCA 1191 (August 16, 1984) p. 10. Compare Aquatel Industries, Inc., supra; Lamco Corp., MSBCA 1227 (February 21, 1985). 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). Compare Lamco, supra.

Appellant contends that it meets the State's responsibility requirements through the experience and qualifications of its President and Vice President, although it has not been operating as a business entity for the required three years. In this regard, the experience of corporate officials gained prior to the formation of a new corporation may be considered when evaluating a bidder's overall experience level. Aquatel Industries, Inc., supra.

Here, the IFB required that bidders have three years experience maintaining elevator facilities comparable to the elevator fleet at CSC. The specifications clearly state that information submitted by a bidder would be used by the CSC procurement officer in determining a bidder's capability to provide maintenance, repair, and inspection services, including emergency services, for CSC elevators.

Although Appellant was formed as a corporation only in July 1984, both Appellant's President and Vice President apparently have experience similar to the length and type of experience described by the IFB's bidder qualification requirements. However there is no evidence in the record that Appellant has any other employees with the requisite experience in providing elevator maintenance services comparable to the services required at the CSC facility or that with only two experienced employees it is sufficiently organized and of sufficient size to perform satisfactorily.

While Appellant was not required to furnish lists of personnel or the names of concerns for which it had performed comparable services prior to bid opening as a condition of submitting a responsive bid, the CSC procurement officer was required to determine whether Appellant was a responsible bidder. Based on discussions with Appellant after bid opening, the CSC procurement officer's determined that Appellant did not have a work force of sufficient size and experience capable of performing the CSC elevator maintenance contract given the size and complexity of the work involved. He also determined that Appellant had not demonstrated its capability to perform satisfactorily by providing information from which it could be determined that Appellant had performed comparable elevator maintenance services for institutions with elevators comparable in size and complexity to those at CSC. Under these circumstances, we find that the CSC procurement officer's rejection of Appellant's bid on responsibility grounds was not unreasonable, an abuse of discretion, or contrary to law or regulations. Compare Allied Contractors, Inc., supra.

Appellant next contends that the IFB improperly restricted Appellant from competition. While the record is devoid of any probative evidence that Appellant was improperly restricted from competing on this procurement, we find that this issue raises a concern involving an impropriety in the solicitation that was apparent prior to bid opening since it involved bidder qualification requirements set forth in the specifications. A protest based upon an alleged impropriety in any type of solicitation which is apparent before bid opening must be filed with the procurement officer prior to that time. COMAR 21.10.02.03.³ Since Appellant did not raise the "restricted competition" issue in a timely manner with the procurement officer, it waived its right to substantive review by this Board. Compare International Business Machines Corp., MSBCA 1071 (August 18, 1982); Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 468 A.2d 1026 (1984); Neoplan USA Corp., MSBCA 1186, 1202 (September 18, 1984).

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

³COMAR 21.10.02.03A provides that "[p]rotests based upon alleged improprieties in any type of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals."