

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of NATIONAL ELEVATOR )  
COMPANY )

) Docket No. MSBCA 1252

Under University of Maryland )  
Baltimore County (UMBC) )  
Bid No. BC14246B )

October 15, 1985

Responsiveness - Information bearing on bidder qualifications to perform an elevator maintenance and repair services contract cannot be made into a question of responsiveness by the terms of the solicitation.

Responsiveness - A bid was improperly rejected as nonresponsive where information concerning the bidder's capability to perform was not submitted with its bid.

Responsibility - Information bearing on a bidder's capability to perform elevator maintenance and repair services relates to responsibility and may be received and evaluated after bid opening.

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

Responsibility - Evaluation - The procurement officer reasonably determined that the bidder was nonresponsible where the bidder had not performed elevator maintenance and repair services for facilities comparable in size and scope to the facility for which elevator maintenance services were sought.

Timeliness - By waiting until its notice of appeal to allege deficiencies in the solicitation, Appellant waived its right to protest and have the Board consider these matters. Maryland procurement law requires a protest on such grounds to be filed initially with the procurement officer prior to bid opening.

APPEARANCES FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

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## OPINION BY MR. KETCHEN

This appeal arises from a UMBC 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. Appellant maintains that its low bid should have been accepted since, inter alia, bidder qualifications are not relevant to contract performance. UMBC, on the other hand, maintains that (1) Appellant's bid was nonresponsive since it failed to furnish bidder qualification information with its bid, and (2) Appellant was nonresponsive because it did not meet the specified responsibility criteria.

### Findings of Fact

1. UMBC issued Invitation for Bids (IFB) BC14246B on April 18, 1985 for elevator maintenance repair and inspection services, including emergency services, for eighteen passenger elevators and six freight elevators located in ten buildings on the UMBC campus.

2. The 24 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. They were manufactured by six different elevator companies (Otis, Standard, General, Dover, Armour, and Elevator Engineering). There are a range of elevator models and sizes. Service problems require emergency repair work as frequently as four times a week.

3. The IFB specifications require the contractor to provide emergency service 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, and require the contractor to maintain an inventory of spare and replacement parts. IFB, Specifications, Paras. 9, 10 and 14.

4. Paragraph 2 of the IFB specifications provides as follows:

#### QUALIFICATION OF BIDDERS

All prospective bidders must have had a minimum of five (5) years successful experience in fully maintaining elevators and dumbwaiters of the type described herein.

All bidders must submit with their bids evidence of their reliability, ability, and experience by furnishing with their bid the following:

- a. A list of personnel who will perform maintenance and repairs under this proposal, showing in detail the length and type of experience of such personnel and what licenses they possess.
- b. A listing of the names and addresses of at least five (5) other comparable colleges, universities, hospitals or similar institutions of comparable size and scope to the University of Maryland Baltimore County, for which the bidder is presently providing service.

- c. Service must be provided by the successful bidder using the personnel designated above. Subcontracting of any portion or part of this proposal is prohibited.
- d. In order to render prompt emergency call back and repair service, it is imperative that the Contractor's place of business be located within a thirty (30) mile radius of the University.

Ability to meet the foregoing qualifications covering personnel and experience requirements and the adequacy of the information submitted by the bidder will be considered by the University in determining the award. The University reserves the right to reject any bid from companies who, in its opinion, do not meet the foregoing requirements.

5. Bids were opened on May 15, 1985 with the following results:

Appellant	\$32,854
Elevator Engineering Co., Inc.	34,560
Consolidated Standard Elevator Co.	35,820
General Elevator Co.	40,524

6. Appellant did not provide material with its bid relating to its qualifications; however, in response to UMBC's request it furnished the information after bid opening.

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 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 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. Although Appellant did not list any employees, other than Mr. Pope and Mr. Bess, who would perform the 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.

8. Appellant did not submit with its bid, or after bid opening, information demonstrating that it presently provides elevator maintenance, repair, and inspection services to five facilities comparable to the UMBC facilities.

9. In response to oral notification that it would not receive the contract, Appellant filed a letter of protest dated June 17, 1985 objecting to the procurement officer's failure to award it a contract as the low responsive and responsible bidder.

10. The procurement officer informed Appellant by letter dated June 28, 1985 that its bid was not responsive because it failed to provide with its bid a list of personnel who would perform maintenance and repair services on the UMBC elevators and a list of five institutions for which comparable services

had been provided. Based on discussions with Appellant, the UMBC procurement officer also determined that Appellant "cannot at this time satisfy these specifications because your firm has not serviced comparable institutions and does not have enough qualified personnel to ensure performance of a maintenance contract as large as the one on our campus." In a separate final procurement officer's decision, also issued on June 28, 1985 but in response to Appellant's June 17, 1985 letter of protest, the UMBC procurement officer reiterated these same grounds in denying Appellant's protest because it was nonresponsive and did not meet the IFB's definitive responsibility criteria.<sup>1</sup>

11. Appellant filed a timely notice of appeal with this Board on July 12, 1985.<sup>2</sup>

#### Decision

The initial issue raised by the instant appeal is whether the UMBC procurement officer properly determined that Appellant was a nonresponsive bidder. COMAR 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."

Responsiveness in competitive sealed bid procurements concerns a bidder's legal obligation to perform the required services in exact conformity with the IFB specifications. Responsibility,<sup>3</sup> on the other hand, concerns a bidder's capability to perform a contract. Carpet Land, Inc., MSBCA 1093 (January 19, 1983). As we have previously held, a matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation. Aquatel Industries, Inc., MSBCA 1192 (August 30, 1984) p. 5. Information concerning a bidder's responsibility thus may be submitted after bid opening notwithstanding a solicitation provision stating that such information must be submitted with the bid as a pre-requisite to a finding of responsiveness. Carpet Land, supra.

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<sup>1</sup>On June 28, 1985, the UMBC procurement officer awarded the contract to Elevator Engineering Co., Inc. pursuant to COMAR 21.10.02.10B in order to protect substantial State interests.

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

<sup>3</sup>COMAR 21.01.02.59 defines a responsible bidder "as 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."

Here, the materials requested in the IFB, Paragraph 2, clearly relate to the capability to perform in accordance with the contract terms and thus concern responsibility. The procurement officer thus erred in rejecting Appellant's bid as nonresponsive on the ground that information concerning Appellant's qualifications and experience was not submitted with its bid.

Appellant next contends that it met the IFB's definitive responsibility criteria and thus its bid was improperly rejected. A procurement officer has broad discretion in determining whether a bidder is responsible. We will not overturn such determination unless shown to be clearly unreasonable, an abuse of discretion, or contrary to law or regulations. Lamco Corp., MSBCA 1227 (February 21, 1985); Allied Contractors, Inc., MSBCA 1191 (August 16, 1984) p. 10. 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.

Here, the IFB required Appellant to have at least five years successful experience maintaining similar type elevators and dumbwaiters, be presently providing service to at least five facilities comparable to UMBC facilities, and be located within a thirty mile radius of UMBC. (Findings of Fact No. 4). Both Appellant's President and Vice President apparently had experience similar to the experience sought by UMBC as evidence of a contractor's ability to perform. In this regard, the experience of corporate officials gained prior to the formation of a new corporation can be included when evaluating a bidder's overall experience level. Aquatel Industries, Inc., supra. The procurement officer thus appropriately could consider the length and type of experience of both Mr. Pope and Mr. Bess in determining whether Appellant was responsible. However, there is no evidence that Appellant had any other employees with the requisite experience in providing elevator maintenance services comparable to the services required at the UMBC facility, or that with only two experienced employees it was sufficiently organized and of sufficient size to perform the contract satisfactorily. The procurement officer also determined that Appellant had not performed elevator maintenance services for facilities comparable in size and scope to the UMBC facility. Under these circumstances, we find that the UMBC procurement officer's decision that Appellant was not a responsible bidder was founded on a reasonable basis, although Appellant's President and Vice President, the only two employees of Appellant, may have had experience similar to that required by the IFB. Compare Allied Contractors, Inc., MSBCA 1191 (August 16, 1984) p. 10; Custom Management Corp. and Ogden Food Service Corp., MSBCA 1086/1090 (October 22, 1982).

Appellant further contends:

- a. The IFB did not include the Department of General Services Minority Goal Provision;
- b. UMBC's procurement methods differ from those of other procurement agencies and thus are arbitrary, capricious and improper; and
- c. The instant IFB and other agency solicitations improperly restrict Appellant from competition.

Each of these matters raises issues concerning improprieties in the solicitation and was apparent prior to bid opening. In addition, these issues were not brought to the UMBC procurement officer's attention but raised for the first time in Appellant's notice of appeal. Consideration of these issues thus has been waived. They were neither timely raised by protest pursuant to COMAR 21.10.02.03<sup>4</sup> nor by protest to the UMBC procurement officer pursuant to COMAR 21.10.02.02 and COMAR 21.10.02.09A.<sup>5</sup> Compare Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 468 A.2d 1026 (1984); Eagle International Inc., MSBCA 1121 (March 2, 1983); International Business Machines Corp., MSBCA 1071 (August 18, 1982); Neoplan USA Corp., MSBCA 1186 and 1202 (September 18, 1984).

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

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<sup>4</sup>COMAR 21.10.02.03A provides that protests based upon alleged improprieties in any type of solicitation which are apparent before bid opening shall be filed before bid opening.

<sup>5</sup>COMAR 21.10.02.02 and COMAR 21.10.02.09A require a protester to raise its concerns initially with the procurement officer representing the agency.  
See: Md. Ann. Code, State Finance and Procurement Article, §17-201.