

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of NATIONAL PATENT)
ANALYTICAL SYSTEMS, INC.)
Under Dept. of General Services) Docket No. MSBCA 1400
RFQ No. 24218)

May 5, 1989

Responsibility - Evaluation - The procurement officer reasonably determined that the bidder was nonresponsible based on evaluation of complaints concerning the bidder's performance on similar contracts in other states at the time of and subsequent to bid opening.

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OPINION BY MR. LEVY

This is an appeal of the Department of General Services (DGS) procurement officer's final decision denying Appellant's protest which alleged that it was a responsive and responsible bidder.

Findings of Fact

1. DGS issued Request for Quotation (RFQ) No. 24218 on March 22, 1988 for the procurement of six (6) infrared absorption breath alcohol testing systems (i.e. breathalizers) for the Maryland State Police (MSP).
2. Prior to issuing the RFQ the MSP examined several different machines to determine what was the latest equipment available in the industry. On March 16, 1988 Appellant demonstrated its BAC Datamaster. It was the demonstration of this unit that the State eventually used to determine if Appellant's machine met the subsequently issued RFQ specification.
3. The following three bids were received for public opening on May 20, 1988:

| | |
|--|------------|
| Eastern Electronics (Appellant) ¹ | - \$26,610 |
| Intoximeters, Inc. | - 32,340 |
| CMI, Inc. | - 52,020 |

Appellant's bid was based on supplying the BAC Datamaster machine.

4. About the end of May, Appellant was orally advised by Ms. Linda Ruley, the DGS buyer, that its bid had been rejected for the following reasons:

- A. Appellant admitted that its product did not appear on the most recent conforming products list published by the National Highway Traffic Safety Administration (NHTSA) of the United States Department of Transportation as required by the RFQ.
- B. Without NHTSA approval, the State of Maryland would lose federal funding.
- C. Appellant's product has a poor service and repair history.

5. Appellant filed a written protest on June 1, 1988 with Mr. Paul Harris (Harris), Chief of the State Purchasing Bureau and the procurement officer for this acquisition. In its letter of protest Appellant reversed the earlier statement made in its bid and asserted that the unit it bid did in fact appear on the NHTSA conforming products list. Appellant also challenged the asserted loss of federal funds if its product did not appear on the NHTSA list and challenged its alleged poor service and repair history citing customer references in the States of Arkansas and Washington.

6. The procurement officer issued his final decision on July 6, 1988 denying Appellant's protest. He cited the following six specifications of the RFQ that

¹ While the bid submitted by Appellant was in the name of Eastern Electronics (Eastern) the required supporting documents as well as the protest were in the name of National Patent Analytical Systems, Inc. (NPAS). In the Agency Report filed with the Board DGS raised for the first time the alleged ambiguity as to the identity of the bidder as an additional reason for declaring Appellant's bid nonresponsive. Testimony at the hearing revealed that National Patent Development Corporation is the parent corporation to both Eastern and NPAS. Eastern manufactures the units and NPAS markets them. At the hearing DGS abandoned its position on this issue. (Tr. 18-19).

the National Highway Traffic Safety Administrations (NHTSA) conforming products list as required in [i]tem 1, section 2 of the bid specification. This was verified with the name you gave us, Mr. Al Flores of Federal DOT, who said you are technically not on the list and it may be months before your product is listed by NHTSA.

Section 1, item 6, first paragraph, requires that the manufacturer shall provide the names of at least two States that have working systems, consisting of at least ten on-line units and a computer controller system. Your bid proposal identified the States of Washington and Arkansas and the City of Boston. When contacted, officials in Boston stated that they only have seven units in operation. Arkansas officials indicated that they have received ten units, but they are not on a computer controller system as the software is not expected to arrive until October.

Section 1, item 6, last paragraph, requires that the computer should have built-in diagnostics. Your proposal indicates that units must be linked to your central computer to be tested, or that they may be checked with a portable test system, neither of which complies with the requirement.

Section 2, item 31, requires that the instrument shall have the capability to capture and preserve the breath sample. The review of your unit shows that it is not capable of performing this function.

Section 3, item 12, requires that the simulator shall detect the presence of Radio Frequency Interference (RFI) and shut down in the presence of strong RFI signals. Your proposals indicates that the testing will be aborted in the presence of the RFI if detected by the breath testing unit. This is not responsive to the bid requirement that the simulator detect RFI.

Section 3, [i]tem 13, requires that the simulator shall be an integral part of the unit. The unit reviewed did not have an integral simulator.

The procurement officer does acknowledge that federal funding will not be lost without NHTSA approval but emphasizes that the issue is the testing and approval by NHTSA, not the funding.

Regardless the allegation that Appellant had a poor service and repair history, the procurement officer's decision states the following:

***you take exception to our evaluations of your service and repair history as being "poor". Your own statements on page 2 say that your repair history is poor and that your total lack of experience does not even allow you to "...properly plan for adequate service." MSP needs a reliable system, approved by NHTSA. Your product does not meet this critical requirement.

***we have checked with the customers reference in your protest letter. Washington State Purchasing Department indicates many problems with the procurement and transition to your system. Arkansas State DOT indicates that the required software still have not been received from your firm and that the software is not expected until sometime in October, 1988. It is not yet in use in Arkansas. The Boston Police Department has been waiting from 6 to 8 months for its new computer program. MSP does not want to spend months debugging a system which is not on the approved list and for which service and repairs are questionable. Contact with other police agencies using your instruments has revealed similar complaints regarding service performance.

The procurement officer then recites the findings of contacts made with seven additional users of Appellant's instruments who all indicate some type of problem either with the machine or with Appellant's service. (It is noted that different types of breathalyzer units are referred to here, i.e. Verifiers, Data Master II and Verifier Data Master).

Based on the above, Appellant was found neither a responsive nor a responsible bidder and its protest was denied.

7. Appellant filed a timely appeal with the Appeals Board on July 18, 1988. Appellant challenged the procurement officer's determination that its product failed to meet all of the RFP specifications and that it was not a responsible bidder.

8. The appeal was heard on October 27, 1988. On November 29, 1988, the parties were orally advised that the appeal was denied and the contract was thereafter awarded to the second low bidder.

Decision

The Board finds that the procurement officer's determination that the Appellant was not a responsible bidder had a rational basis and therefore denies the appeal. 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 21.01.02.59.² In determining whether a bidder is responsible (which is a requirement for award of a contract) the procurement officer must determine whether the bidder, as of the date of contract award, will have the capability to perform. Roofers, Inc., MSBCA 1129, 1 MSBCA ¶46 (1983). Factual information pertaining to this consideration may be received after bid opening. Id. Such information may properly include performance history on current or recent work under other contracts. See Allied Contractors, Inc., MSBCA 1191, 1 MSBCA ¶79 (1984) at p. 7; National Elevator Company, Inc., MSBCA 1329, 2 MSBCA ¶160 (1987) at p. 4; Customer Engineer Services, Inc., MSBCA 1332, 2 MSBCA ¶156 (1987).

The hearing of the appeal largely centered around Appellant's attempt to show that difficulties in prior performance under other contracts in other States were or would be resolved and thus it could be assumed that it would be able to perform the Maryland contract satisfactorily. Appellant was able to establish that many of the complaints of poor service on other contracts resulted from difficulty servicing a model of breathalizer that differed from the one offered in the instant procurement. These differing models had been manufactured by a company acquired by Appellant in 1985. When Appellant acquired this company, Appellant had no experience in servicing such products and thereafter experienced difficulty in providing service including taking excessive time to supply repairs.

With respect to the breathalizer actually proposed by Appellant in the instant appeal, Appellant specifically called the procurement officer's attention in its protest letter of June 1, 1988 to its experience with this product under

² References to COMAR are to those in effect at bid opening on May 20, 1988.

contracts with the State of Arkansas and the State of Washington. The procurement officer checked with these customer references and found as stated in the letter of July 6, 1988 denying Appellant's protest that the "Washington State Purchasing Department indicates many problems with the procurement and transition to your system. Arkansas State DOT indicates that the required software still has not been received from your firm and that the software is not expected until sometime in October, 1988."

At the hearing, DGS presented testimony from Trooper Williams of MSP who was employed in the Chemical Test for Alcohol Unit of the Crime Laboratory Division (CTA). Sometime in June 1988 Trooper Williams contacted Ms. Gay Horn, Director of the Arkansas Blood Alcohol Program (Department of Health), who was one of the two customer references set forth in Appellant's protest. Ms. Horn indicated that Appellant's software was not expected until October of 1988 (i.e. it was long overdue) and that Appellant was providing less than satisfactory service and maintenance on the breathalizers (the model proposed for Maryland) requiring her to call Appellant weekly to obtain the required services. Sergeant Kirckhoff of the MSP (Supervisor of the CTA) also testified at the hearing. He had contacted the State of Washington State Patrol (the other customer reference set forth in Appellant's protest letters) and found that Washington was experiencing difficulty with data collection in the breathalyzer model (as proposed for use in Maryland) in use in Washington. Appellant did not specifically rebut the testimony of the officers of the MSP concerning their findings about Appellant's Arkansas and Washington experience. It offered instead the opinion of its president that the delay in providing software to Arkansas was due to funding problems in that agency and introduced a court

opinion from Washington in which a conviction based on breathalyzer results obtained from one of Appellant's units had been upheld on appeal. (Tr. 75; Appellant's Ex. 1). The information conveyed to State personnel concerning Appellant's poor service and maintenance record in Arkansas and difficulty with data collection in Washington remained unrebutted.

In addition to the above the record indicates that Appellant has only been producing the machine it is offering under this bid since November, 1987 (Tr. 102). At the time of the hearing Appellant had only manufactured 300 units in 1988 and of these 200 had gone out of the country to Holland, 50 to Arkansas and the remaining to individual buyers. (Tr. 31). Appellant's Mr. Dunn recognized that the units distributed by the company it had purchased in 1985, which included those units in the State of Washington, did have problems. He testified (Tr. 28) that it was not until June 1988 (after bids were opened) that Appellant was able to turn around the problems with those machines.

We also note that Appellant had never produced a machine with a simulator as required by the RFQ, item 13, section 3. (Tr. 138). A drawing of the proposed simulator had been requested from Appellant in June 1988 but it had never been provided. (Tr. 242). The drawing produced at the hearing (Appellant's Exhibit No. 5) is dated September 20, 1988. Since the RFQ required delivery of the units within 20 days of bid notification (Tr. 248; RFQ specification No. 5) it was reasonable to assume that Appellant would not be capable of satisfying this delivery requirement.

Based on all of the above, the Appellant has not met its burden of proof of showing that the procurement officer's determination of Appellant's nonresponsibility was unreasonable and we thus deny Appellant's appeal on such

grounds. In view of this determination and since award of a contract may only lawfully be made to a bidder bound by the procurement officer to be responsible we need not consider whether Appellant's bid was responsive. The appeal is denied.