

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of PENINSULA GENERAL)
HOSPITAL MEDICAL CENTER)
Under DHMH Deer's Head Center) Docket No. MSBCA 1248
Contract)

August 19, 1985

Responsibility - Information bearing on a prospective contractor's ability to perform in accordance with the contract terms relates to responsibility. This type of data may be received and evaluated after bid opening.

Responsibility - Questions concerning a bidder's qualifications and responsibility are for determination by the procurement officer. Such determinations will not be disturbed by the Board unless unreasonable.

APPEARANCE FOR APPELLANT: None

APPEARANCES FOR RESPONDENT: James P. Casey
Laurence B. Russell
Assistant Attorneys General
Baltimore, MD 21201

OPINION BY CHAIRMAN HARRISON

This timely appeal is from a Department of Health and Mental Hygiene (DHMH) procurement officer's final decision that Appellant's bid was nonresponsive and that the low bidder to whom the contract was awarded was responsive and responsible.

Findings of Fact

1. Bids for provision of partial laboratory services (diagnostic - blood and urine -and blood transfusion) for Deer's Head Center in Salisbury, Maryland were opened on March 20, 1985. The Invitation for Bid (IFB) required bidders to submit a fixed bid price for each of three items: (1) the aggregate annual cost of performing an estimated number of various laboratory tests as set forth in the IFB, (2) a STAT¹ processing fee for a specified number of these tests, and (3) a STAT transportation charge for a specified number of these tests. Maryland Medical Laboratory, Inc. (MML) was the low bidder.

¹Use of the term "STAT" in the IFB indicates that expeditious or at once handling or processing is required.

2. On April 11, 1985, Appellant protested the award of the contract to MML on grounds that MML was not a responsible bidder since it allegedly could not (1) provide certain services at the price bid, (2) provide 24 hour "on call" services or (3) provide blood for emergency transfusion in instances where irregular antibodies might be present. By letter dated April 23, 1985, DHMH requested MML to provide information concerning its ability to perform in accordance with specifications pertaining to availability of services 24 hours per day, 7 days per week and availability of blood for transfusing. MML affirmatively responded to this request by letter dated May 1, 1985.

3. On June 5, 1985, the procurement officer issued a final decision denying Appellant's protest on the grounds asserted.² Appellant appealed the procurement officer's decision to this Board on June 21, 1985. Appellant did not request a hearing pursuant to COMAR 21.10.07.06 nor elect to comment on the agency report as provided in COMAR 21.10.07.03 D.

Decision

Contract award in a competitive sealed bid procurement is made to the responsive and responsible bidder whose bid is either the lowest bid price or lowest evaluated bid price. Md. Ann. Code, Art. 21, §3-202(g); COMAR 21.05.02.13. MML's bid was responsive to the terms of the IFB and was the low bid.

Appellant, however, argues that MML was not a responsible bidder.³ Appellant alleges that MML is unable to provide 24 hour "on-call" services. Appellant also questions whether MML can provide blood for an emergency transfusion in cases where irregular antibodies may be present and whether MML has included the cost for antibody identification in its cross match cost.

The procurement officer determined that MML was a responsible bidder⁴ and specifically addressed Appellant's concerns regarding MML's capability to perform in accordance with the contract terms⁵ in his final decision as follows:

"Regarding the bid from Maryland Medical Laboratory, we have been assured by the firm's Director of Laboratories that his company will provide the STAT laboratory services as required in the specifications

²The procurement officer also determined that Appellant's bid was nonresponsive respecting the fixed price requirements of the IFB. Since Appellant was not the low bidder and in view of our decision herein, we need not address this aspect of Appellant's appeal.

³Responsibility of a bidder relates to its ability to perform in accordance with the contract terms. COMAR 21.01.02.59; Lameco Corporation, MSBCA 1227 (February 21, 1985).

⁴The procurement officer's finding that MML was a responsible bidder was based in part on information supplied by MML after bid opening. However, matter relating to the determination of a bidder's responsibility may be submitted and evaluated after bid opening. Aquatel Industries, Inc., MSBCA 1192 (August 30, 1984).

⁵The IFB requires that bidders provide all the services called for in the specifications. Therefore, MML is contractually obligated to provide those services at the prices submitted in its bid.

7 days a week, 24 hours a day. Our inspection of their operation leads us to believe that they will provide the required services.

There was some confusion as to the requirements of crossmatch (with type and screen). Maryland Medical Laboratory bid \$14.00 for this service which does not include the processing fee for the handling of the blood. This company has made arrangements with the American Red Cross to provide the necessary blood or blood products for transfusing. They have informed us of plans to establish their own Blood Bank storage facility in Salisbury.

Maryland Medical Laboratory has agreed to charge the Department a fee of \$46.50 for the crossmatch which will include the fee for processing the blood to be used in transfusing. When there is no blood to be supplied the fee of \$14.00 has been established.

This represents a reduction from the \$59.00 (\$14.00 + \$45.00) originally bid. I am adjusting their bid to this new figure based on Section II, Subsection D-2 of the bid solicitation which states in part "a late modification of a successful bid which makes its terms more favorable to the State shall be considered at any time it is received and may be accepted."

Under Maryland law, the determination of a bidder's responsibility is the duty of the procurement officer who is vested with a wide degree of discretion and business judgment in making that determination. Lameco Corporation, supra, at pp. 6-7; Louise T. Keely, Esq., MSBCA 1195 (September 26, 1984); Board of Education of Carroll Co. v. Allender, 206 Md. 466, 112 A.2d 455 (1954); see also Keco Industries, Inc. v. United States, 203 Ct.Cl. 566, 576, 492 F.2d 1200 (1974). 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 procurement [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).

Accordingly, a procurement officer's determination of responsibility will not be disturbed unless it is unreasonable. See: Allied Contractors, Inc., MSBCA 1191 (August 16, 1984).

The Board does not conclude that the procurement officer's determination in the instant case that MML was responsible was unreasonable. Therefore, the appeal is denied.

I have a great pleasure in writing you and hope you will be pleased to hear from me as often as I can.

The weather is very pleasant here at present and we are all well. I hope you are the same. I shall be glad to hear from you soon.

I am very truly yours,
Your affectionate friend,
John Smith

I have just received your letter of the 15th and was glad to hear from you. I shall be glad to hear from you again soon.

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