

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF ROMMEL
ENGINEERING & CONSTRUCTION

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Docket No. MSBCA 2398

Under Maryland Transportation
Authority Contract No. KH-
528-000-006

April 24, 2004

Responsiveness — A bidder's failure to commit itself, at the time of bid, to required affirmative action goals constitutes a material omission which renders the bid nonresponsive. In determining whether a bidder has committed itself to the minimum affirmative action requirements, the entire contents of the bid must be scrutinized to determine whether the required commitment has been met.

APPEARANCE FOR APPELLANT:

None

APPEARANCE FOR RESPONDENT:

Sandra E. Clifford
Gisele M. Mathews
Assistant Attorneys General
Baltimore, Maryland

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals from the final decision of the Maryland Transportation Authority's (MdTA) Procurement Officer in which he determined that bids submitted by Midasco, Inc., Carr & Duff, Inc., Enterprise Electric Co., and Byers Electrical Construction were responsive, and in which he denied Appellant's protest.

Findings of Fact

1. In November, 2003, the MdTA issued an Invitation for Bids (IFB) for sign lighting and maintenance systems on the John F. Kennedy Memorial Highway.
2. A pre-bid meeting held on December 4, 2003 provided information on the Minority Business Enterprise (MBE) participation program. At this meeting, bidders were informed that the MBE goal for this contract was 25 percent, that MBE firms must be certified by the Maryland Department of Transportation, and that the contractor must submit the MBE package within ten working days of notice of being the verified low bidder.
3. Bids were due by noon on January 9, 2004. Five bids were received. At the bid opening it appeared that Midasco, Inc. (Midasco), with a bid of \$149,920.00, was the lowest bidder,

followed by the next lowest bidders, Carr & Duff, Inc., with a bid of \$209,714.80, and Enterprise Electric Co., with a bid of \$272,028.00. Bids were also received from Byers Electrical Construction, in the amount of \$356,928.50, and Appellant, in the amount of \$385,000.00.

4. At the bid opening, the Procurement Officer identified that the four lowest bids were incomplete.
5. Midasco included with its bid, but did not sign, the Certified MBE Utilization and Fair Solicitation Affidavit (MBE Affidavit) at page 94 of the bid book. The other three lowest bidders did not include page 94 with their bids.
6. On January 14, 2004, a bid protest was received from Appellant, asserting that the other four bidders' bids should be declared non-responsive because they did not complete page 94, and further asserting that Appellant should, therefore, be awarded the contract.
7. On February 6, 2004, the Procurement Officer issued a final decision determining that, despite the failure to complete or include the MBE Affidavit, the other four bidders' bids were responsive, and, accordingly, he denied Appellant's protest.
8. On February 18, 2004, Appellant appealed the Procurement Officer's decision, requesting that this Board rule that the bids of the other four bidders should be rejected.

Decision

A responsive bid is one that conforms in all material respects to requirements contained in the invitation for bids. COMAR 21.01.02.01(78). In this case, the Procurement Officer determined that Midasco and the other three bidders that failed to submit a signed MBE Affidavit were responsive bidders because, based on his examination of each bidder's entire bid, each bidder had clearly indicated an enforceable commitment to the minimum MBE goal of 25 percent. The Procurement Officer found that the failure to sign and/or include the MBE Affidavit was a minor irregularity pursuant to COMAR 21.06.02.04.

The Procurement Officer is required to make a determination of responsiveness prior to the award and must reject a bid that is non-responsive. P. Flanagan & Sons, Inc., MSBCA 2121, 5 MSBCA ¶461 (1999); Fortran Telephone Communications Systems, Inc., MSBCA 2068 & 2098, 5 MSBCA ¶460 (1999). *See also*, State Finance and Procurement Article, §13-206, Annotated Code of Maryland; COMAR 21.05.02.13.

This Board has previously considered cases involving the submission of the MBE Affidavit and determined that the failure to commit to the MBE goal at the time of the bid renders the bid non-responsive. Track Materials, MSBCA 1097, 1 MSBCA ¶30 (1982). In Track, while recognizing that the matter of MBE participation is a material matter and is one of substance rather than form, the Board also recognized that in determining whether a bidder has committed itself to the minimum affirmative action requirements the entire contents of the bid must be scrutinized. We observed that "the responsiveness of the low bid must be measured not by IFB language warning against a determination of non-responsiveness in the event of a failure to sign an affirmative action form, but rather by the presence or absence in the bid package of a bidder's commitment to the affirmative action plan." Track, *supra* at p. 5. The Board then considered whether some additional statement was included in the bid package to "otherwise demonstrate the bidder's intent to pursue the required level of minority business participation

under an awarded contract.” Track, *supra* at p. 6. Similar expressions regarding demonstrations of the bidder’s intent have appeared in a number of subsequent cases. See MAS Contractors, Inc., MSBCA 1345, 2 MSBCA ¶155 (1987); DeBarros Construction Corporation, MSBCA 1467, 3 MSBCA ¶215 (1989); Century Construction, Inc., MSBCA 2385, 6 MSBCA ¶547 (2004).

In the appeal at hand, the MBE Affidavit was not the only statement in the bid package which indicated the bidder’s intent to be bound by the contract’s required MBE goal. In cases subsequent to Track, this Board has found enforceable evidence of a bidder’s commitment to the required level of MBE participation where, as here, the MBE Affidavit was not signed. MAS Contractors, *supra* and DeBarros, *supra*. In MAS and DeBarros, this Board found that inclusion of the MBE goal in the bid as part of the general provisions demonstrated the bidder’s intent to comply with the MBE goal.

In this case, in addition to the MBE Affidavit on page 94, a six-page form was included and identified as “Affirmative Action Requirements Utilization of Minority Business Enterprises” on pages 112 through 117 of the bid book. This certificate acknowledged that the overall MBE participation goal was 25 percent, and it was signed by each of the other four bidders.

In addition to this certificate, which evidenced a clear commitment to the MBE utilization goal of 25 percent, there were other references to the MBE goal in the portion of the bid book submitted by all bidders. Special Provisions 1-1 on page 3 stated the overall MBE goal of 25 percent. Pages 95 through 100 of the bid book describe the procurement’s affirmative action requirements, including specifying the overall goal of 25 percent and describing the administrative procedures for enforcement.

Each of the bidders signed the Bid Affidavit, which on page 126 includes the acknowledgment that “BY SIGNING, THE BIDDER CERTIFIES THAT HE/SHE WILL COMPLY IN EVERY ASPECT WITH THESE SPECIFICATIONS.”

We conclude, based on the above, that the Procurement Officer correctly determined that all of the bids were responsive, and that the failure to complete and/or include the MBE Affidavit was a minor irregularity in light of the other indicia in the bid that demonstrated each bidder’s commitment to the MBE utilization goal.

For the foregoing reasons, Appellant's appeal is denied.

Wherefore it is Ordered this 24th day of April, 2004 that the appeal is denied.

Dated: April 24, 2004

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

Michael J. Collins
Board Member

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 2398, appeal of Rommel Engineering & Construction under Maryland Transportation Authority Contract No. KH-528-000-006.

Dated: April 24, 2004

Michael L. Carnahan
Deputy Recorder

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