

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ROOFERS, INC. )

Under DGS Project No. )  
BB-685-817-003 )

Docket No. MSBCA 1129

April 8, 1983

Responsiveness — A bidder's commitment to affirmative action goals, submitted as part of the bid package, was not vitiated by a simultaneous request for an exception from those goals. The exception request raised only a factual question concerning the bidder's capability to perform and did not affect the legal sufficiency, i.e., responsiveness, of the bid.

Responsibility — Factual information concerning a bidder's capability of meeting affirmative action goals pursuant to its commitment to do so involves a determination of responsibility and thus may be received after bid opening.

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APPEARANCES FOR RESPONDENT:

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OPINION BY MR. KETCHEN

This timely appeal has been taken from a Department of General Services (DGS) final decision rejecting Appellant's protest of the award of a contract to the apparent low bidder. Appellant contends that the low bidder was non-responsive because it did not comply with the requirements set forth in the invitation for bids (IFB) concerning the Minority Business Enterprise (MBE) affirmative action program. Appellant, therefore, submits that it should have been awarded the contract.

FINDINGS OF FACT

1. On October 28, 1982, DGS issued an IFB for roof replacement and repair of the pedestrian walkway connecting State office buildings located at the Preston Street complex, Baltimore, MD. Bids were due by November 16, 1982 at 10:00 a.m.
2. The following three bids were received and opened at the appointed hour:

United Cold Storage  
Specialties, Inc. (United)

\$130,700

Appellant	\$139,000
Lawrence Construction	\$141,115

3. United's base bid was submitted on the IFB Standard Form of Proposal. Included on this form was the following language: "Also, it is agreed that on or before the date the firm has executed the contract, the firm will have and submit to the State an Affirmative Action Plan as specified in Section §9 [of the General Conditions]." (Underscoring added.)

4. Contract General Condition §9.05 is entitled "Minority Business Enterprise Utilization" and provides as follows:

A. The contractor shall structure his procedures for the performance of the construction services required by this contract to attempt to achieve the result that a minimum of 10 percent of the total dollar value of the contract is performed directly or indirectly by minority business enterprise. Such performance by minority business enterprise shall be in accordance with this Section. The provisions of this section are applicable to contracts with a value of \$25,000 or more. The contractor agrees to use his best efforts to carry out the requirements of this section consistent with efficient performance of the project.

\* \* \*

C. Contractor Responsibilities

1. The contractor must submit the Minority Business Enterprise Affirmative Action Certification (Exhibit I) and Schedule for Participation by Minority Business Enterprises Contractors/-Suppliers (Exhibit II) in five working days after bids are opened by the Department. (Underscoring added.)

2. The contractor must assure that minority business enterprises shall have the maximum practical opportunity to compete for subcontract work under the contract.

3. The contractor must enter into an agreement or award subcontracts or procure supplies and services with minority business enterprises, or take other appropriate action, to achieve the result that a minimum of 10 percent of the total dollar value of the contract is performed by minority business enterprise.

4. If the contractor is unable to enter into an agreement or subcontract or procure supplies and materials from minority business enterprises as required by paragraph 3. above, the contractor must submit with his proposal a Request for Exception to the 10 percent requirement, using the Exception Form attached as Exhibit III. (Underscoring added.)

5. The IFB included the following three MBE forms identified in §9.05C of the IFB's General Conditions: Exhibit I, "Minority Business Enterprise Affirmative Action Certification;" Exhibit II, "Schedule For Participation By Minority Business Enterprises

**Contractors/Suppliers;" and Exhibit III, "Request For Exception."**

**6. IFB Exhibit I contains the following affirmation:**

**"I do hereby declare and affirm that it is the intention of the above organization to take affirmative action, pursuant to the Bid Conditions, to seek out and consider Minority Business Enterprises and affirmatively solicit their interest capability, and prices. The same will be effected through, but not necessarily be limited to, the use of the Minority Business Enterprise Directory as may from time to time be issued by an agency of the State of Maryland or any Political Subdivision thereof."**

**\* \* \***

**"I understand and agree, that if awarded the contract, the aforesaid organization will undertake to implement the provisions of the above paragraph with respect to subcontracts to be let after the award of the contract, but that such subcontracts will not be let until the Department of General Services has reviewed and approved the Schedule for Participation by Minority Business Enterprises (Exhibit II). I understand that for failure to submit this Certification, the Department of General Services may consider this bid non-responsive. (Underscoring added).**

**7. United's bid included an executed copy of Exhibit I, the MBE Certification, committing it to the 10% MBE participation goal. However, United also submitted with its bid an executed copy of Exhibit III requesting an exception from the entire 10% MBE goal. Consistent with its request for exception from the 10% MBE goal, United returned with its bid a blank copy of Exhibit II.**

**8. On November 17, 1982 Appellant filed a written protest contending that United's failure to submit the MBE Exhibit II with its bid showing a schedule of 10% MBE participation caused its bid to be nonresponsive**

**9. On November 23, 1982, five (5) working days after bid opening, United forwarded to 1)GS a completed copy of MBE Exhibit II, indicating that it had obtained 10% MBE participation by an agreement with a materials supplier. Based on this information, the DGS procurement officer determined that United met the requirements concerning MBE participation and thus was eligible for contract award as the low responsive and responsible bidder.**

**10. The DGS procurement officer denied Appellant's protest in a written final decision dated December 6, 1982 on the grounds that United submitted its schedule of 10% MBE participation (Exhibit II) within the time the IFB allowed.**

**11. Appellant filed a timely appeal with this Board on December 22, 1982.**

**12. On Wednesday, February 2, 1982 the Board of Public Works approved contract award to United.**

## DECISION

Where an IFB requires a bidder to commit to an MBE program at the time of bid, the failure to do so constitutes a material defect which, thereafter, cannot be waived. Track Materials, MSBCA 1097 (November 30, 1982) p. 9. Our concern here, therefore, is whether an MBE commitment was required at the time of bid and, if so, whether the apparent low bidder complied therewith.

Contract General Conditions §9.05C.1 provides that "[t]he contractor must submit the Minority Business Enterprise Affirmative Action Certification (Exhibit I) and schedule for Participation By Minority Business Enterprises Contractors/Suppliers (Exhibit II) in five working days after bids are opened by the Department. "Nothing in the "Minority Business Enterprise Affirmative Action Certification" (Certification) expressly contradicts the requirement. This Certification, however, does state that "[b]idder] understand that for failure to submit this Certification, the Department of General Services may consider this bid non-responsive." Since responsiveness involves a determination as to the legal sufficiency of a bid, Appellant contends that this language impliedly required that the Certification be submitted as part of the bid.

While we agree that a bid's responsiveness should be determined by the bid content as originally submitted,<sup>1</sup> we nevertheless find that the terms of the solicitation did not require that the Certification be submitted with the bid documents. The language of the Certification, although improper and confusing, was not sufficient in view of General Conditions §9.05C.1 to render submittal of the Certification a clear requirement of the bid.

Regardless of the foregoing, however, United did submit an executed copy of the Certification with its bid. Concomitantly, it asked for an exception to the requirements of the MBE program by attaching to its bid Exhibit III to the IFB. Appellant contends that submission of Exhibit III contradicted United's offer to pursue MBE participation and rendered its bid non-responsive.

The executed Certification obligated United to seek out and consider minority business enterprises and solicit their interest, capability, and prices. It was recognized by DGS, however, that despite a contractual obligation to pursue MBE participation, a contractor might not be able to subcontract with MBE firms so as to achieve the desired goals. Accordingly, an exception form was provided and a mechanism established to review it. Under this review procedure, where DGS' Contract Compliance Review Team agrees that an exception should be granted, the contractor is eligible for award despite its failure to achieve the 10% MBE goal. See General Conditions, §9.05C.5. Where an exception is denied, however, a contractor remains obligated to achieve the 10% MBE goal.

From the foregoing, we conclude that the exception form did not vitiate United's obligation to pursue the 10% MBE goal. The form merely constituted an admission by United that it could not meet the 10% goal as of the date of bid opening. Whether the reasons for its inability to meet the 10% MBE goal were justified was a factual question relating to United's capability to perform fully the contract

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<sup>1</sup>See Inner Harbor Paper Supply Co., MSBCA 1064 (September 9, 1982).

requirements. As such, it involved a determination of responsibility. See COMAR 21.01.02.59.

In determining whether a bidder is responsible, an agency must determine whether the bidder, as of the date of the contract award, will have the capability to perform. 52 Comp. Gen. 240 (1972); 49 Comp. Gen. 619 (1970). Factual information pertaining to this consideration thus may be received after bid opening. Track Materials, supra. When United ultimately demonstrated to the DGS procurement officer that it could achieve the 10% MBE goal, it properly was determined to be responsible, notwithstanding its earlier admission and request for an exception.

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

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