

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ROOFERS, INC.

)

) Docket No. MSBCA 1284

Under SAA Contract No.

)

SAA-CO-86-008

)

July 11, 1986

Responsiveness - A bidder's commitment to affirmative action goals required by Maryland's Minority Business Enterprise (MBE) program is a responsiveness requirement and, therefore, needs to be submitted with the bid.

Responsibility - Information concerning a bidder's ability to meet the MBE goals committed to by affidavits submitted with the bid, like other information bearing on the bidder's ability to perform, relates to the issue of bidder responsibility. This responsibility requirement was not converted into one of responsiveness by the terms of the IFB. Accordingly, MBE forms showing that a bidder met the MBE goals it had committed to in its bid appropriately were received and considered after bid opening.

Subcontracting - There is no Maryland statutory or regulatory provision prohibiting a successful bidder from contracting with MBE subcontractors following notice that it is the low responsive bidder. The regulations implementing Maryland's MBE program permit the low responsive bidder to obtain MBE subcontractors after bid opening, and even after contract award subject to satisfaction of the MBE requirement, in the interest of fostering the statutorily mandated MBE program.

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OPINION BY MR. KETCHEN

This timely appeal is taken from a State Aviation Administration (SAA) procurement officer's decision denying Appellant's bid protest which objects to the consideration of the bid of F.A. Taylor & Sons, Inc. (Taylor). Appellant maintains that Taylor's bid should have been rejected by SAA as nonresponsive.

Findings of Fact

1. On February 23, 1986, the SAA issued an Invitation for Bids (IFB) soliciting bids for the rehabilitation of the roofs of several buildings at Baltimore/Washington International Airport (BWI). The IFB Notice to Contractors, p. iv, contains the following statement:

The State Aviation Administration establishes for this Contract a minimum goal of ten (10%) percent Minority Business Enterprise Participation to include MBE, WBE and Disadvantaged Business Enterprise (DBE), in Contracts in excess of \$100,000. At the time of submission of bids, all bidders must submit a complete MBE Package [IFB, Section E] identifying the MBE (and if appropriate, WBE) participants in the Contract.

2. The IFB, Special Provisions, Section SP-11.44 provides:

Bids which are Irregular:

(B) Any bid having the following faults will be considered irregular:

* * *

(3) If Section N, Part I, Minority Business Enterprise Utilization Affidavit and Part II, Subcontract Utilization Affidavit is not executed.

3. The IFB, General Provisions, Section GP-7.29A provides:

A. This contract is subject to Executive Order 01.01.1970.15, December 9, 1970; amended by Order 01.011976.05, July 9, 1976 (Code of Fair Practices), and COMAR 21.11.04 Contractor's Affirmative Action Plan Review/Approval and Compliance Monitoring Process-DOT. This contract is subject to the applicable provisions of Section 8-601 of Article 21 of the Annotated Code of Maryland and the provisions of COMAR 11.01.10 which incorporates by reference the Minority Business Enterprise Program, dated July 1980, as amended April 27, 1981. Copies of the Minority Business Enterprise Program may be obtained from the Department of Transportation Fair Practices Officer, P.O. Box 8755, BWI Airport, Maryland 21240. This contract is also subject to applicable Federal law and regulation pertaining to Minority Business Enterprise and Affirmative Action. (Exhibit 1, p. 4).

B. To the extent any of the above laws or regulations are applicable to this contract they are specifically incorporated herein.

4. Additionally, in Section 12 of the IFB, dealing with the contractor Affirmative Action Program, Section II.B.2 provides in pertinent part:

Mandatory Documentation. The following documentation shall be considered as part of the bid package and shall be furnished by every bidder to the procurement officer at time of bid submission.

(a) Schedule for Participation of Minority Business Enterprise (Form D-EEO-003), fully executed;

(b) Minority Contractor Project Disclosure and Participation Statement (Form D-EEO-004) completed and signed by each certified business listed in the Schedule of Participation;

* * *

(g) Any other documentation considered appropriate by the Department or State Aviation Administration to ascertain bidder responsibility in connection with the contract MBE participation goal.

5. Forms D-EE-003 (Form 003) and D-EE-004 (Form 004) mentioned above as part of the IFB's mandatory documentation are included in Section E of the IFB entitled "Minority Business Enterprise Package" which the IFB requires to be submitted with the bid. Form 003 is completed by the bidder and identifies the MBE subcontractors the bidder engaged to participate in the contract, the nature of the work or service to be performed by each MBE subcontractor, and the agreed amount to be paid to each MBE subcontractor. Submission of this form, or its equivalent, or a request for waiver from the requirement, is required by COMAR 21.05.08.07D(1). Form 004 is to be executed by each MBE subcontractor engaged by the bidder and establishes each MBE subcontractor's intent to contract with the bidder if the bidder is awarded the contract. Form 004 also identifies the nature and amount of any bonds required of the MBE subcontractors. Submission of this form, or its equivalent, is required by COMAR 21.05.08.07D(3).

6. The IFB does not cite either COMAR 21.05.08.07 or 21.11.03.10B(2), both of which direct that the apparent low bidder furnish documentation equivalent to Forms 003 and 004 within 10 working days from the date of award of the contract or notification that it is the apparent low bidder, whichever is earlier. In this regard, COMAR 21.05.08.07, in pertinent part, states:

.07 Minority Business Enterprise Subcontract Participation Goal.

Mandatory provision for each solicitation that provides MBE subcontract opportunities under COMAR 21.11.03 except small procurements made under COMAR 21.05.07. The language may be varied but shall contain the following information:

A. MBE subcontract participation goal of _____ percent of the contract has been established for this procurement. The bidder or offeror agrees that this amount of the contract will be performed by minority business enterprises.

* * *

C. Each bid or offer submitted in response to this solicitation shall be accompanied by a completed MBE utilization affidavit, on forms provided by the procurement agency, whereby the bidder acknowledges the MBE participation goal and commits to make a good faith effort to achieve the goal.

D. Documentation. The following documentation shall be considered as part of the contract, and shall be furnished by the apparent low bidder or successful offeror to the procurement officer within 10 working days from notification that he is the apparent low bidder or successful offeror or within 10 working days following the award, whichever is earlier. If the contract has been awarded and the following documentation is not furnished, the award shall be null and void.

(1) A completed schedule of participation naming each MBE who will participate in the project that describes the:

(a) Contract items to be performed or furnished by the MBE and the proposed timetable for performance; and

(b) Agreed prices to be paid to each MBE for the work or supply.

(2) If the apparent low bidder or successful offeror is unable to achieve the contract goal for MBE participation the apparent low bidder or successful offeror may submit instead of or in conjunction with the schedule of participation a request in writing for a waiver to include the following:

* * *

(6) Any other documentation considered appropriate by the Department or procurement agency to ascertain bidder responsibility in connection with the MBE participation goal. (Underscoring added).

COMAR 21.11.03.10B(2) provides:

The apparent low bidder or successful offeror shall within 10 working days from the date of award of the contract or notification that it is the apparent low bidder or successful offeror, whichever is earlier, submit the documentation described by COMAR 21.05.08.07D.

However, the IFB does not advise prospective bidders that the SAA would grant them the 10 working day period established by COMAR for submission of Forms 003 and 004. Instead, the IFB, Addendum No. 1, states, "[b]idders are required to include completed Forms D-EEO-003 and D-EEO-004 with their bids."

7. Failure to execute Section N, Parts I and II is cited in IFB Section SP-11.44(B)(3) as a basis for finding a bid irregular. By completing Section N, Parts I and II, bidders affirm that they would make ever effort to meet the SAA's goal of ten percent (10%) MBE participation in the performance of

the contract and that in soliciting quotations or offers from MBE sub-contractors, bidders would give MBE subcontractors the same information and time for making their responses as non-MBE's.

8. IFB, Section N, Part I, the Minority Business Enterprise Utilization Affidavit, in pertinent part, states that:

"I AFFIRM that (name of firm), as the General Contractor, in performing the above-referenced contract, we shall make every effort to achieve a minimum goal of ten (10) percent minority business (MBE) participation measured by the value of the contract."

9. When bids were opened as scheduled on April 9, 1986, Taylor was the apparent low bidder. Appellant was the second low bidder.¹ Taylor submitted with its bid a completed Section N, Parts I and II but did not submit Forms 003 and 004 demonstrating its compliance with the ten percent MBE participation goal. They were submitted two days later on April 11, 1986. Appellant submitted both Section N, Parts I and II, and Forms 003 and 004 with its bid on April 9, 1986.

10. Appellant protested award of the contract to Taylor by letter dated April 14, 1986. Appellant maintained that Taylor's omission of Forms 003 and 004 made its bid nonresponsive, thus requiring its rejection.

11. The SAA procurement officer on April 30, 1986 denied Appellant's protest for reasons paraphrased as follows:

- a. The failure to submit Forms 003 and 004 is a minor irregularity which was waived because it is in the State's best interest to do so.
- b. The issue of compliance with the MBE participation goal is one of "responsibility" rather than "responsiveness."
- c. In the event of a substantial conflict between the terms of the IFB and the COMAR regulations, the regulations must prevail, or else the resulting contract will be void.
- d. To accord Taylor the 10 day grace period to submit Forms 003 and 004 does not prejudice Appellant as it too was free to read COMAR 21.05.08.07D and 21.11.03.10B(2).
- e. Taylor did make a timely submission of Forms 003 and 004 under COMAR 21.05.08.07D and 21.11.03.10B(2).

12. Appellant filed a timely notice of appeal with this Board on May 8, 1986.

Decision

Appellant maintains that the apparent low bid should be rejected as nonresponsive for failure to contain a completed Minority Business Enterprise Package as the IFB required. The primary issue, therefore, is whether the

¹Taylor's bid was \$730,000 and Appellant's bid was \$776,000.

absence of Forms 003 and 004 in Taylor's bid submission involves a matter of responsiveness to the IFB - intent to be bound - or of the responsibility of the bidder. Appellant contends that the language in the IFB which calls for submission with the bid of both the completed Section N affidavits and completed Forms 003 and 004 indicates the intent of the procuring agency to assess Forms 003 and 004 as part of its determination of whether a bidder is responsive to the IFB.

In general, we have held that information sought by the IFB bearing on a prospective contractor's ability to perform in accordance with the contract terms relates to responsibility, as distinguished from responsiveness, its legal obligation to perform the required services in exact conformity with the IFB specifications. Since the State may determine whether the bidder is responsible at the time of contract award, factual information pertaining to this consideration may be received after bid opening. Track Materials, MSBCA 1097, 1 MICPEL ¶30, (November 30, 1982); Roofers, Inc., MSBCA 1129 at 6, 1 MICPEL ¶46 at 4-5 (April 8, 1983); Construction Management Associates, Inc., MSBCA 1238 at 5, 1 MICPEL ¶108 at 5 (August 2, 1985); Aquatel Industries, Inc., MSBCA 1192 at 5, 1 MICPEL ¶82 at 4 (August 30, 1984); Haughton Elevator Division, Reliance Electric Company, B-184865, 76-1 CPD ¶294, May 3, 1976, at 8. In this regard, the terms of the IFB may not convert what is ordinarily a responsibility requirement into one of responsiveness. Aquatel Industries, Inc., supra. Therefore, the fact that an IFB may require submission of specified forms with a bid does not necessarily render the requirement one relating to responsiveness. See: Maryland Supercrete Co., MSBCA 1079, 1 MICPEL ¶27, (October 14, 1982). (Anti-bribery affidavit required by the IFB was a responsibility requirement the bidder could satisfy after bid opening.)

These principles equally apply to use of the procurement process to foster Maryland's MBE program. A company by its MBE affidavit obligates itself to the specified goals and timetables, notwithstanding its failure to prove it has met them at the time it submits its bid. Since a bidder thus obligates itself, the failure to demonstrate, also at that time, that it has actually performed the obligation by submitting forms demonstrating compliance does not relate to responsiveness but to responsibility. See: Roofers, Inc., supra; Track Materials, supra, at 8; 53 Comp. Gen. 451 (1974); 51 Comp. Gen. 329, 333 (1971).

Here, Taylor completed the IFB's Section N, Parts I and II, although it did not submit completed Forms 003 and 004 with its bid. Accordingly, the procurement officer correctly determined Taylor's bid to be responsive to the terms of the IFB as Taylor clearly and unequivocally committed through its completion of Section N, Parts I and II to obtain, if possible, MBE subcontractors to the extent of ten percent of its bid price.

Forms 003 and 004, when executed, identify the MBE subcontractors, the nature of the work to be performed by them, the amount to be paid to each subcontractor, and each subcontractor's intent to contract with a bidder if a bidder is awarded the contract. Since these forms in the MBE context relate to a bidder's demonstration of its ability to perform and thus to its responsibility, the procurement officer properly accepted Forms 003 and 004

from Taylor after bid opening.² We thus reject Appellant's interpretation that Forms 003 and 004 raised a responsiveness issue. See: Track Materials, supra, at 9.

Appellant, however, maintains that to allow Taylor ten days after bid opening to complete Forms 003 and 004 gives Taylor an unfair advantage because as the low bidder it could decide not to demonstrate MBE compliance and simply "walk away" from the contract if its bid proved to be too low. This is the classic "two bites at the apple" argument applicable when the "responsiveness" of a bid is in issue. That is, a bidder if it perceives an advantage may simply stand silent regarding a defect affecting the validity of its offer and thereby allow the defect to require its rejection. This argument is inapposite since we have found that submission of Forms 003 and 004 relate to responsibility considerations which may be established after bid opening. Thus, the State could require Taylor to perform under the terms of its bid.

Appellant next argues that Taylor's failure to submit Forms 003 and 004 with its bid placed Taylor in a position to exert leverage in obtaining a price quote from various MBE subcontractors. Having the knowledge that it is the apparent low bidder, Appellant contends, would permit Taylor to engage in "bid shopping"³ in order to lower its subcontractor prices.

²While we do not condone the confusion or inconvenience that may have been caused to bidders by SAA's attempt to have bidders show that they met the MBE ten percent participation goal at the time of bidding, we reiterate that the IFB requirement for submitting Forms 003 and 004 indicating that the ten percent goal has been met is a responsibility requirement that may be complied with after bid opening. Since COMAR 21.05.08.07D and 21.11.03.10B(2) likewise permit bidders to demonstrate MBE compliance after bid opening, the IFB and COMAR are in harmony. See: Kasmer Electrical Contracting, Inc., MSBCA 1065, at 10, 1 MICPEL ¶33, at 8 (January 12, 1983); Downing Development Corp. v. Brazelton, 253 Md. 390, 398, 252 A.2d 849, 854 (1969).

³"Bid shopping" is a practice where a prime contractor in a competitively bid procurement after receiving notice that it will be awarded the contract uses this fact to negotiate low or lower price contracts with subcontractors. The theory is that the subcontractors are at a disadvantage because they know by this time who the prime contractor likely will be and that bargaining with this contractor is their only chance to participate in the work. Those who decry "bid shopping" theorize that the owner (the State) is harmed because subcontractors will lower their prices to get the work at the expense of quality. See generally: Lynch v. Delaware, 465 A.2d 345, 350 (1983) (applying a Delaware statute expressly prohibiting bid shopping).

There is no prohibition against a prime contractor's negotiation after bid opening with either MBE or non-MBE subcontractors in Maryland procurement law that we have been made aware of, and we have been pointed to no such restriction in a regulation or statute. Without characterizing a prime contractor's negotiation of subcontracts after bid opening, it goes without saying here that COMAR 21.05.08.07 and COMAR 21.11.03.10 expressly permit what Appellant complains about. Bidders may obtain MBE subcontractors after bid opening, and, indeed, even after contract award⁴ in the interest of fostering the State's statutorily mandated MBE program. Based on these considerations, we find that the SAA procurement officer properly determined in the State's best interest that Taylor submitted the low responsive and responsible bid.

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

⁴COMAR 21.11.03.10B(3) provides, "[n]othing in this regulation is intended to preclude the award of a contract conditionally upon receipt of the documentation specified in B [COMAR 21.11.03.09] above."