

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of)	
)	
SMITH MANAGEMENT)	Docket No. MSBCA 2028
CONSTRUCTION, INC.)	
)	
Under MdTA Contract No. LB-764-)	
000-006)	

November 13, 1997

Multi-Step Procurement - Step Two - Consideration of bids submitted under step two of a multi-step procurement is done in accordance with competitive sealed bid procedures.

APPEARANCES FOR APPELLANT:	Norman E. Parker, Esq. Charles S. Hirsch, Esq. Ballard, Spahr, Andrews & Ingersoll Baltimore, MD
----------------------------	--

APPEARANCE FOR RESPONDENT:	Steven W. Vanderbosch Assistant Attorney General Baltimore, MD
----------------------------	--

APPEARANCE FOR INTERESTED PARTY: (Cam Construction Company, Inc.)	Kenneth K. Sorteberg Esq. Huddles & Jones, P.C. Columbia, MD
--	--

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its protest by the Maryland Transportation Authority (MdTA) Procurement Officer that its price bid in a Multi-Step Sealed Bidding process was not responsive.

Findings of Fact

1. This procurement followed a Multi-Step Sealed Bidding process (in accordance with COMAR 21.05.02.17) to obtain a contractor to provide final design and to construct pursuant thereto a Police and Automotive Shop facility adjacent to US Route 50 at the Lane Memorial Bridge in Anne Arundel County.
2. The contract was advertised on April 1, 1997.

3. Step one of this multi-step procurement required the submittal of technical proposals from interested contractors and step two involved the evaluation of price bids. The evaluation criteria was set forth in the Notice to Contractors as follows:

STEP ONE

Step one will include the submittal of Technical Proposals from each interested contractor. Following will be the review and evaluation of the Technical Proposals by the MdTA.

The Technical Proposal shall consist of six sections (A-F) as directed in the technical proposals form contained in the proposal package. The sections should include, as a minimum, the information described below. The number of rating points assigned to each section is also indicated.

Section A: Introduction (10 points)

- 1) Provide a description and brief history of prime contractor and other principal firms.*
- 2) Describe organization of Construction Team.*
- 3) Describe organization of Design Team.*

Section B: Statement of Experience. (20 points)

- 1) Provide information requested on forms in the proposal package.*

Section C: Management and Design Team Information (20 points)

- 1) Provide information requested on forms in the proposal package for each of the principal members of the Design Team.*
- 2) Additional resume information may be provided.*

Section D: Scope of Services (20 points)

- 1) Provide a summary of the work to be accomplished.*
- 2) Describe any special requirements of the project.*
- 3) Present any unique circumstances or suggestions.*
- 4) Present observations resulting from field review.*

Section E: Work Plan (20 points)

- 1) Describe methodologies, techniques and processes that are proposed to be used.*

- 2) *Set forth any unique methodologies to be utilized.*
- 3) *Set forth the distribution of work assignments among sub-contractors, lines of responsibility and who will have management authority.*
- 4) *Present a work schedule with completion times.*

Section F: Commitment from Sub-Contractors (10 points)

- 1) *Provide a clear statement of commitment from each significant subcontractor and consultant to be utilized.*

Each technical proposal shall be assigned a score, from 0 to 100, based on the evaluation described above. The top rated firm, along with those other firms that receive a score of over 70% of that of the top rated firm, will be determined to be technically qualified to submit a bid.

During Step Two, only the Price Proposals of those companies determined in Step One to be technically qualified shall be opened and evaluated by the Maryland Transportation Authority. The lowest responsible and responsive bid will be awarded the Contract.

The two-step bid evaluation process shall involve the following activities:

Step One

- 1) *Advertisement of Contract - April 1, 1997.*
- 2) *Technical Proposals from Contractors to be received by the Office of the Director of Engineering, Maryland Transportation Authority, 300 Authority Drive, Baltimore, Maryland 21222, no later than 12:00 Noon (local Time) on April 29, 1997.*
- 3) *The technical review and rating of the submitted Proposals will be completed by May 20, 1997.*
- 4) *The selected qualified contractors will be notified by May 27, 1997.*

Step Two

- 1) *The Pre-Bid Conference for selected qualified contractors will take place in the Engineering /Finance Building's Conference Room on June 3, 1997 at 10:00 a.m.*
- 2) *Sealed price proposals, addressed to the Maryland Transportation Authority, 303 Authority Drive, Baltimore, Maryland 21222, and*

marked "Police and Automotive Shop Facility" will be received until 12:00 Noon on June 26, 1997 (changed by addenda to August 12, 1997).

(Emphasis supplied.)

3. Technical Proposals were received on April 29, 1997, and were reviewed and evaluated.
4. Six firms were determined to be technically qualified and invited to submit a price bid.
5. Bid opening was scheduled for August 12, 1997. Appellant submitted the apparent low bid of \$5,552,066.65. Enclosed with the bid was a letter which qualified the bid as follows:

Pursuant to the contract documents we are clarifying our intent to perform the following mechanical work:

1. *Delete the entire boiler system to include piping, pumps and boilers.*
2. *Install a system a split system electric air conditioners and LP fired gas furnaces and ductwork in lieu of split system units with hot water coils for heat.*

Thank you for your assistance with this matter. . . .

6. The three volume Proposal Form made it clear that the work required under the contract is for the "final design" of the project and Appellant acknowledged in its Technical Proposal at Section E: Work Plan "the completeness of the facilities design . . ." and noted where further design would be necessary. A majority of the necessary design work was set forth in the drawings and the 1600 plus pages of specifications.
7. The Proposal Form (Volume III - Technical Proposal) did not specifically solicit any new, different, competing or substitute designs for the project. The Technical Proposal sought information on organization, experience, management and design team, scope of services, work plan, and subcontractors. Under the categories of information sought for scope of services and work plan, changes in design to include the pro-posed change to the mechanical system at issue in this appeal could have been proposed with the technical proposal. Appellant did not propose any changes to the mechanical system design in its Technical Proposal.
8. A question was raised at the pre-bid meeting of June 3, 1997, whether this was "a design/build project or a plan/spec bid project." The preliminary response given at the meeting stated that the detail of the contract documents extend beyond a normal design/build project, and that guidelines would be developed. The Final Determination, described with the minutes of the meeting, referred all bidders to Section 01010/1.3 of the specifications for clarification. Paragraph 1.3B provides: "All final design work and plans shall be in accordance with the Plans and Specifications included herein."
In the Agency Report the MdTA states that it does not consider this contract to be a design/build contract, but a "complete the design and build" contract.
9. The MdTA did not specifically solicit alternate designs for the project. However, as noted,

language in the Notice to Contractors regarding information sought would have permitted Appellant to propose changes in design or alternate designs including changes to the mechanical system design or alternate mechanical system designs in the Step One, Technical Proposal submission stage. This would allow MdTA an opportunity to evaluate the proposed changes or alternate designs, determine whether they were acceptable, and notify other technically qualified vendors of the acceptable alternatives that could be considered when preparing their bids in the step two bidding phase.

10. COMAR 21.05.02.21 states: "Unless multiple or alternate bids are requested in the solicitation, these bids may not be accepted." In this solicitation, alternate bids were not requested. In fact, no bidder other than Appellant proposed any design changes, substitutions or alternatives in its price bid.
11. The design change proposed by Appellant with the submission of its price bid was material. Appellant estimated that but for its proposed HVAC (mechanical) system change it would have increased its bid \$225,000 to provide the system called for in the plans and specifications.
12. The contract specifications, specifically Proposal Form Volume I(A) - Special Provisions - Section 01631 - Substitutions, provides the mechanism for the contractor to request or propose changes in the project. These specifications, however, distinguish between pre- and post- award substitutions, and specifically provide in relevant part that:
 - B. Substitutions: Changes in products, materials, equipment, and methods of construction required by the Contract Documents proposed by the Contractor after award of the Contract are considered to be requests for substitutions. The following are not considered to be requests for substitutions:
 1. Substitutions requested during the bidding period, and accepted by Addendum prior to award of the Contract, are included in the Contract Documents and are not subject to requirements specified in this Section for substitutions.
 2. Revisions to the Contract Documents requested by the Owner or Architect.
 3. Specified options of products and construction methods included in the Contract Documents.
 4. The Contractor's determination of and compliance with governing regulations and orders issued by governing authorities.

(Emphasis added).

13. In September 4, 1997, Appellant received a final decision dated September 2, 1997 from the MdTA Procurement Officer rejecting its bid as non-responsive. This letter rejecting Appellant's bid followed receipt by the Procurement Officer of a bid protest from the Interested Party on the day of bid opening (August 12, 1997) that Appellant's bid was non-responsive because of the proposed HVAC or mechanical system substitution set forth in its

- price bid and receipt of Appellant's response to the Interested Party's protest that had been solicited by MdTA.
14. On September 11, 1997, Appellant filed a protest with the MdTA Procurement Officer protesting the rejection of its price bid as non-responsive on grounds that a reasonable reading of the solicitation documents established that the procurement was a negotiated procurement that would allow it to submit a proposed change to the mechanical system with its cost proposal.
 15. On September 12, 1997, Appellant filed an appeal with this Board from the MTA final decision dated September 2, 1997. Notwithstanding the absence of a response to Appellant's protest to MdTA of September 11, 1997, the Board assumes jurisdiction on the basis of a timely appeal from MdTA's final decision of September 2, 1997 (that Appellant received on September 4, 1997) rejecting Appellant's bid as non-responsive.
 16. The basic ground of Appellant's appeal was that the solicitation was a "design/ build" solicitation and thus a procurement by competitive sealed proposals under COMAR 21.05.03 which did not prevent Appellant from suggesting a change or refinement to design components for the HVAC or mechanical system with the submission of its price proposal.
 17. Appellant did not comment on the Agency Report or request a hearing.

Decision

The Board finds that the procurement was a procurement by multi-step sealed bidding pursuant to COMAR 21.05.02.17 which involves a two-phase process in which "bidders" first submit unpriced technical offers or samples, or both, to be evaluated by the State. In the second phase those bidders whose technical offers or samples, or both, have been found to be acceptable during the first phase have their price bids considered under competitive sealed bidding procedures. COMAR 21.05.02.17 provides:

.17 Multi-Step Sealed Bidding.

A. *Definition.* "Multi-step sealed bidding" means a two-phase process in which bidders submit unpriced technical offers or samples, or both, to be evaluated by the State and a second phase in which those bidders whose technical offers or samples, or both, have been found to be acceptable during the first phase have their price bids considered.

B. *Conditions for Use.* Multi-step sealed bidding may be used when it is determined by the procurement officer, with the approval of the agency head or designee and the appropriate control authority, that it is impracticable to initially prepare specifications to support an award based solely on bid price.

C. *Evaluation.*

(1) *Once the technical offer or samples, or both, have been evaluated and accepted, price bids from only those vendors whose technical offers or samples, or both, have been found acceptable shall be considered and evaluated in accordance with this chapter. [Chapter 02]*

(2) *Price bids may be solicited at the same time as technical offers, in separate sealed envelopes, or after evaluation of technical offers, only from those whose technical offers have been found acceptable.*

(3) *Price information may not be opened until the technical evaluation*

is complete. Price information from vendors whose technical offers have been found unacceptable shall be returned unopened.

Evaluation of price bids is thus to be conducted in accordance with the provisions of Chapter 02, Procurement by Competitive Sealed Bidding. Such evaluation does not permit a bidder to offer alter-natives and still have its bid considered to be responsive. Responsive is defined to mean a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements contained in the invitation for bids. COMAR 21.01.02 .01(78). A non-responsive bid may not be accepted.

Chapter 02 provides at 21.05.02.13 that:

13. Bid Evaluation and Award.

A. General. The contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the most favorable bid price or most favorable evaluated bid price. A bid may not be evaluated for any requirement or criterion that is not disclosed in the invitation for bids.

B. Determination of Most Favorable Bid. Bids shall be evaluated to determine which bidder offers the most favorable price to the State in accordance with the evaluation criteria set forth in the invitation for bids.

Only objectively measurable criteria which are set forth in the invitation for bids shall be applied in determining the most favorable evaluated bid price.

The State reserves the right to make the award by item, or groups of items, or total bid if it is in the best interest of the State to do so unless the bidder specifies in its bid that a partial or progressive award is not acceptable.

C. Restrictions. Nothing in this regulation shall be deemed to permit a contract award to a bidder submitting a higher quality item than that designated in the invitation for bids if that bid is not also the most favorable bid. Further, this regulation does not permit negotiations with any bidder.

D. Award. Upon determination of the most favorable bid, review of the bid for responsiveness, and satisfaction that the bidder is responsible, the procurement officer shall, after obtaining all required approvals, award the contract to that bidder.

Section C of the regulation precludes negotiations with any bidder and the Board has noted that a bid which does not constitute a definite and unqualified offer to perform in accordance with the requirements of the invitation to bid is not responsive. See Excelsior Truck Leasing Company, Inc., MSBCA 1102, 1 MSBCA ¶50 (1983); Long Fence Co., Inc., MSBCA 1259, 2 MSBCA ¶123 (1986). The MdTA Procurement Officer also noted in his final decision that had the proposed mechanical system “deviation” been noted in Appellant’s technical proposal the evaluation and scoring of the technical proposal would have been different.

Appellant submitted the low bid. However, based on the record, the Board cannot find that the proposed change to the mechanical (HVAC) system represents the submission of a “higher quality item than that designated in the invitation for bids” within the contemplation of the language

of 21.05.02.13 C above. Since Appellant qualified its bid by offering to perform the work with a different or alternate HVAC or mechanical system than that called for in the specifications and since such change was clearly material,¹ Appellant's bid was not responsive and could not be accepted.

Appellant argues, however, that the procurement is not a multi-step procurement at all, but rather a procurement by competitive sealed proposals under COMAR 21.05.03. No pre-proposal or pre-bid opening inquiry or protest concerning the nature of the procurement was filed by Appellant and the bid or proposal documents do not specifically define what type of procurement is intended.

Appellant's argument that the procurement is one by competitive sealed proposals seems to be based on (1) the assertion that the procurement was a design/build; and (2) references in the solicitation documents to "price proposals," language typically found in procurements by competitive sealed proposals.

Concerning Appellant's first assertion and assuming *arguendo* that the contract was a design/build, regardless of whether the procurement is viewed as a multi-step under COMAR 21.05.02.17 or a competitive sealed proposal under COMAR 21.05.03, the applicable rules of the procurement as set forth in the bid or proposal documents required any design changes to be submitted during the technical proposal phase. No best or final offers were sought and once the technical phase was concluded bidders or offerors were not at liberty to suggest further technical modifications in their price bids or proposals notwithstanding that award under a competitive sealed proposal procurement may (if so stated in the evaluation criteria) be made to a higher priced offer for a better technical product or approach. Appellant modified its technical proposal in the price proposal phase where the requirements of the procurement, whether viewed as a multi-step or competitive sealed proposal procurement, did not provide for such modification.

Concerning Appellant's second assertion concerning language typically found in procurement by competitive sealed proposals, we note that the solicitation documents use both the words "bid" and "price proposals" in connection with the price process as set forth in the Notice to Contractors. The Board concludes, however, that the words are used interchangeably to refer to a competitive sealed bid. The most reasonable reading of the Notice to Contractors and the solicitation documents as a whole is that a Multi-Step Sealed Bidding process was intended and would reasonably have been understood by contractors to have been intended.

¹ Such change affected price significantly. A matter is material if its significance as to price, quantity, quality or de-livery is not trivial or negligible when contrasted to the total cost or scope of the procurement. COMAR 21.06.02.04.

Accordingly, Appellant's price bid was appropriately rejected as being non-responsive and the appeal is denied.

Wherefore, it is Ordered this 13th day of November, 1997 that the appeal is denied.

Dated: November 13, 1997

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 2028, appeal of Smith Management Construction, Inc, under MTA Contract No. LB-764- 000-006.

Dated: November 13, 1997

Mary F. Priscilla
Recorder