

BEFORE THE MARYLAND
STATE BOARD OF CONTRACT APPEALS

In the Appeal of)
)
SUBSTATION TEST COMPANY)
) MSBCA Docket Nos. 2016 & 2023
Under Department of)
General Services)
Project No. B-000-970-027)
)

Award of Contracts-Jurisdiction - Regardless of circumstances, only the Board of Public Works, not the Board of Contract Appeals, has the authority to require an agency to award a contract to address error in the procurement process.

Responsiveness - Where the low bidder failed to respond to material specifications by showing that its employees had the required certification by testing agencies approved by the State, the bidder should not have been permitted to attempt to cure the defect in its bid. Failure of a bid to comply with a material requirement of the solicitation may not be waived.

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OPINION BY BOARD MEMBER STEEL

These consolidated appeals arise out of two invitations for bid seeking high-voltage electrical testing services.

Findings of Fact

1. For many years, the Department of General Services (“DGS”) procured high voltage electrical testing services by periodically entering into a direct contract with a testing company to provide service on demand with payment based on an hourly rate. Appellant Substation Test Company (“Substation Test”) held the testing contract for several years,

including the period ending December 31, 1996.

2. On or about November 6, 1996, DGS issued a solicitation ("IFB") requesting competitive sealed bids for the furnishing of high voltage electrical testing services on demand for a period commencing January 1, 1997 through December 31, 1999, with a not-to-exceed amount of \$25,000 per job. Section VI of the bid specifications required inter alia that the testing firm have in its employ full-time a minimum of two two-man testing teams who enjoyed certification by the International Electrical Testing Association ("NETA") in Electrical Power Distribution Testing, or who were certified as engineering technicians in Electrical Testing Engineering Technology by the National Institute for Certification in Engineering Technologies ("NICET"). In addition, the specifications required that the company have in its employ an electrical engineer licensed in the State of Maryland, and that the bidder be independent of all electrical equipment manufacturers, suppliers and construction contractors.
3. The initial bid opening date was December 3, 1996. Prior to bid opening, Independent Testing Agency, Inc. requested that AVO¹ certification be acknowledged as an acceptable bidder qualification in lieu of NICET or NETA certification. In addition, Westinghouse Electric Corporation ("Westinghouse") submitted a letter dated November 27, 1996 seeking clarification that it was qualified to bid based on its assertion that the qualifications of its personnel were consistent with the intent of Section IV 2.C. of the Specifications (respecting certification by NICET or NETA). On December 2, 1996, Westinghouse submitted a letter stating that it was independent of all manufacturers producing the equipment described in the IFB, and presuming confirmation from Ms. Seiler of its eligibility to bid relative to certification.
4. Bids were opened on December 3, 1996, with Westinghouse the apparent low bidder. The second low bidder was H&H Testing, Inc. ("H&H"). H&H and Substation Test submitted timely protests (as did Met Electrical Testing Company, Inc.) asserting that the Westinghouse testing team members were not NETA or NICET certified as required by Section IV 2.C. of the Specifications; Westinghouse was in fact an electrical equipment manufacturer; and Westinghouse had not, as required by Section IV 2.C. of the Specifications, submitted the name of a Maryland-registered professional electrical engineer.
5. The Procurement Officer (Ms. Catherine Seiler) forwarded the protests to the responsible DGS electrical engineer, Mr. Glen Welker, who evaluated the protests and reported back to the Procurement Officer that in his opinion Westinghouse had a comprehensive course for certification of electrical testing technicians equal to or exceeding the requirements of NETA. Further, he asserted that the documents submitted listed a Registered Professional Engineer in the State of Maryland. Finally, he opined that the only manufacturing that Westinghouse could be remotely associated with was the LaGrange Medium Voltage Vacuum Breaker Center.

The Board finds that the Westinghouse program did not meet or exceed the requirements of NETA or NICET. The Board finds that the Westinghouse bid did not list a professional engineer registered in the State of Maryland, but listed a professional engineer (Mr. Frank

¹The record does not indicate what "AVO" stands for.

Angelini) licensed in the State of Pennsylvania. The Board further finds that Westinghouse was affiliated with other manufacturers, such as Cutler Hammer.

6. Apparently the Procurement Officer was not persuaded that Westinghouse had been a responsive bidder, and on December 24, 1996, by letter DGS sustained the protests as follows:

The specifications require that the members of the testing teams shall be currently certified by the International Electrical Testing Association (NETA) or certified as an Engineering Technician in Electrical Testing Engineering Technology by the National Institute for Certification in Engineering Technologies (NICET). The specification as currently written does not allow for equal certification. Therefore, your protest is sustained.

7. Rather than award to the next lowest responsive bidder, however, in the December 24, 1996 letter, the Procurement Officer also rejected all bids, despite the fact that three bids other than Westinghouse's were responsive and within the State's estimated budget. The Procurement Officer advised bidders of this decision in relevant part as follows:

The Department has decided it is in the State's best interest to reject all bids, revise the specification as to accepted certification and rebid the project. This action is being taken because the Department has concluded that the specification was unnecessarily restrictive in its certification requirements.

8. The Specifications were redrafted to state that Section IV certification (or equivalent) was required, and that affiliation of a bidder with electrical equipment manufacturers, suppliers and contractors was no longer prohibited. The new specification Section IV 2.C.1 read:

1) Each member of the testing team shall at all times hold a certification as to competence in electrical power distribution system testing, electrical testing engineering technology, or comparable electrical system testing. The certification must be based on passing an actual test or evaluation of competence. Mere certification of training will not be sufficient. Certification of competence must be issued by a company acceptable to the Department and must be reasonably indicative of competence to perform the service required by this contract with a high degree of skill and expertise. .

..

* * *

2) The names and certification numbers of the testing teams shall be identified on the bid form.

Section IV.2.B was not revised and continued the requirement that the bid documents list an electrical engineer registered in the State of Maryland who was a full-time employee who would evaluate all test results and issue a certified test report.

9. A new Request for Bid Date was approved on January 16, 1997, and the revised specifications were issued with a bid opening date of February 21, 1997.
10. H&H Testing, Inc., and Met Electrical Testing did not participate in the second bid. On

February 21, 1997, bids were received from Independent Testing, Westinghouse, and Appellant. Westinghouse was again the apparent low bidder at \$113 per hour, with Substation Test as the next low bidder at \$124.00 per hour (still within the continuing estimation of the DGS engineer of \$130.00 per hour).

11. There was no protest filed by any prospective bidder to the revised specification, or, for that matter, to the original specification.
12. In its second bid Westinghouse listed four testing team members, writing "Westinghouse" in the blank where certification type and number was called for. Mr. Angelini was again listed with the Pennsylvania registration number "PE-024841" written where a Maryland registration number was called for.
13. Substation Test listed seven testing team members, providing their NETA Certification numbers as required by the IFB. In addition, they listed a Maryland Registered Electrical Engineer, and included his Maryland Registration Number, "17410", as required.
14. On February 26, 1997, Substation Test again protested any award of the contract to the apparent low bidder, Westinghouse, on the grounds that the bid was non-responsive and non-responsible. Substation Test listed as its grounds for pro-test the failure to furnish certification numbers for members of the testing team, failure to attach a resume for the electrical engineer, and the listing of a professional engineer registration which was not issued by the State of Maryland.
15. On the same day, DGS faxed the Substation Test protest letter to Westinghouse requesting assistance in responding. On March 10, 1997, the Procurement Officer wrote a letter to Westinghouse stating, inter alia,

On February 27, 1997 you were instructed . . . to submit proof of a Maryland License and the Resume for your Registered Electrical Engineer and Certification Type and Numbers for your Testing Team Members as stated in the Detailed Specification. This certification was to be based on passing an actual test or evaluation of competence. Mere certification of training will not be sufficient.

A copy of the protest filed by Substation Test Company was sent to you and you were to respond accordingly.

However you have failed to comply with this request and the Department's "Instructions to Bidders". You have not submitted proof of the above. Therefore, I am requesting that all documents be returned to this Department by 2:00 p.m., March 12, 1997, so we may proceed with the response to the protest and award of this project to your firm.

Failure to provide acceptable documentation by the aforementioned time and date shall be cause for the State to reject your bid under COMAR 21.06.01.03 and award the project to the next lowest responsive and responsible bidder.

16. On March 11, 1997, Westinghouse's Baltimore/Washington District Engineering Services Manager for the Energy Services Division of the Power Generation Business Unit, Mr. Bond, responded as follows:

I have continuously supervised the following Westinghouse field service personnel since 1988:

<u>Name</u>	<u>Assignment</u>	<u>Westinghouse Experience</u>
Vern Hart	Field Engineer	37 Years
Tom Krista	Field Engineer	28 Years
Chip Gavin	Field Engineer	11 Years
Dave Schroyer	Field Technician	15 Years

I believe the above personnel to be highly trained, experienced and fully competent to perform the high voltage electrical testing and evaluation services specified by referenced contract.

The above named personnel will be assigned to referenced contract as required.

Westinghouse has been in the business of performing high voltage electrical testing services for over 110 years.

Westinghouse is the largest independent field engineering services organization in the world with over 60 regional service locations worldwide.

17. Attached were resumes of the four listed employees, with training records. However, the training records provided were not sufficient to show that they had obtained certification or equivalent as required by the revised second set of specifications.
18. The DGS electrical engineer, Mr. Welker, reviewed the March 11 response and in a March 31, 1997 memorandum to the Procurement Officer noted that all four men listed in the March 11, 1997 letter

[a]re qualified, competent and experienced to perform [sic] the testing of high voltage electrical equipment as per the intent of the specifications.

However the documentation of actually taking and passing a written examination was not supplied by Westinghouse.

19. Evidence produced at the hearing showed that subsequent to the second bid the Procurement Officer assisted Westinghouse in securing a Maryland-registered professional engineer license for Mr. Angelini by determining when such license applications were reviewed and what documents were required to be submitted.
20. On April 22, the Procurement Officer denied the Appellant's February 26, 1997 protest. She found that the Westinghouse Certified Electrical Engineer, Mr. Angelini, held a Certified Electrical Engineering license in the State of Pennsylvania and noted that Maryland recognizes, through reciprocity, the Pennsylvania license. She further stated that the Maryland Board for Professional Engineers had also approved Mr. Angelini's registration

for certification in the State of Maryland. While acknowledging that Mr. Angelini's resume had not been submitted with the bid, she informed Substation Test that it was submitted before contract award, and that this minor irregularity could be waived in the State's best

interest. Finally, she addressed the issue of certification of the members of the testing team. She stated:

The certification of the members of the testing team was evaluated by the Procurement Officer and the DGS Office of Facilities Planning, Engineering and Construction and was found to be "reasonably indicative of competence to perform the service required with a high degree of skill and expertise". Their team certification is based on their competence in electrical power distribution system testing, electrical testing engineering technology, or comparable electrical system testing as certified by Westinghouse. The members of the testing team received their certification through in-house training and performed their own electrical testing. Their training also included attendance at many training courses presented by Westinghouse.

In the previous solicitation for this project in December, it was determined that it would be in the best interest of the State to reject all bids and revise the specification with respect to acceptable certification. Nowhere in the specification does the State restrict certification by a major electrical equipment company. Section IV.2.C.1 states ". . . Certification of competence must be issued by a company acceptable to the Department . . ." "The 110 years of experience by Westinghouse in this field, combined with the fact that Westinghouse is the largest independent field engineering services organization in the world, is strong evidence of the firm's responsibility as well as their competency to certify their employees in the area of high voltage electrical testing. Therefore, your protest is denied.

Notwithstanding the Procurement Officer's view of Westinghouse's competence, the Board finds that the Westinghouse bid was non-responsive to the rebid specifications and should not have been considered for award.

21. On May 2nd, the appeal from that Procurement Officer decision of April 22 was timely filed with this Board (2016).
22. On May 19, 1997, Mr. Welker sent a memorandum to John Cook, Chief of DGS Facilities and Construction Contracting who was Ms. Seiler's supervisor. In that memorandum Mr. Welker proposed that, since in the year 1996 there were only two projects that required high voltage testing, a substantial reduction from previous years, that DGS have the "electrical contractor" on a job procure and pay for high voltage testing services as part of his contract. He argued that this would eliminate renewal of the contract on a periodic basis, and would place the burden of funding on the "electrical subcontractor." He suggested that DGS could still maintain control over high voltage electrical testing by receiving copies of the test data and the recommendations of the electrical engineer. In the memorandum he also stated that at that moment he was aware of no contracts that would require high voltage testing and that if there were any they could be handled on an individual basis.

23. At the hearing, Mr. Cook testified that he had suggested this change in policy (to have the electrical testing procured as part of the construction contract procurement) since 1989. He recalled a brief telephone conference conversation in the Spring of 1997 with the DGS Director of Engineering in which a policy decision was made not to award a contract in the instant procurement at his urging and that of one or two DGS electrical engineers. He further testified that the proximity of the decision (to cancel the instant procurement and have the general construction contractors provide such services) to the date of filing of the appeal to this Board on May 2 was coincidence. Apparently at this time there were no projects requiring such services on the horizon.
24. Mr. Welker's recommendation of May 19, 1997 that electrical testing services be procured as part of individual construction contract procurements was thus adopted by DGS. By letter of May 22, 1997, the Procurement Officer informed Appellant that DGS had elected to again reject all bids for the project because it had been determined that there was no longer a need for a maintenance service contract for this type of service. Thus the solicitation was canceled, with such services to be the responsibility of the general contractor (presumably through his electrical sub-contractor) on a contract-by-contract basis.
25. Appellant protested such action and upon denial of the protest timely appealed to this Board again on July 17, 1997 (2023).

Decision

The Board is faced with two questions in this appeal. First, did Westinghouse, in either the first or the second solicitation, submit a responsive bid? Second, if Westinghouse did not submit a responsive bid, did DGS so strongly prefer Westinghouse for the contract that when Westinghouse was unable to file a responsive bid, it canceled the solicitation?

Was Either Westinghouse Bid Responsive?

The Board agrees that, as noted by the Procurement officer in sustaining the first protest, the first Westinghouse bid was not responsive. The decision to amend the specifications and issue a second solicitation was not protested, however, and the record, despite the possible inference to the contrary, does not reflect that the action to cancel the solicitation was actually taken to moot the protests and appeals to this Board on May 2 and July 17, 1997.

The Board finds no bad faith or malice on the part of Mr. Welker or Ms. Seiler. However, it is abundantly clear from this record that by the time the second evaluation was made, they both believed that Westinghouse was fully competent to perform the contract. Mr. Welker in particular believed Westinghouse should be awarded the contract regardless of the manner in which it responded to the solicitation, i.e., even if the Westinghouse bids were non-responsive to the requirements and evaluation criteria set forth in the IFB. This does not comport with the direction of the Board of Public Works as set forth at COMAR 21.05.02.13(A) that

. . . [t]he contract is to be awarded to the responsible and responsive bidder who's 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.

A responsive bid is defined as one 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).

This Board on occasion has had to deny an appeal filed by a contractor who, failing to fully describe its qualifications or otherwise respond to the IFB criteria or requirements in its bid argues “but I was doing or could do the job, they knew I could do it.” Responsiveness, however, must be determined from the face of the bid itself and not from information subsequently obtained through the verification process or other extrinsic evidence. See Calvert General Contractors Corp., MSBCA 1314, 2 MSBCA ¶140 (1986).; Inner Harbor Paper Supply Company, MSBCA 1064, 1 MSBCA ¶24 (1982); Excelsior Truck Leasing Company, Inc., MSBCA 1102, 1 MSBCA ¶50 (1983); Long Fence Co., Inc., MSBCA 1259, 2 MSBCA ¶123 (1986). See also Merjo Advertising ¶ Sales Promotions Company, MSBCA 1942, 5 MSBCA ¶393 (1996).

Although the deficiencies in its bid were not minor as defined in COMAR 21.06.02.04 (and thus there should have been no opportunity to cure) Westinghouse was, nevertheless, given an opportunity to cure the deficiencies in its second bid. It failed to do so, however. In fact, the Board finds that under the terms of the solicitation, it is apparent that Westinghouse was unable to cure since they did not have a testing and certification program which was the equivalent of those provided by NICET And NETA. Error was compounded when a waiver was considered after this failure to cure. The State obviously went beyond the permissible waiver contemplated by COMAR 21.05.02.12 and 21.06.02.04 since the deficiencies were not minor irregularities or technicalities. COMAR 21.05.02.12(A) states:

- A. General. Technicalities or minor irregularities in bids, as defined in COMAR 21.06.02.04, may be waived if the procurement officer determines that it shall be in the State's best interest. The procurement officer may either give a bidder an opportunity to cure any deficiency resulting from a technicality or minor irregularity in its bid, or waive the deficiency if it is to the State's advantage to do so.

COMAR 21.06.02.04 states in relevant part:

- A. A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors.

* * *

C. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State.

Here, we have a determination to waive a material specification. The Board finds that the specification for testing certification required actual test-taking and evaluation. Westinghouse had not provided a certification number based on passing an actual test or evaluation of competence for any member of its teams despite the fact that DGS relaxed the first bid specification to allow Westinghouse to use any other company that Westinghouse wanted to issue certification of testing and evaluation, not just NETA or NICET. The costs of such training, test-taking and evaluation are substantial. It was obvious from the testimony at the hearing that the failure to hold Westinghouse to the testing requirements which the other bidders fulfilled would be strongly prejudicial to the other bidders.

An essential element of the fairness underlying Maryland's procurement law is the principle that bidders are evaluated based solely on their bids and that a non-responsive bid may not be accepted. Appellant's appeal in MSBCA 2016 is thus sustained.

Was the Solicitation Canceled Because the Preferred Bidder, Westinghouse, Was Unable to File a Responsive Bid?

The gravamen of Appellant's argument in 2023 is that DGS so strongly wished to award the contract to Westinghouse that rather than award to another bidder [Appellant] upon Westinghouse's failure to file a responsive bid, it canceled the procurement.

Appellant calls the Board's attention to its opinion in Solon Automated Services, Inc. MSBCA 1046, 1 MSBCA ¶10 (1982) rev'd on other grounds, The University of Maryland Baltimore County Campus and Solon Automated Services, Inc. v. Macke Laundry Services, Inc., Misc. Law. Nos. 82-M-38 and 82-M-42 (Cir. Ct. Balt. Co. October 13, 1982). In Solon this Board observed that:

[t]he rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without an award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have expended manpower and money in preparation of their bids without the possibility of acceptance. . . . Harm to the procurement system especially is grievous where, as here, the resolicitation is for the same services originally sought. Under such circumstances, and auction atmosphere is created. . . . Since the principles and policies set forth in Maryland's procurement law underscore a strong public interest in fostering competition through the fair and equitable treatment of bidders, the rejection of all bids clearly was inconsistent with the State's interest.

Solon at p. 10, citations omitted. The Appellant argues that there is no evidence that the State believed it was fiscally advantageous or in the State's best interest to cancel this procurement in the face of Appellant's appeal to this Board. We disagree.

While the Board sustains the appeal in MSBCA 2016 on grounds that Westinghouse's second bid was not responsive, we note that the actions and motivations of DGS in canceling the solicitation and procuring such services through the general contractor were not inappropriate. For example, it is not unreasonable to cancel a solicitation where only two occasions for testing services were required in 1996, and none were immediately foreseen. As unfortunate as their timing was, we find that responsible officials at DGS in good faith determined to make a policy change regarding the solicitation of electrical testing services and procure such services through the general contractor on an individual contract basis and that such policy change was responsible and arrived at independently and was taken coincidental to and not as a means of circumventing Appellant's protest and appeal in 2016. Appellant's appeal in 2023 is thus denied.

The Board recognizes, however, that the goal of the General Procurement Law to increase confidence in State procurement is not met when the facts as found by the Board in this appeal exist. See, Peter J. Scarpulla, Inc., MSBCA 1209, 1 MSBCA ¶88 (1984), rev'd. 84-347-041/CL 28625 (Cir. Ct. Balt. City May 31, 1985) dismissed as moot, Per Curiam, No. 825 [unpublished] (Md. Ct. Spec. App. Mar. 3, 1986). To remedy the situation presented by the facts herein, Appellant requests that this Board direct that Appellant be awarded a contract under the terms of the second solicitation as the low responsive bidder under the second solicitation.

Notwithstanding this Board's earlier pronouncements in Scarpulla, supra, this Board lacks jurisdiction to direct an agency to award a contract. This Board's jurisdiction is limited. As recently observed by the Court of Appeals, the Board only has such authority as is specifically conferred by statute. Univ. of MD. v. MFE, 345 Md. 86 (1997); reconsid. den. (May 2, 1997). The General Assembly has not authorized this Board to direct award of a contract to a particular party upon a determination that an appeal be sustained because of a violation of statute or regulation during the procurement process. This is clear by reference to the provisions of § 11-204 of the State Finance and Procurement Article which provides that a contract entered into in violation of law is void subject to a determination by the Board of Public Works that the contract is voidable. Only the Board of Public Works, or a subordinate procurement unit acting upon a finding by the Board of Public Works, may affect the award of a contract. The Appeals Board (i.e. this Board) may only determine whether the procurement law has or has not been followed and (since 1994, Chapter 750, Acts 1994) award certain costs to a Protester/Appellant where this Board sustains an appeal and finds there has been a violation of statute or regulation.

Thus, we sustain the appeal in MSBCA 2016 on grounds that the Respondent erred in concluding that Westinghouse submitted a bid that was responsive as required by COMAR 21.05.02.13. However, we may not direct that Appellant be awarded a contract.

Wherefore, it is Ordered this 30th day of December, 1997 that the appeal in 2016 is sustained and the appeal in 2023 is denied.

Dated: December 30, 1997

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

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 2016 & 2023, appeal of Substation Test Company under Department of General Services Project No. B-000-970-027.

Dated: December 30, 1997

Mary F. Priscilla
Recorder