

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE NATIONAL ELEVATOR COMPANY,)
INC.)
Under Morgan State Univ. Contract No.) Docket No. MSBCA 1329
MSU-87-06008-S)

October 1, 1987

Responsibility - An invitation for bids requirement to list elevator maintenance personnel and their type of experience raises a responsibility issue even though the invitation for bids states that failure to provide the information at the time of bid will cause the bid's rejection as being nonresponsive.

Responsibility - While the low bidder listed the type of experience of its elevator maintenance personnel in its bid in this instance, a bidder may furnish information after bid opening, but prior to award, regarding its qualifications, i.e., demonstrating its responsibility.

Responsibility - Procurement officials may consider a bidder's performance on other contracts as a factor in determining bidder responsibility.

APPEARANCE FOR APPELLANT:

Barbara Solomon Brown, Esq.
Alvin Solomon, P.A.
Baltimore, Maryland

APPEARANCE FOR RESPONDENT:

Lawrence White
Assistant Attorney General
Baltimore, Maryland

OPINION BY MR. KETCHEN

This timely appeal is taken from a Morgan State University (Morgan State) procurement officer's final decision denying Appellant's protest of award of the captioned contract to General Elevator Company, Inc. (General). Appellant maintains that General's bid was non-responsive because it did not satisfy the specification requirement for bids to indicate the type of experience of the personnel who will perform the maintenance and repairs covered by the contract.

Findings of Fact

1. On March 17, 1987, Morgan State issued an Invitation for Bids (IFB) for the captioned contract for repair, service, inspection and maintenance of fourteen automatic passenger and freight elevators manufactured by a number of different companies. The elevators are located in approximately thirty multi-story classroom and administrative buildings, residence halls, and residential apartment buildings on the Morgan State Campus located in northeast Baltimore City.

2. IFB, Section IV, Paragraph 3, page IV-1 provides in pertinent part as follows:

3. PREQUALIFICATIONS OF BIDDERS:

a. The elevator maintenance Contractor, must possess at least five (5) years of full-time experience in the maintenance of elevator equipment of this type. He shall, also, possess sufficient financial responsibility, technical ability, shop equipment and technical organization, and have demonstrated the reliability, experience and ability to maintain elevators of the types covered by these specifications. The bidder must furnish with his Proposal, the following:

1. A listing of personnel who will perform the maintenance and repairs covered by this contract, showing the length and type of experience of such personnel, (any changes that may occur in personnel during the term of this contract will be made known in writing to the Superintendent prior to reinstating new personnel to allow them to become familiarize [sic] with locations, contact persons, etc.

2. The name and address of at least three (3) other concerns and/or similar institutions of comparable size and function for which the bidder has or is presently providing similar services were rendered by the bidder.

b. The contractor must prove to the State that he operates a machine shop which is a back-up facility for his preventive maintenance and repair operation and that this facility is operated by the contractor's employees. If necessity arises, the shop must have the capability to operate on a 24-hour basis. This shop must be located within a 30-mile radius of the site. Should the contractor not have a machine shop as specified, he must provide the State with the name and location of the machine shop utilized as the back-up facility for his preventive maintenance and repair operation. Contractor must provide certification with his proposal that this machine shop has the capability to operate on a 24-hour basis to meet emergencies and that the machine shop is located within a 30-mile radius of the site. Failure of the contractor to provide this certification will result in rejection of the proposal.

c. The contractor must satisfy the State that he possesses an adequate stock of parts necessary to maintain the equipment under these specifications and further, that the maintenance mechanic/s assigned to perform preventive maintenance are equipped with a vehicle containing the necessary parts and tools for the performance of routine preventive maintenance.

d. Ability to meet the foregoing experience requirements and the adequacy of the information submitted shall be considered by the Procurement Officer in determining the recommendation of the award of the contract. (Underscore added).

3. The IFB required bidders to submit separate bid prices for three separate years with Morgan State obligated to accept the options for the second and third years subject to the appropriation or availability of funds. Bids were evaluated based on the total combined bid price submitted by each bidder for the three year period.

4. Bids were received and opened on March 18, 1987 with the following results:

	<u>1st</u> <u>Year</u>	<u>2nd</u> <u>Year</u>	<u>3rd</u> <u>Year</u>	<u>Bid</u> <u>Total</u>
General	\$17,864	\$17,864	\$17,864	\$52,992
Appellant	19,800	20,394	20,411	60,605
Standard Elevator Co.	27,800	28,980	30,429	87,009

5. With regard to the elevator repair, maintenance and service personnel listed, General's bid, indicated the following:

a. The bid identified General's personnel as elevator mechanics with various elevator companies,

b. The bid described the employees' training and qualifications and represented that its employees are trained in the repair of all phases of electrical and mechanical elevator equipment,

c. The bid asserted that its supervisors, superintendents, field engineers, and foremen are thoroughly trained and have many years of experience in the adjustment, repair and maintenance of all types of elevator equipment produced by various manufacturers, and

d. The bid included a detailed description of the professional qualifications and experience of the project manager it will assign to supervise performance of the contract at Morgan State. He currently supervises 28 elevator mechanics who service all types of elevators and escalators amounting to greater than 1500 units. His qualifications include experience as a Navy electrician, experience providing elevator repair and maintenance services, and experience as an elevator service and maintenance superintendent.

6. On March 18, 1987, Appellant protested award of the contract on the ground that General's bid was nonresponsive to the requirements of the specification for failure to list the type of experience of its elevator service and repair personnel.

7. The Morgan State procurement officer denied Appellant's protest by a final written decision dated March 23, 1987.

8. Appellant filed a timely appeal with this Board on April 1, 1987.¹

Decision

Appellant maintains that General's bid was nonresponsive because it failed to set forth in response to IFB Section IV, Paragraph 3.a.1. the type of experience of the elevator service personnel identified in its bid who it had assigned to perform the inspection, maintenance, and repair services. Regardless of whether we deal with the issue as one of "responsiveness" or "responsibility," General's bid in fact does indicate the type of experience of the personnel who it has assigned to perform the elevator inspection, maintenance and service work. A list of personnel was furnished with General's bid on a page entitled "Qualifications of Elevator Mechanics" indicating that each person listed was a qualified elevator mechanic.

Appellant shapes the issue it raises as one of whether General's bid is responsive to the IFB. However, the issue raised properly is one of responsibility.² The specification, which forms the basis for Appellant's protest, concerns a bidder's qualifications or ability to perform the work based on definitive responsibility criteria. We have held that such requirements do not raise responsiveness issues even though the IFB may expressly state that failure to provide such information at the time of bid will cause a bid's rejection as being nonresponsive. Such requirements relate to matters of responsibility which cannot be made into questions of responsiveness by the terms of the solicitation. Aquatel Industries, Inc., MSBCA 1192, August 30, 1984, 1 MICPEL 182 at 4. In a strikingly similar appeal in National Elevator Co., MSBCA 1299, October 6, 1986, 2 MICPEL ¶____, involving a similar elevator maintenance and service contract with similar specifications, Appellant objected to award to General, who was also the low bidder in that solicitation, because it did not meet that IFB's definitive responsibility criteria, i.e., the specified experience requirements. We there delineated the appropriate distinctions between responsiveness and responsibility as follows:

We agree that General met the IFB's requirements regarding the listing of its service personnel, although the issue raised is not one of responsiveness. Responsiveness in competitive procurements concerns a bidder's legal obligation to perform the required services in exact conformity with the IFB specifications.

Compliance with the IFB specification at issue here, regarding whether General is sufficiently staffed with experienced elevator maintenance personnel, properly concerns General's capability to perform the contract; that is, whether it is a responsible bidder.² Carpet Land, Inc., MSBCA 1093 (January 19, 1983), 1 MICPEL ¶34. Bidder responsibility is a matter for the procurement officer to determine. He has broad discretion in this regard. His determination that a bidder is responsible will

¹Appellant requested a hearing on its appeal on May 14, 1987 following the filing of the Agency Report on May 4, 1987. However, due to the personal medical circumstances of Appellant's counsel, the Board deferred the hearing until September 17, 1987 on which date an evidentiary hearing was held.

²Maryland Ann. Code, State Finance and Procurement Article, Section 13-402(b), provides in pertinent part that "[i]f prequalification is used, prequalification does not prevent . . .

(2) [a] determination that a person who is not prequalified at the time of bid opening or receipt of offers is responsible." Compare Maryland Ann. Code, State Finance and Procurement Article, Section 11-119 (1986, ch. 840, §1, effective July 1, 1987) with COMAR 21.05.02.05.

not be overturned unless shown to be clearly unreasonable, an abuse of discretion, or contrary to law or regulation. Allied Contractors, Inc., MSBCA 1191 (August 16, 1984), 1 MICPEL ¶82. As we observed in Aquatel Industries, Inc., MSBCA 1192 (August 30, 1984) at 5-6, 1 MICPEL ¶82 at 4 (quoting from 39 Comp. Gen. 705, 711) this basic rule is explained as follows:

"... The projection of a bidder's ability to perform if awarded a contract is of necessity a matter of judgment. While such judgment should be based on fact and should be arrived at in good faith, it must properly be left largely to the sound administrative discretion of the contracting offices involved, since they are in the best position to assess responsibility, they must bear the major brunt of any difficulties experienced by reason of the contractor's lack of ability, and they must maintain the day to day relations with the contractor on behalf of the Government. For these reasons, it would be unreasonable to superimpose the judgment of our Office or any other agency or group on that of the contracting officials. . . ."

The responsibility requirement in the specification before us requires that the bidder demonstrate that it is sufficiently staffed to perform the required services by providing a list of its staff members who will do the work showing the length and type of their experience. Evaluation of the information provided by General about its personnel and the determination of responsibility was a matter for the procurement officer's sound discretion.

² Maryland procurement law defines a responsible bidder as follows:

"Responsible bidder or offeror.—'Responsible bidder or offeror' means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." Md. Ann. Code, State Finance and Procurement Article, §13-101(h).

Even though the IFB indicates that bidders were required to include in their bids information demonstrating their capability to perform the work with qualified elevator mechanics, this does not convert the issue to one of responsiveness requiring bid rejection if the information was not included. A bidder may furnish information after bid opening, but prior to award, regarding its ability to perform the work in accordance with the contract's terms, i.e., demonstrating its responsibility. Construction Management Associates, MSBCA 1238, August 2, 1985, 1 MICPEL ¶108.

In any event, evaluation of the information provided by General with its bid concerning its elevator service and repair personnel and the determination that General is capable of performing the instant contract was a matter for the Morgan State procurement officer to decide initially based on the exercise of his sound discretion. Appellant has not demonstrated by any credible evidence that the Morgan State procurement officer's determination that General meets the IFB's definitive responsibility requirements, including the requirement to list the type of experience of maintenance and repair personnel, and is capable of performing the work was in any way unreasonable or arbitrary. See generally: Custom Management Corp. and Ogden Food Service Corp., MSBCA 1086/1090, October 10, 1982, 1 MICPEL ¶28.

Appellant also maintains that the procurement officer improperly considered General's performance of the existing contract at Morgan State in deciding to award the contract to General as the low responsive and responsible bidder. This was a competitively sealed bid procurement. Maryland procurement law mandates award to the low bidder if it is otherwise responsive and responsible. COMAR 21.05.02.13. A low responsive bidder's performance on other contracts, including its performance on the existing contract as the incumbent contractor, reasonably may be considered as a factor in determining whether it is responsible. There is absolutely nothing untoward in considering past performance when determining the responsibility of the bidder submitting the low responsive bid. This approach comports with Maryland procurement law and otherwise makes practical procurement sense. Compare: Customer Engineer Services, Inc., MSBCA 1332, August 14, 1987, 2 MICPEL ¶____, with Pan Am Aero, Comp. Gen. Dec. B-220486, 85-2 CPD ¶382 (1985); and with Northern Arizona Gas Service, Inc. — Reconsideration, Comp. Gen. Dec. B-216440.2, 84-2 CPD ¶541 (1984).

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