

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE NATIONAL ELEVATOR)
COMPANY)
Under DGS Contract No.) Docket No. MSBCA 1291
MSC-NW86-MS5)

October 1, 1986

Responsiveness - The apparent low bid containing a separately stated price for recommended repair work was ambiguous and thus nonresponsive. The IFB required bidders to include the price of repairs recommended as necessary in their base bids.

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APPEARANCE FOR RESPONDENT: Allan B. Blumberg
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OPINION BY MR. KETCHEN

This timely appeal is taken from a Department of General Services (DGS) procurement officer's decision sustaining the second low bidder's protest of the proposed award of the captioned contract to Appellant who was the apparent low bidder. The decision concluded that Appellant's bid was nonresponsive. Appellant now contests award to the second low bidder and requests, inter alia, that it be awarded the contract on the basis that it is the lowest responsive bidder.

Findings of Fact

1. On April 16, 1986, DGS issued a Request for Bids (RFB) for Project No. MSC-NW86-MS5 for a three year contract (June 1, 1986 - May 31, 1989) to maintain four elevators in the Edward F. Borgerding Court Building, Baltimore, Md.

2. A prebid conference and inspection of the premises was held on May 7, 1986. Of the eventual three bidders, only General Elevator Co., Inc. (General) took advantage of this inspection opportunity. (Ex. 2).¹ Otis Elevator Company, however, had manufactured and installed the existing elevators.

¹All references to exhibits are exhibits to the agency report.

3. The specifications provide, in pertinent part, that:

1. SCOPE OF THE WORK:

"The contractor shall furnish all supplies, materials, electrical and electronic parts, hydraulic and mechanical parts, labor and transportation necessary to perform maintenance, preventive maintenance, and repairs on four . . . elevators. . . ." p. IV-1 ¶1.

* * *

2.4 MACHINE SHOP FACILITY:

"The successful bidder to this contract must have access to a machine shop that will augment his ability in providing a preventative maintenance and repair program at this Center.

- a. The machine shop required above must be within a 50 mile radius of the Multi-Service Center served, operated by the contractor's employees, and capable of operating on a 24 hour basis if required to perform a service for the State under the terms and conditions of this contract.
- b. The contractor must furnish evidence to [sic] the existence of the above facility by providing the Building Manager with the name and location of the machine shop. This facility must be available for inspection by the Building Manager upon his demand." p. IV-1 ¶2.4.

* * *

10. REPAIRS AND/OR RENEWALS:

"The Contractor shall be held responsible for all necessary repairs, adjustments and part renewals to all elevators housed within the Multi-Service Center. This shall include static loading of the cars as required to set automatic control limit devices.

The above shall also include any and all testing as required by the Department of Licensing and Regulation (Division of Labor and Industry) in compliance with Section 1001, Safety Code ANSI A17.1, Elevators, Escalators and Dumbwaiters (Full Capacity Safety Test).

The Contractor shall be held responsible for holding the above test within the time limit set by the governing authority." p. IV-5 ¶10.

* * *

26. ACCEPTANCE OF THE ELEVATORS:

"Should the bidder consider that repair work or deviations from specified methods will be necessary to achieve acceptance result, [sic] he shall submit with his bid a written statement clearly stating his recommendations. The price for this work will be included in

the base bid. The absence of a written statement in this regard will be construed as totally accepting the condition of the elevators for normal servicing. It is the full intent of this specification to provide for completed operation and control of all elevators for the duration of this contract." p.-IV-9 ¶26. (Emphasis added).

4. Bids were received and opened on May 19, 1986, with the following results:

Appellant	\$15,840.00
General	\$19,966.00
Otis Elevator Co.	\$26,027.04 (Ex. 6)

Appellant included with its bid an attached sheet which listed recommended repair work at a cost of \$16,800. (Ex. 4). However, this amount was not included in its base bid of \$15,840.

5. On May 20, 1986, a DGS employee responsible for this procurement, Joyce L. Heinemeyer (Heinemeyer), wrote to Mr. Bess, Vice President of Appellant's company, requesting that he clarify the intent of the attachment to its bid which listed "Recommended Repair Work" and assigned costs to this work.

6. On May 20, 1986, prior to award of the contract, General protested the proposed award to the apparent low bidder, Appellant. In its protest, General stated that: a) Appellant failed to include in its base bid a separate list of recommended repairs and their cost as required by p. IV-9, ¶26 of the specifications, and b) Appellant failed to furnish evidence of its access to a machine shop facility as required by the specifications. (Ex. 8).

7. On May 22, 1986, Heinemeyer received a letter from Appellant which was intended to clarify its bid. In it, Mr. Bess stated that the intent of the "attachment listing recommended repair work and assigned cost is in accordance to [sic] page IV-9 ¶26 of the solicitation. It is the opinion of this company that these items will need replacing or repair, if not now in the near future. . . . I also reiterate that this is strictly a recommendation only."

8. On June 9, 1986, Mr. Raymond Hughes, the procurement officer, sustained General's protest on both points in his final decision. (Ex. 9). He considered Appellant's bid to be nonresponsive and recommended award of the contract to General as the lowest responsive bidder.

9. On June 16, 1986, Appellant filed a timely appeal of the procurement officer's decision with the Board. (Ex. 10).

Decision

The final decision of the procurement officer contains two separate reasons for not recommending the award of the contract to Appellant. In the first instance, he found Appellant's bid to be nonresponsive because it did not comply with the specification requiring the successful bidder to have access to a machine shop. (Finding of Fact No. 3). Appellant's interpretation of this section was that only the successful bidder to the contract must have access to, and furnish evidence of a machine shop, and that "successful

bidder" means that only as a prerequisite to award of the contract to the apparent low, responsive bidder must this evidence be submitted. Appellant argues that there is nothing in the specifications which indicates that such evidence must be submitted with the bid.

In its agency report, DGS stated that an award is made to the successful bidder only after it has satisfied the DGS procurement personnel that it has met the requirements of the solicitation. DGS characterized Appellant's omission of this information as a matter of responsiveness. Responsiveness in competitive procurements concerns a bidder's legal obligation to perform the required services in exact conformity with the IFB specifications. Responsibility, on the other hand, concerns a bidder's capability to perform a contract. Carpet Land, Inc., MSBCA 1093 (January 19, 1983), 1 MICPEL ¶34. In this regard, information bearing on a bidder's responsibility may be submitted and considered after bid opening. Carpet Land, supra.

Here, the requirement in the specification that the successful bidder must have access to a machine shop facility clearly relates to the bidder's capability to perform in accordance with the contract terms, and the specification did not require that this information be submitted with the bid. Thus the requirement for a machine shop, inherently, was a matter of responsibility. The procurement officer thus erred when he concluded that Appellant's bid was not responsive on this ground. While DGS, therefore, has not made an adequate determination of Appellant's responsibility based on Appellant's access to a machine shop facility, a separate issue regarding Appellant's responsiveness to the IFB is dispositive of this appeal.

The procurement officer considered Appellant's bid to be ambiguous and, therefore, nonresponsive because Appellant included with its bid a document which itemized recommended repair work for a separately stated price but did not include this in its base bid.

The specifications provide:

ACCEPTANCE OF THE ELEVATORS:

"Should the bidder consider that repair work or deviation from specified methods will be necessary to achieve acceptance result [sic], he shall submit with his bid a written statement clearly stating his recommendations. The price for this work will be included in the base bid. The absence of a written statement in this regard will be construed as totally accepting the condition of the elevators for normal servicing. It is the full intent of this specification to provide for completed operation and control of all elevators for the duration of this contract." p.-IV-9 ¶26.2 (Emphasis added).

²While not properly raised in this appeal as an issue, we observe that as a general matter leaving bidders to specify additional work they will do and a price for that work in the context of a competitively bid procurement could lead to challenges of the IFB as defective on the grounds that bidders are not bidding on the same work. See COMAR 21.05.02.13. Compare 53 Comp. Gen. 32 (1973) with AMF, Inc., Comp. Gen. Dec. B-181732, 75-1 CPD ¶318 (1975) and with 52 Comp. Gen. 219 (1972). Aside from the niceties of

and

SCOPE OF THE WORK:

"The contractor shall furnish all supplies, materials, electrical and electronic parts, labor and transportation necessary to perform maintenance, preventive maintenance, and repairs on four . . . elevators. . . ." p. IV-1 ¶1.

These two sections of the specifications clearly state that the contractor must make all necessary repairs, and that the cost of these repairs must be included in the base bid. Appellant, however, submitted with its bid a document itemizing "recommended repair work" (Ex. 4) which consisted of repacking the elevator jacks and rebuilding the elevator valves for a total cost of \$16,800. This amount was not included in Appellant's base bid. When Heinemeyer saw this attachment, she asked for a clarification. In his reply letter, the Vice President of Appellant's Company stated that the attachment was in accordance with the specifications, but was only a recommendation.

It is well settled that "responsiveness must be determined from the face of the bidding documents." Inner Harbor Paper Supply Company, MSBCA 1064 (September 9, 1982) at 5, 1 MICPEL ¶24 at 4. See Aeroflow Industries, Inc., Comp. Gen. Dec. B-197628, 80-1 CPD ¶399; United McGill Corp. and Lieb-Jackson, Inc., Comp. Gen. Dec. B-190418, 78-1 CPD ¶119. In this instance, it was impossible for DGS to compute the exact amount of Appellant's bid because DGS was unsure whether to include the repair costs with the amount of the base bid. The specifications clearly stated that the costs of any foreseeable repairs were to be included in the base bid, yet Appellant put these costs in an attachment and then stated, when asked about them, that this was only a recommendation, i.e., they were not to be included in its bid. This deviation from the IFB's requirement clearly qualified Appellant's bid. Stated another way, Appellant's bid does not evidence a firm obligation to comply with the IFB requirement that a base bid cover all repair work since Appellant's bid provides a separate and additional price for certain described, but only recommended repair work.

To be responsive, a bid cannot be ambiguous. If the bid is subject to two or more reasonable interpretations, under one of which it is nonresponsive, it is ambiguous and, therefore, should be rejected as nonresponsive. Free State Reporting, Inc., MSBCA 1180 (June 14, 1984) at 6, 1 MICPEL ¶75 at 6. See Franklin Instrument Co., Inc., Comp. Gen. Dec. B-204311, 82-1 CPD ¶105; Railway Specialties Corporation, Comp. Gen. Dec. B-212535, 83-2 CPD ¶519; 51 Comp. Gen. 831. Accordingly, the procurement officer was correct in deciding that the ambiguity created by Appellant's separately stated price for repair work rendered the bid nonresponsive.

For the foregoing reasons, therefore, Appellant's appeal is denied.

procurement law applicable to the contract formation process, we are seriously concerned in this procurement, where there are obvious safety concerns involved, about the Hobson's choice this specification places on potential bidders of having to choose between recommending repairs necessary for safe elevator operation that will increase their bid prices and not doing so in order to remain in competition for the contract. In this regard, we point out that the procurement agency is responsible for preparing specifications that define its minimum needs. COMAR 21.04.01.

