

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of the Niedenthal Corp.)
)
Under DGS Contract No. P-020-) Docket No. MSBCA 1783
932-003)

February 14, 1994

Responsibility - The execution of a contract Affidavit and Bid/Proposal Affidavit pertains to the issue of a bidder's responsibility and not the responsiveness of the bid. The Procurement Officer may waive as a minor informality the failure to supply such requested document or information at the time of bid opening since it bears on responsibility. Such information may be supplied after bid opening but before award of the contract.

APPEARANCE FOR APPELLANT: Greg J. Niedenthal, President
 Judith A. Niedenthal,
 Vice President
 La Plata, MD

APPEARANCE FOR RESPONDENT: John H. Thornton
 Assistant Attorney General
 Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: None
Patuxent Pump & Well, Inc.

OPINION BY MR. PRESS

This timely appeal has been taken from a Department of General Services (DGS) final decision rejecting Appellant's protest as untimely and approval of award of a contract to the apparent low bidder. Appellant contends that the apparent low bid was nonresponsive because it did not comply with the requirements set forth in the invitation for bids (IFB) for the bidder failed to include a signed Bid/Proposal Affidavit and a signed Contract Affidavit with its bid.

DGS denied Appellant's protest on timeliness grounds and on the merits. However, at the time DGS denied Appellant's protest as being untimely, DGS was unaware that Appellant was not permitted between October 26, 1993 (bid opening) and November 1, 1993 to inspect bids. DGS now agrees that Appellant's protest was timely filed, but asserts the protest must be denied on the merits. Neither party has requested a hearing and this decision is based on the written record.

Finding of Fact

1. This IFB is a solicitation to procure construction of a water supply system at Calvert Cliffs State Park for the Department of Natural Resources (DNR).
2. On October 26, 1993, DNR opened bids on the project at a public bid opening held at the Merkle Wildlife Sanctuary, Upper Marlboro, Maryland. The following bids were received:

Patuxent Pump & Well, Inc. ("Patuxent")	\$31,600
The Niedenthal Corporation ("Niedenthal")	\$44,300
A.C. Schultes of Md., Inc. ("Schultes")	\$83,375

3. Patuxent's bid failed to include the Contract Affidavit required by COMAR 21.07.01.25 pursuant to which every bidder is required to furnish the State with an executed Contract Affidavit, which contains the Certification of Corporation Registration and Tax Payment, the Contingent Fee Affirmation, Anti-bribery Affirmation, The Republic of South Africa Affirmation, and the Drug and Alcohol Free Workplace Affirmation.

Patuxent, in addition, failed to include with its bid the Bid/Proposal Affidavit required by COMAR 21.05.08.07 which requires a bidder to furnish the State with a Anti-bribery Affirmation, Non-coercion Affirmation, Procurement Affirmation (concerning debarment and other proceedings), Financial Disclosure Affirmation, Political Contribution Disclosure Affirmation, and the Drug and Alcohol Free Workplace Affirmation. In all other respects, the bids of the three bidders were responsive.

4. Patuxent furnished DGS with executed copies of both Affidavits dated November 2, 1993. However, the Certificate of Corporation Registration and Tax Payment in Patuxent's executed Contract Affidavit incorrectly listed the resident agent of the Corporation as the Maryland Income Tax Division.
5. On November 5, 1993, Appellant filed a protest against award to Patuxent, alleging that Patuxent's bid was nonresponsive for failure to include executed copies of the two affidavits. The protest was denied on timeliness grounds and on the merits by a DGS Procurement Officer's decision dated December 7, 1993. DGS now finds the protest was timely filed. As noted the Procurement Officer's decision dated December 7, 1993, also denied the protest on the merits and in pertinent part states:

"The failure to file a bid/proposal affidavit or contract affidavit with the bid is a matter of responsibility, not a matter of responsiveness, and

the failure to file these affidavits with the bid, therefore cannot be used as the basis for rejecting a bid...."

6. The DGS Departmental Procurement Review Board on December 9, 1993, approved of an award to Patuxent, but award of the contract has been postponed pending resolution of this protest. On December 20, 1993, Appellant filed an appeal to this Board and Patuxent has furnished DGS with a corrected copy of the Contract Affidavit dated January 6, 1994.
7. Appellant in its comments to the Agency Report dated January 17, 1994 states the following:

"....On November 1, 1993, Greg Niedenthal, President of The Niedenthal Corporation, reviewed the bid documents at the Department of Natural Resources, Annapolis, Maryland. At that time, Deborah Thompson, Procurement Officer, stated that she had requested that Patuxent Pump & Well, Inc. submit the completed and executed copies of the Bid/Proposal Affidavit and the Contract Affidavit which it had erroneously omitted from its bid documents on October 26, 1993. Deborah Thompson stated, in the presence of two other Department of Natural Resources employees, that Patuxent Pump and Well, Inc. had five days in which to furnish these documents.

Patuxent Pump & Well, Inc. submitted a completed Contract Affidavit and a Bid/Proposal Affidavit dated 11/2/93. We note that the face of these documents bears no date of receipt so as to this we are certain.

It was later discovered that the Contract Affidavit submitted by Patuxent Pump & Well, Inc. was incorrect and a corrected copy bear-

ing the date of January 6, 1994 was subsequently provided. Again, no date of receipt is obvious, but assuming for the sake of argument that the earliest possible date of receipt was January 6, 1994, Patuxent Pump & Well, Inc. has clearly failed to meet the five day deadline requirement established by the Procurement Officer. COMAR 21.06.01.01B(1) provides that "A procurement officer may find that a person is not a responsible bidder or offeror for unreasonable failure to supply information promptly in connection with a determination of responsibility under this chapter."

If this case is to rise and fall on the issue of responsibility, then it follows that where an error or omission has occurred and a specific time frame has been provided by the procurement officer to correct that error, it must be that acceptance of these documents cannot be extended to acceptance of incorrect or inadequate documents. Otherwise there would be no purpose in requiring receipt of these documents or in providing a specific time frame for allowing a bidder to correct a previous error.....

The Niedenthal Corporation reiterates its position that the low bidder, Patuxent Pump & Well, Inc. was not responsive in its bid on October 26, 1993 and is subsequently not responsible in its failure to produce the required documents in a timely manner as required by the Procurement Officer.

The Niedenthal Corporation believes that the Agency Report of January 10, 1994 did not address our appeal. COMAR 21.10.07.03(5) "The statement shall be fully responsive to the allegations set forth in the notice of appeal"

Decision

Appellant argues that the failure of Patuxent to file a Bid/Proposal Affidavit and Contract Affidavit with the bid renders Patuxent's bid nonresponsive because the solicitation documents provide that the submission of the affidavits is a mandatory written solicitation requirement.

In respect to the failure to submit affidavit's, this Board has held on prior occasions that certificates and affidavits that seek information bearing on a bidder's integrity concerns bidder responsibility, not bid responsiveness. DeBarros Construction Corporation, MSBCA 1467, 3 MICPEL ¶215(1989). See Calso Communications, Inc., MSBCA 1377, 2 MICPEL ¶185(1988) (debarment affidavit); Calvert General Contractors Corp.; MSBCA 1314, 2 MICPEL ¶140 (1986) (proposal affidavit and contract affidavit); Maryland Supercrete Company, MSBCA 1079, 1 MICPEL ¶27 (1982) (anti-bribery affidavit). A responsible bidder is defined as one "who has the capability in all respects to perform fully the contract requirements and the integrity and reliability that shall assure good faith performance." COMAR 21.01.02.01B(77). (Emphasis supplied). DeBarros Construction Company, supra.

The Bid/Proposal Affidavit pertains to possible criminal violations or convictions involving the bidder and goes to the question of the bidder's integrity and therefore is a matter of the bidder's responsibility. See, Calso Communications, Inc., supra, 2 MICPEL ¶185 pp. 17-22. Where a matter of bidder responsibility is concerned we have held that even where the solicitation documents mandate submission of an item "[a] procurement officer may waive as a minor informality the failure to supply requested documents or information at time of bid opening bearing on responsibility. The bidder may supply such requested information after bid opening but before award of the contract." Calvert General Contractors, Corp., supra, 2 MICPEL ¶140 at p. 15. Therefore, we reject Appellant's argument that Patuxent's failure to provide the Bid/Proposal Affidavit with its bid requires rejection.

Appellant, additionally argues Patuxent's failure to submit the Contract Affidavit with its bid, results in the Patuxent bid being nonresponsive and that the bid therefore should be rejected. This affidavit becomes a part of the contract between the parties if a bidder is awarded a contract. Again, we hold that the execution of such a document pertains to the issue of a bidder's responsibility and not the responsiveness of the bid. To reiterate

we maintain that issues of responsibility do not affect responsiveness of the bid and that a Procurement Officer may waive as a minor informality the failure to supply requested documents or information at time of bid opening bearing on responsibility. The bidder may supply such requested information after bid opening but before award of the contract. Calvert General Contractors, Corp., supra, 2 MICPEL ¶140 at pp. 15 & 16. Therefore, Patuxent's failure to submit the Contract Affidavit with its bid was an error that could be corrected and the Procurement Officer can rectify the error after bid opening and prior to award.

As to the issue raised by Appellant in its comments to the Agency Report pertaining to the period of time Patuxent was allowed to comply with submission of the corrected Contract Affidavit we find the following. The affidavits were submitted on or about November 2, 1993, however, the Contract Affidavit had to be corrected by Patuxent and Patuxent was allowed an extended period to correct the error regarding its resident agent.

We agree with Appellant, a Procurement Officer may find that a person is not a responsible bidder or offeror for "unreasonable failure to supply information promptly...." COMAR 21.06.01.01(B)1. Here, the record does not provide any explanation of why DGS allowed Patuxent a protracted period of time to correct the Contract Affidavit. However, the extended time limit to accept the corrected Contract Affidavit, we believe, falls within the discretion of the DGS Procurement Officer. The Appellant has provided no evidence to suggest that the Procurement Officer abused his discretion in granting the extension from five days to two months. Such an extension is not shown to be unreasonable in our view and the corrected Contract Affidavit was provided prior to award.

Therefore, the amount of time allowed Patuxent to correct the Contract Affidavit does not upon our review give cause for this Board to conclude that DGS abused the process of pre-contract administration nor that Patuxent is not responsible. It is not the function of this Board, as part of the bid protest procedure, to substitute its judgment for that of an agency unless we find the

judgment was legally erroneous, arbitrary or capricious. CMC Health Care Center; MSBCA 1489, 3 MICPEL ¶237(1990).

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

Dated: February 14, 1994

Sheldon H. Press
Sheldon H. Press
Board Member

I concur:

Robert B. Harrison, III
Robert B. Harrison, III
Chairman

Neal E. Malone
Neal E. Malone
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 1783, appeal of The Niedenthal Corp. under DGS Contract No. No. P-020-932-003.

Dated: *February 14, 1994*

Mary F. Priscilla

Mary F. Priscilla
Recorder