

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of)
THE TOWER BUILDING CORP.) Docket No. MSBCA 1057
Under DGS R.F.P. No. LA-1-82)

April 2, 1982

Proposal Securities — Although COMAR 21.06.07.02 requires a proposal security where a contract is expected to exceed \$25,000, the failure of an offeror to accompany his proposal with a security bond is not grounds for rejection of the proposal. Under Maryland's procurement regulations, an offeror should be permitted to furnish a security bond during negotiations.

Late Proposals — Where a proposal was submitted late due, in part, to the offeror's own negligence, the contributory action of a lower level State employee was insufficient to excuse that lateness pursuant to COMAR 21.05.03.02F and 21.05.02.10.

APPEARANCES FOR THE APPELLANT:

Mr. Sidney J. Brown
President
Tower Building Corp.
Baltimore, Maryland

APPEARANCES FOR THE RESPONDENT:

Varda N. Fink
Assistant Attorney General
Baltimore, Maryland

OPINION BY CHAIRMAN BAKER

This appeal has been taken from a final decision, issued by a Maryland Department of General Services (DGS) procurement officer, rejecting a proposal submitted by Appellant pursuant to a competitive negotiation procedure. This proposal was deemed unacceptable by the procurement officer because it was received after the time set forth in the request for proposals (RFP) for such receipt and did not include the required security bond. Appellant, however, contends that these omissions constituted minor informalities which could have been waived in the best interests of the State. Appellant thus asks this Board to now require the DGS procurement officer both to consider its proposal and take the necessary steps to award it a contract, if its proposal is found to be the most advantageous of those received.

Findings of Fact

1. By letter dated July 29, 1981, the Office of the Maryland Attorney General requested DGS to "advertise for 39,500 square feet of office space in the downtown area of Baltimore bounded by Fayette Street on the North, Guilford/South Streets on the East, Lombard Street on the South, and Charles Street on the West." (Letter from James G. Klair to DGS dated July 29, 1981.)

2. In preparing a solicitation for the requested office space, the designated DGS procurement officer concluded that competitive negotiation rather than

competitive sealed bidding should be utilized in selecting a site because:

- "1. Specifications cannot be prepared that permit an award on the basis of either the lowest bid price or the lowest evaluated bid price; and
- "2. It is in the best interest of the State that negotiations be conducted to obtain the best possible price and other relevant evaluation factors advantageous to the State."

This determination was made in writing on August 13, 1981 and approved by the agency head as required by COMAR 21.05.03.OIB.¹

3. On August 11, 1981, DGS issued RFP No. LA-1-82 for the leasing of the desired office space. This RFP included 1 page of Specific Requirements, 11 pages of Instructions To Offerors, 3 pages of General Specifications, 13 pages of Building Specifications, 10 pages of Services, 7 pages of Instructions For Completing Forms, a standard DGS lease agreement (DGS Form LA-5) and miscellaneous forms and statements including a proposal bond form.

4. The RFP expressly provided that offers (proposals) would be received until 4:30 p.m. on September 8, 1981. Paragraph 14 of the accompanying Instructions To Offerors further stated that:

- A. Policy. Any proposal received at the place designated in the solicitation after the time and date set for receipt of offers is late. Any request for withdrawal or request for modification received after the time and date set for receipt of proposals at the place designated is late.
- "B. Treatment. A late proposal, late request for modification, or late request for withdrawal may not be considered. Exceptions may be made when a late proposal is received before contract award, and the proposal, the modification, or withdrawal should have been timely but for the action or inaction of State personnel directing the procurement activity or their employees. A late modification of a successful proposal which

¹COMAR 21.05.03.OIB entitled "Determinations" provides that:

Before a contract may be awarded by competitive negotiation, the procurement officer, with the approval of the agency head or his designee, shall make a determination in accordance with COMAR 21.05.01.02 that competitive sealed bidding cannot be used and that there is more than one available source for the subject of the contract. (8:9 Md. R. S-51 (May 1, 1981))

makes its terms more favorable to the State shall be considered at any time it is received and may be accepted."

5. With regard to timely proposals, paragraph 8 of the Instructions To Offerors provided for their receipt as follows:

"A. Receipt of Proposals. Proposals may not be opened publicly but shall be opened in the presence of two State employees. Proposals and modifications shall be held in a secure place until the established due date. After the established due date a register of proposals shall be prepared that identifies each offeror. The register of proposals shall be open to public inspection only after final award of the contract. Proposals and modifications shall be shown only to State employees having legitimate interest in them."

6. The pertinent negotiation procedure to be followed was set forth in paragraph 9 of the RFP Instructions To Offerors as follows:

"A. Upon the closing date for receipt of offers the Procurement Officer shall classify proposals as:

- (1) Acceptable;
- (2) Potentially acceptable, that is, reasonably susceptible of being made acceptable; or
- (3) Unacceptable.

"B. Offerors whose proposals are unacceptable shall be so notified.

"C. Basic information on acceptable or potentially acceptable offers shall be submitted to the using agency.

"D. The using agency with a Department of General Services representative shall inspect all sites considered acceptable or potentially acceptable.

"E. After the inspection, the using agency shall submit its written comments to the Department of General Services and classify all sites as acceptable or unacceptable. All acceptable sites shall be ranked, by the using agency, in order of preference for preliminary evaluation purposes.

"F. The Procurement Officer shall make a determination on those sites considered unacceptable by the using agency. If the agency rejection is upheld, the offeror will be so

notified. If the agency rejection is overruled, the site will be included in the remainder of the process.

"G. A preliminary evaluation will be prepared for each acceptable offer.

"H. Negotiations will be conducted with the offeror of each acceptable site ("Responsible Offerors") as follows:

- (1) Each responsible offeror will be individually contacted and apprised of the weak and strong points of his offer and any changes or revisions to these specifications. Specific scores or ranking will not be discussed.
- (2) After all offerors have been briefed, a written best and final offer will be solicited from each responsible offeror. A due date will be specified. Failure to submit a final offer will not disqualify an offeror and their previous offer shall be construed as the best and final offer.
- (3) If in the sole discretion of the Procurement Officer, it is in the best interest of the State, the negotiation/final offer process may be repeated.

"I. After receipt of final offer, the Procurement Officer shall reevaluate each proposal and based on Evaluation Factors make a preliminary award.

"J. Preliminary awards will not be final until approved by the Board of Public Works."

7. Offerors were apprised in paragraph 10 of the RFP Instructions To Offerors that all proposals would be binding and irrevocable for a minimum of 90 days following the submission closing date.

8. Paragraph 18 of the RFP Instructions To Offerors further provided that if the total amount of the proposal (annual rent X number of years (5) in initial term) exceeded \$25,000, a proposal security was to be submitted as part of the proposal. The security required was set at 5% of the total amount of the proposal.

9. By the date and time set for receipt of all proposals, only one proposal had been submitted. This proposal was from Baltimore Investment Associates, offering to provide 38,111 square feet of office space in the Munsey Building located at Calvert and Fayette Streets, Baltimore, Maryland. The annual rental cost is quoted as follows:

<u>Years</u>	<u>Amount</u>
1 - 3	\$400,165.50/Yr.
4 - 5	\$480,198.60/Yr.

10. Appellant's President, Mr. Sidney Brown, states that he mailed Appellant's proposal to DGS on September 7, 1981, one day before the proposal closing date. The envelope in which the proposal was contained, however, was postmarked September 8, 1981 and it is undisputed that this copy of Appellant's proposal did not arrive at the appropriate DGS office until after the time set for receipt of proposals.

11. Appellant's Mr. Brown also states that he called DGS at 2:30 p.m. on September 8, 1981 to see if Appellant's proposal had arrived in the mail. After learning that it had not, Mr. Brown asserts that he offered to hand deliver another copy of Appellant's proposal that afternoon. However, Mr. Brown purportedly was told, by an unidentified DGS employee, that it would be permissible to deliver the proposal the next morning.

The DGS procurement officer, in preparing his final decision, called Mr. Brown on November 10, 1981 to determine the identity of the person who allegedly authorized the submittal of Appellant's proposal after the closing date set forth in the RFP. Mr. Brown stated that he could not remember the name of the person to whom he spoke. Thereafter, the procurement officer conferred with the agency head designee, Mr. William Raymond Bosley, and with those in his office who had some responsibility for the instant procurement, but was unable to find anyone who could recall speaking with Mr. Brown on September 8, 1981. In these proceedings, Mr. Brown likewise has omitted to identify the DGS employee with whom he spoke on September 8, 1981. Accordingly, we find that if Mr. Brown did speak with a DGS employee as alleged, that person was neither the procurement officer, the agency head nor one who otherwise had authority to amend the proposal closing date set forth in the RFP.

12. Appellant's proposal ultimately was received by DGS on September 9, 1981 at 5:00 p.m. Since this was after the close of business on that date, receipt of the proposal was not recorded until the morning of September 10, 1981. The proposal, although in excess of \$25,000, was not accompanied by a security bond.

13. By letter dated September 16, 1981, DGS informed Appellant that its proposal was unacceptable because:

- "1. It was received after the 4:30 p.m. September 8, 1981 deadline.
- "2. It did not include the necessary proposal bond."

For these reasons, Appellant's proposal was not considered further for award.

14. On October 21, 1981, the Board of Public Works approved the award of a contract to Baltimore Investment Associates for the lease of 38,111 square feet of office space in the Munsey Building. Appellant's Mr. Brown immediately was informed of this action by Mr. James Klair, the principal counsel in charge of administration for the Attorney General's office.

15. By letter dated October 22, 1981, Appellant's Mr. Brown apprised the Board of Public Works that he was protesting the award of a contract to Baltimore Investment Associates. The Board of Public Works referred the bid protest to the designated DGS procurement officer who received it on October 27, 1981.²

16. The DGS procurement officer denied Appellant's protest by written decision dated November 17, 1981. This decision was transmitted to Appellant by certified mail postmarked November 18, 1981. Thereafter, DGS received a return receipt indicating that delivery had been made on November 19, 1981. However, on December 10, 1981, the final decision was returned to DGS by the U.S. Postal Service. DGS then remailed its procurement officer's final decision on December 15, 1981 along with a cover letter which apprised Appellant's Mr. Brown that DGS previously had received a certified receipt indicating that the first transmittal of the final decision had been received by Appellant. Appellant's Mr. Brown received this second transmittal of the procurement officer's decision on December 16, 1981. By letter dated December 17, 1981, Mr. Brown informed DGS both of his receipt of the second transmittal and his concern that the certified return of the original transmittal had been forged.

17. Appellant filed its appeal with the Board on December 18, 1981. While DGS reserved its right to challenge the timeliness of this appeal, it has omitted to produce any evidence to show that Appellant actually received the procurement officer's final decision earlier than December 16, 1981.

DECISION

COMAR 21.06.07.02³ originally was drafted by the Governor's Task Force on State Procurement Regulations as follows:

Bid Security.

- A. General. Invitations for bids on all state contracts in excess of \$100,000 shall require the submission of bid security in an amount equal to at least 5 percent of the total amount bid, at the time the bid is submitted. If a contractor fails to accompany its bid with the required bid security, the bid shall be deemed nonresponsive as provided by § B.
- B. Failure to Comply. If a bid does not comply with the security requirements of this regulation, the

²Because Appellant's Mr. Brown had been led to believe that his proposal would be considered by DGS notwithstanding its late filing, the procurement officer ruled that the time for filing a bid protest did not begin to run until October 21, 1981, the day when Mr. Brown first learned that a contract had been awarded to another offeror. Mr. Brown thus had 7 days from this date within which to file his bid protest with the procurement officer. Since he met this filing deadline, timeliness was not raised as an issue by the procurement officer.

³8:9 Md. R. S-74 (May 1, 1981).

bid shall be rejected as nonresponsive, unless the failure to comply is determined by the procurement officer to be nonsubstantial when:

- (1) Only one bid is received, and there is not sufficient time to rebid the contract;
- (2) The amount of the bid security submitted, though less than the amount required by the invitation for bids, is equal to or greater than the difference in the price stated in the next higher acceptable bid; or
- (3) the bid guarantee becomes inadequate as a result of the correction of a mistake in the bid or bid modification in accordance with COMAR 21.05.02.12, and the bidder increases the amount of guarantee to required limits within 48 hours after the correction. (Underscoring added.)⁴

As is evident, this draft regulation applied solely to competitive sealed bid procurements.⁵ Maryland's procurement law, however, requires that a bond, or other adequate security, also be submitted under negotiated procurements where the contract is estimated to exceed \$25,000. See Art. 21, Md. Ann. Code, § 3-504(a). Recognition of this statutory language apparently prompted the promulgators of the regulations to later amend COMAR 21.06.07.02 to comport with the legislative intent.⁶ This was accomplished by simply substituting the word "solicitations"⁷ for the term "invitations for bids" in the first sentence of the draft regulation. Unfortunately, however, the remainder of the regulation concerning the treatment of competitive sealed bids which omit a required security bond was never similarly amended to address the treatment of proposals. Thus, COMAR 21.06.07.02 is unclear concerning how a proposal which omits the required security is to be considered.

⁴See proposed State Procurement Regulations presented for review of Governor's Task Force on April 13, 1981.

⁵This is demonstrated by, among other things, the use of the term "invitations for bids" which is defined in COMAR 21.01.02.37 (8:9 Md. R. S-10 (May 1, 1981)) to mean "...any document, whether attached or incorporated by reference, used for soliciting bids under procurement by competitive sealed bidding and small procurement procedures including requests for quotations."

⁶See 8:9 Md. R. S-74 (May 1, 1981).

⁷The term "solicitation" means "...invitation for bids, request for quotations, request for proposals, or any other method of instrument used to provide public notice and advertisement of a State agency's intent to procure supplies, services, and construction." (Underscoring added.) COMAR 21.01.02.64 (8:9 Md. R. S-12 (May 1, 1981))

Maryland's procurement law is of limited help in construing the regulation. This law provides only that "...[i]f the invitation for bids or request for proposals require that a bid bond be provided, a bidder or offeror that does not comply shall be rejected." Art. 21, Md. Ann. Code, § 3-504(c). The law does not specify, however, precisely when rejection of a bid or proposal must take place.

The DGS procurement officer construed COMAR 21.06.07.02 to require the immediate rejection of a proposal, as nonresponsive, if submitted without a security bond. When other provisions of Maryland's procurement regulations pertaining to the distinction between competitive sealed bid and negotiated procedures are considered however, it becomes apparent that this construction was unreasonable and erroneous.

Under competitive sealed bid procedures, award of a contract is made to the responsible bidder who submits the lowest bid or lowest evaluated bid. COMAR 21.05.02.13B⁸ Since price is the determining factor in this type of procedure, it is imperative that all bids be based upon the same scope of work. Accordingly, the concept of responsiveness was developed to prohibit the consideration of a bid which deviates from the requirements of the invitation for bids [IFB]. See 1. R. Nash & J. Cibinic, *Federal Procurement Law*, Ch. 6 at p. 345 (1977); COMAR 21.01.02.60; Art. 21, Md. Ann. Code, § 3-101(i) (1981 Repl. Vol.). Under negotiated procurements, however, price is not the sole criteria for award. Other factors are deemed important to the procuring agency and must be evaluated. In order to "[p]romote understanding of the Procurement Agency's requirements and the offerors' proposals; and ...[f]acilitate arrival at a contract that shall be most advantageous to the State taking into consideration price and other relevant factors set forth in the request for proposals," the procurement officer is permitted to conduct oral and written discussions with offerors after receipt of proposals. COMAR 21.05.03.03.¹⁰ In the course of these discussions, the procurement officer may consider proposals which vary from the RFP where these proposals are susceptible of being made acceptable. COMAR 21.05.03.03B. Thus, in negotiated procurements, the concept of responsiveness is meaningless and inapplicable. Compare *Materials Research Corporation*, Comp. Gen. Dec. B-173522, 51 Comp. Gen. 431, 433 (1972); *Riggins & Williamson Machine Company, Inc.*, Comp. Gen. Dec. B-182801, 54 Comp. Gen. 783, 789 (1975). Therefore, given that COMAR 21.06.07.02 provides only for the rejection of nonresponsive competitive bids and since the regulations (and the instant RFP) permit nonconforming proposals to be made acceptable during negotiations, we conclude that it was improper for the DGS procurement officer, under Maryland law, to reject Appellant's proposal without first allowing Appellant an opportunity to

⁸8:9 Md. R. S-48 (May 1, 1981).

⁹8:9 Md. R. S-11 (May 1, 1981).

¹⁰8:9 Md. R. S-52 (May 1, 1981).

furnish the omitted security during negotiations.¹¹

We now turn to the issue of lateness. In this regard, COMAR 21.05.03.02F¹² provides that:

"Any proposal, withdrawal, or modification received after the established due date and time at the place designated for receipt of proposals is late and may only be considered in accordance with COMAR 21.05.02.10."

Pursuant to this standard, Appellant's proposal clearly was late and could only have been considered if "... the bid (proposal) would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees...." COMAR 21.05.02.10¹³ and Finding of Fact No. 4. The specific question for our consideration therefore concerns whether the telephone waiver of the proposal closing date by an unidentified DGS employee constitutes the type of action intended by the regulations to excuse lateness.

¹¹This conclusion is consistent with the treatment of bid and proposal securities under comparable Federal principles of procurement. In this regard, we note that the omission of a bid bond under Federal competitive sealed bid procedures originally was considered by the Comptroller General of the United States to be a minor informality which could be waived by a procurement (contracting) officer, if in the government's best interests. See General Wrecking Co., Comp. Gen. Dec. B-58637, 26 Comp. Gen. 49 (1946); Secretary of Agriculture, Comp. Gen. Dec. B-134050, 37 Comp. Gen. 293 (1957). These holdings were founded upon the Comptroller General's assumption that a bid bond did not measurably affect the cost of supplies or services being obtained by the Government. In 1959, however, the Comptroller General reversed himself and ruled that the submission of a security bond with a bid was a material requirement of an IFB and could not be waived. Secretary of the Army, Comp. Gen. Dec. B-137319, 38 Comp. Gen. 532 (1959). As such, if an IFB required a security bond, the failure of a bidder to attach the necessary bond to his bid would render that bid nonresponsive. This new rule was premised upon the Comptroller General's realization that the requirement to furnish bid bonds prior to bid opening had a distinct effect upon the fairness of competition. Under the former rule, bidders with marginal bonding capacity were permitted to participate in procurements without the need to first obtain a bond. If they submitted the low bid, both they and their bonding companies then had the advantage of comparing the low bid to the others received and publicly opened to determine the risks involved in performance. If the risks appeared great, a bond was not provided and the low bidder would withdraw its bid. Such marginal bidders thus were being given "two bites at the apple."

The same circumstances and concerns do not exist, however, in negotiated procurements where proposals are not publicly opened and disclosure of any information derived from competing proposals is prohibited. See COMAR 21.05.03.03(3). For this reason, the Comptroller General has not made the submittal of security bonds under a negotiated procedure an element of initial proposal acceptability and has permitted the necessary security to be furnished during negotiations. See H. G. Peters & Company, Inc., Comp. Gen. Dec. B-183115, 76-1 CPD, ¶190 (1976).

¹²8:9 Md. R. S-51 (May 1, 1981).

¹³8:9 Md. R. S-46 (May 1, 1981).

Although no Maryland cases previously have addressed this issue, the Comptroller General of the United States has rendered numerous decisions in this area. Generally, these decisions have excused lateness only where (1) the action or inaction of the bidder or offeror is not an intervening cause of the lateness; and (2) where the consideration of a late bid or proposal would not result in a competitive advantage or otherwise compromise the integrity of the procurement system. Young Engineering Systems, Comp. Gen. Dec. B-185433, 55 Comp. Gen. 754 (1976); Associate Control, Research and Analysis, Inc., Comp. Gen. Dec. B-184071, 75-2 CPD, ¶186; Bertolini Engineering Company, Comp. Gen. Dec. B-186242, 76-1 CPD, ¶86.¹⁴ Given the comparability of Maryland's procurement law and regulations to those in effect in the Federal system, we conclude that the Comptroller General's guidelines reasonably should apply here.¹⁵

In the instant appeal, the solicitation, as required by regulation, instructed offerors as to the submission requirements, "...including the time and date set for receipt of the bids [proposals] and the address where bids [proposals]...[were] to be delivered...." COMAR 21.05.02.01B;¹⁶ COMAR 21.05.03.02A.¹⁷ These terms and conditions could be amended only by authority of the procurement officer and Appellant thus had no right or basis to rely upon the statements of an unauthorized DGS employee purporting to change a material requirement of the RFP. COMAR 21.05.02.08;¹⁸ COMAR 21.05.03.02E.¹⁹ Since the lateness of Appellant's proposal therefore was, in part, directly attributable to its own failure to obtain an amended closing date from the DGS procurement officer, that lateness may not be excused. Compare Payne-Maxie Consultants, Comp. Gen. Dec. B-180827, 74-1 CPD, ¶309.

Of equal importance here is the confusion and unfairness which a contrary conclusion would generate. Bidders or offerors conceivably would be able to obtain permission to submit a late bid or proposal from any agency employee and thereby obtain a competitive advantage over others who have complied faithfully with the requirements of the solicitation. The procurement officer also would lose substantial control over the procurement process and the principal purposes and policies which underlie Maryland's

¹⁴See also 34 Comp. Gen. 150 (1954) where the government changed the room to be used for bid opening without informing bidders; 51 Comp. Gen. 69 (1971) where the bid box was improperly marked and a bid was placed in the wrong receptacle; 54 Comp. Gen. 999 (1975) where the government's telex machine was broken and improperly indicated that messages being transmitted were being received; 55 Comp. Gen. 1340, 76-2 CPD, ¶139 where government employees closed their building to go to a luncheon and Western Union was required to leave a telegraphed bid under a door mat.

¹⁵See Solon Automated Services, Inc., MSBCA 1046 (January 20, 1982) at p. 23 concerning the significance of the decisions of the Comptroller General of the United States to these proceedings.

¹⁶8:9 Md. R. S-44 (May 1, 1981).

¹⁷8:9 Md. R. S-51 (May 1, 1981).

¹⁸8:9 Md. R. S-46 (May 1, 1981).

¹⁹8:9 Md. R. S-51 (May 1, 1981).

procurement law would be subverted. See Art. 21, Md. Ann. Code, § 1-201 (1981 Repl. Vol.). For these reasons, the representations of an unauthorized employee could not have been intended by the promulgators of the procurement regulations to excuse the lateness of a bid or proposal and we so find.

Finally, we consider Appellant's allegation that lateness in a negotiated procurement is a minor informality which does not affect the fairness of competition. In this regard, however, the submission of late proposals traditionally has been treated as an exception to the general rule of negotiated procurement which permits consideration of non-conforming proposals. 1 R. Nash & J. Cibinic, *supra* at p. 346. As stated by the Comptroller General of the United States:

"...our office is of the view that the negotiated system of procurement is strengthened by adhering to the solicitation advice that only proposals received before the time stated would be for consideration unless the listed exceptions are applicable. Moreover, we consider it to be within the prerogative of the procurement activity to impose rules as to the handling of late proposals and to adhere strictly to those rules in circumstances wherein the rules do not permit a deviation from their effect. We see no reason to object to the ... refusal to consider the late proposal in view of the specific regulation embodied in the solicitation. While compliance with the late proposal provisions might appear to be unduly harsh in certain instances, relaxation of the limitation would create confusion and unequal treatment." (Underscoring added.)

Jack Faucett Associates, Comp. Gen. Dec. B-181052, 74-2 CPD, ¶19.

The instant procurement likewise incorporated a regulation providing that late proposals could not be considered except under the circumstances discussed heretofore. Accordingly, in view of that regulation and despite the fact that this is a negotiated procurement, the lateness of Appellant's proposal cannot be waived.

For the foregoing reasons, we sustain the determination of the DGS procurement officer that Appellant's proposal was both inexcusably late and unacceptable under Maryland's procurement regulations. The appeal, therefore, is denied.

