

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Track Materials)
Under SRA Contract No. 168-1208-12) Docket No. MSBCA 1097

November 30, 1982

Responsiveness — A bidder's failure to commit itself, at the time of bid, to required affirmative action goals constituted a material omission which rendered its bid non-responsive.

Responsiveness — IFB language warning against a finding of non-responsiveness in the event of a failure to sign an affirmative action is not sufficient to establish that the signature is a substantive requirement. A commitment to affirmative action goals may be set forth in other ways within the bid package and, if done, will render the bid responsive.

IFB Interpretation — Although bidder alleged that the IFB could be read to permit and affirmative action commitment to be made up to 14 days after bid opening, the board rejected this interpretation as unreasonable.

Appearances for Appellant:

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Appearance for Respondent:

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OPINION BY CHAIRMAN BAKER

This timely appeal has been taken from a State Railroad Administration (SRA) procurement officer's final decision to reject Appellant's bid due to its failure to submit executed copies of two affirmative action certification forms along with its bid package. Appellant maintains that its failure to execute such forms prior to bid constituted a minor informality which it should have been permitted to cure prior to contract award.

1. On March 3, 1982, SRA first published a Notice To Bidders that competitive sealed bids would be received for the rehabilitation of 16 highway grade crossings and track approaches on two rail lines owned by the State of Maryland. The Notice To Bidders apprised all interested parties of the following pertinent matters:

- a. Copies of the invitation for bids (IFB) and contract documents could be obtained from the SRA;
- b. A pre-bid meeting was to be conducted at 10 a.m. on April 15, 1982;

- c. The contractor would be required to comply with all applicable Federal and State Equal Employment Opportunity and minority business laws and regulations; and
- d. Bids would be opened on May 4, 1982 at noon.

2. As required by law,¹ the Maryland Department of Transportation (MDOT) has developed a minority business enterprise (MBE) program which is to be followed when contracting for construction services where the value of the prime contract is expected to exceed \$100,000. (Exh. 13). Pursuant to this program, a pre-bid conference is to be scheduled for such procurements, in part, to "...review with the prospective bidders the detailed steps to assure compliance with the MDOT MBE Program requirements." (Exh. 13, p. 52).

3. A pre-bid conference was conducted for the instant procurement on April 15, 1982. Although Appellant did not send a representative to this conference, minutes were taken by the SRA and copies thereof were transmitted to Appellant and other prospective bidders. Of particular relevance was the following paragraph contained in the minutes:

MBE Requirements - The contractor will be expected to follow the Maryland DOT Affirmative Action Requirements for Contracts over \$100,000. Ten percent minority participation will be required. Material supply is limited to 2 percent of the 10 percent goal.

4. The IFB issued to those contractors responding to the published Notice To Bidders consisted of 79 pages of general information, contract provisions, and bidding documents. The bidding documents were contained at pages 49-79 of the IFB and included: (1) a proposal form, (2) an item bid sheet, i.e., unit price list, (3) a bidder's affidavit, (4) a contract affidavit, (5) a bidder's certification of work capacity, (6) an "Affirmative Action Requirements" form, (7) a "Minority Business Affirmative Action Certification", (8) a sub-contractors listing, (9) a small business set-aside certification, (10) a bid letter, (11) a proposal guaranty, (12) a noncollusion certificate, and (13) an anti-bribery affidavit. Each of these documents was to be completed either by the bidder or his surety and, with the exception of the sub-contractors listing, the bid letter, and the item bid sheet, all documents were to be executed by the bidder.

5. Bids were opened on May 4, 1982. Although eight bids were received at this time, only the two lowest are of continuing interest. These are:

Appellant	\$407,889.35
Eastcoast Railroad Contractors	\$412,291.98

6. In submitting its bid to SRA, Appellant omitted to execute and/or complete three documents. These were the certificate relating to "Affirmative Action Requirements", the "Minority Business Affirmative Action Certification", and the sub-contractors listing. Appellant ultimately did execute and complete the two affirmative action documents, transmitting them to SRA by letter dated May 17, 1982.

¹See Md Ann. Code, Art. 21, §8-601.

7. The "Affirmative Action Requirements" form is prescribed for use in MDOT construction contracts exceeding \$100,000 in value. (Exh. 13, Attach. 2). This is a six page form which includes, among other things, the following MBE requirements:

B. Bidder's Action

1. The bidder shall procure, by subcontract or otherwise, supplies and services, the combined value of which equals or exceeds ten percent (10%) of the total value of the contract, from minority business enterprises (MBEs). Unless procured directly from an MBE manufacturer, procurement items purchased separately cannot comprise more than two percent (2%) of the 10% goal. Additional procurement items from MBEs will be only credited when in excess of the 10% goal. Develop and submit for approval before award, no later than fourteen (14) days after bid opening, an affirmative action plan, which will include as a minimum:
 - a. The name of an employee designated as the bidder's liaison officer for minority affairs.
 - b. A completed Schedule of Participation (SHA 72.0-D-84.1 Goal 1, and SHA 72.0-D-84.2 Goal 2), of minority business enterprises, from among those whose names appear in the MDOT MBE Directory or who are otherwise certified by MDOT as being minority business enterprises.
 - c. A Minority Contractor Project Disclosure and Participation Statement (SHA 72.0-D-85.1 Goal 1 and SHA 72.0-D-85.2 Goal 2), completed and signed by the bidder and MBE for each business listed in the Schedule for Participation.
 - d. When a bidder intended [sic] to attain the 10% goal for minority enterprise participation by use of a joint venture, it must submit a Joint Venture Disclosure Affidavit (MDOT D-EEO-006-A0 showing the extent of MBE participation. If a bidder intends to use a joint venture as a subcontractor to meet its goal, the affidavit must be submitted through the bidder by the proposed subcontractor and signed by all parties. In addition, unless it is already in the MDOT Directory, any MBE which intends to act as a joint venture, whether prime or subcontractor, must submit a completed Minority Business Enterprise Disclosure Affidavit (MDOT D-EEO-001).

On the final page of this form, just before the signature block, appears the following paragraphs:

I do hereby certify that it is the intention of the above organization to affirmatively seek out and consider minority business enterprises to participate in this contract as subcontractors and/or suppliers of material and services.

I understand and agree that any and all subcontracting or supplies and services in connection with this contract, whether undertaken prior to or subsequently to award of contract, will be in accordance with this provision. I also understand and agree that no subcontracting will be approved until the State Railroad Administration has reviewed and approved the affirmative actions taken by the above organization.

I acknowledge that this Certification is to be an integral part of the proposal form for the above numbered project.
(Underscoring added.)

8. The "Minority Business Affirmative Action Certification" is a two page form dealing with the application of MBE requirements to subcontracts. Among other things, the form requires a bidder to acknowledge by its signature that the certification "...is...an integral part of the proposal form." Further, the form expressly apprises bidders that a "...failure to submit this Certification or submission of a false certification [sic] shall render...[the] bid nonresponsive."

9. By letter dated June 3, 1982, the SRA procurement officer apprised Appellant, without elaboration, that its bid was being rejected as nonresponsive. Appellant, on June 17, 1982, then wrote the SRA procurement officer requesting some detail as to why its bid was being rejected. By letter dated June 10, 1982, the SRA procurement officer complied with this request by forwarding a document entitled "Advice of Counsel". This document explained that the failure to complete and/or sign the two minority certifications and the sub-contractors listing was considered a material defect which could not be waived.²

10. By letter dated June 11, 1982, Appellant filed a timely protest with the SRA procurement officer. Appellant thereafter transmitted additional information to the procurement officer denied Appellant's protest by final decision dated July 6, 1982.

11. Appellant's appeal was received by the Board on July 23, 1982. Although the record does not reflect the date upon which Appellant received the SRA procurement officer's final decision, SRA has conceded the timeliness of this appeal.

12. A contract award has been made to the second low bidder, Eastcoast Railroad Contractors, Inc. Notice to proceed under that contract was issued on August 9, 1982 with the work scheduled to be completed within 175 working days.

²On appeal, SRA contends only that the failure to execute the two MBE forms was the basis for a determination of non-responsiveness. (Agency Report, p. 5).

DECISION

The MDOT MBE program is similar to numerous "hometown" plans utilized throughout the country to encourage minority business development in the construction industry. These hometown plans uniformly require bidders to commit themselves at the time of the bid to the fulfillment of specified affirmative action goals and requirements. Compare Rossetti Contracting Co., Inc. v. Brennan, 508 F2d 1039 (1975) (Chicago Plan); 52 Comp. Gen. 874 (1973) (Cleveland Plan); Limbach Company, 51 Comp. Gen. 329 (1971), Pittsburgh Plan); Chicago Bridge & Iron Co., Comp. Gen. Dec. B-179100, February 28, 1974, 74-1 CPD ¶ 110 (1974), (Little Rock Plan); Art Penner Construction Co., Inc., Comp. Gen. Dec. B-180216, April 12, 1974, 74-1 CPD ¶ 192, (Kansas City Plan). Where a definite commitment to these affirmative action goals is not evidenced in bids submitted under procurements requiring compliance with hometown plans, such bids traditionally have been considered non-responsive. Compare Veterans Administration re Welch Construction, Inc., Comp. Gen. Dec. B-183173, March 11, 1975, 75-1 CPD ¶ 146; 52 Comp. Gen. 874 (1973).

Notwithstanding the foregoing, Appellant initially contends that a pre-bid commitment to affirmative action goals is not essential to bid responsiveness under Maryland law. In this regard, Appellant states that COMAR 21.06.02.03 defines a material bid omission as one relating solely to price, quantity, quality, or delivery. Defects unrelated to these elements are said to be immaterial and hence waivable. COMAR 21.06.02.03, however, also provides that a material defect is one which is a matter of substance rather than form. Since an IFB requirement that a bidder commit itself to MBE program goals at the time of substance rather than form, we conclude that the omission of such a commitment, where required, likewise is a material bid defect under Maryland law. Compare Rossetti Contracting Co., Inc. v. Brennan, supra at p. 1043; L. Reese & Sons, Inc., Comp. Gen. Dec. B-182050 (November 11, 1974), 74-2 CPD ¶ 255.

In the instant appeal, it is undisputed that Appellant failed to submit with its bid executed copies of the two affirmative action forms contained in the IFB. SRA contends that this conclusively rendered Appellant's bid non-responsive in view of the express statement contained in the "Minority Business Affirmative Certification" that a failure to submit the form would render the bid non-responsive. As previously stated, however, the basic test for determining responsiveness is whether an omission is one of form or substance. Accordingly, the responsiveness of the low bid must be measured not by IFB language warning against a determination of non-responsiveness on the event of a failure to sign an affirmative action form, but rather by the presence or absence in the bid package of a bidder's commitment to the affirmative action plan. Compare Bartley, Inc., 53 Comp. Gen. 451, 74-1 CPD ¶ 1 (1974); 52 Comp. Gen. 874 (1973). Indetermining whether a bidder has committed itself to the minimum affirmative action requirements, the entire contents of the bid must be scrutinized. Compare Chicago Bridge & Iron Co., supra.

Under the SRA solicitation, the affirmative action forms appear as numbered pages in the bidding documents. (Exh. 1, p. 63-70). Appellant contends that by submitting the blank affirmative action forms as part of the sequentially numbered pages comprising the complete set of bidding documents and signing the other required bid forms, it demonstrated an intent to commit itself to all of the IFB requirements including the MBE program goals. We disagree. A signed bid form does not clearly commit a bidder to the MBE requirements of a solicitation where, as here, the solicitation also requires the execution of an affirmative action certification. Compare 52 Comp. Gen. 874, 876 (1973). The absence of a required signature on an IFB affirmative action certification reasonably may be interpreted as a refusal by the bidder

to commit itself to MBE goals and requirements. Thus, where some additional statement is not elsewhere contained in the bid package to otherwise demonstrate the bidder's intent to pursue the required level of minority business participation under an awarded contract³, the bid is ambiguous and thus non-responsive. See generally, P. Schnitzner, *Government Contract Bidding* (1975) at p. 267.

Under the facts present here, we conclude that Appellant did not clearly and unequivocally commit itself to the MDOT MBE program goals when submitting its bid. Accordingly, the SRA procurement officer properly rejected Appellant's bid as non-responsive.

Appellant alternately alleges that the IFB was ambiguous concerning the affirmative action forms to be executed and returned with the bid, but further contends that the IFB otherwise afforded the low bidder a period of 14 days after bid opening to comply fully with the affirmative action requirements. In resolving this perceived conflict, Appellant states that it looked to the MDOT MBE Program statement and found therein a statement that bid responsiveness would not be determined until after the post-bid submission and consideration of the low bidder's affirmative action plan. On this basis, Appellant submits that it reasonably concluded that a pre-bid commitment to the affirmative action program was not essential to establish the responsiveness of its bid and that the required commitment could be made concomitant with the post-bid submittal of the affirmative action plan.

Although the board recognizes the inappropriate and misleading use of the term responsiveness within the "MDOT MBE Program"⁴, Appellant's interpretation of the IFB affirmative action requirements nevertheless is unreasonable. The IFB expressly required bidders to certify their intent to affirmatively seek out and consider minority business enterprises to participate in the contract as subcontractors and/or suppliers of materials and services. Appellant's interpretation would permit this commitment to be made concurrent with the submission of the affirmative action plan which identifies

³See Chicago Bridge & Iron Works, supra at p. 3 where the bidder failed to sign one of two affirmative action forms included in the solicitation. Signature of the first form was determined to be sufficient to demonstrate the necessary commitment. See also, Limbach Company, 51 Comp. Gen. 329 (1971) where the Comptroller General found a commitment to a hometown plan where a bidder acknowledged, in its bid, the receipt of an amendment containing the plan. The bid ultimately was rejected, however, on other grounds.

⁴Responsiveness is a legal determination involving whether the person who has submitted the bid, under procurement by competitive sealed bidding, has conformed in all material respects to the requirements contained in the IFB. See COMAR 21.01.02.60. In making this determination, the procurement officer may rely only upon the bid as submitted. See Inner Harbor Paper Supply Co., MSBCA 1064, September 9, 1982, p. 5. Responsibility, on the other hand, is a factual determination as to whether a bidder has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which shall assure good faith performance. See COMAR 21.01.02.59. In this regard, a procurement officer may consider information received after bid opening to assist in this determination. Under the MDOT MBE program the post-bid submission and evaluation of a contractor's affirmative action plan has been treated as a matter of responsibility and not responsiveness.

those minority firms already selected by the bidder to perform work totalling a minimum of 10% of the contract value. Put another way, Appellant's interpretation would permit a bidder to promise to affirmatively seek out minority business participation after it already demonstrated that it had done so. Such an interpretation obviates both the need for a commitment and renders meaningless its very requirement.

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

CONCURRING OPINION BY MR. LEVY

I concur in the Opinion of Chairman Baker but I do so with much concern and misgiving. The reason relied on to deny the appeal is technical and does not address the socioeconomic problem that the State was attempting to correct. Because of the failure to execute the required affirmative action forms, the Respondent was unable to review the real heart of the issue which is the Appellant's minority business participation program itself.

While it is true, as Rossetti Contracting Co., Inc. v. Brennan, 508 F.2d 1039 (1975) points out at p. 1044, that a pre-bid commitment is essential to assure compliance with a minority business program, the ability to obtain an enforceable commitment from the contractor to abide by MBE goals can be done in other ways. For example, this could be achieved by providing a statement of the required commitment to MBE goals either in the specification or on the signature sheet for the bid. The execution of the bid signature sheet would then create the necessary contractual obligation. The separate document procedure is not mandated by law or regulation and only provides another opportunity to find a bid non-responsive and enable the State to lose a financially favorable bid. This is particularly difficult to accept when the contractor would probably have complied with the MBE program such as the Appellant in the matter before us. The MBE Statute is intended to encourage and promote equal opportunity in State construction contracts. Its purpose is not to eliminate interested bidders who omit, by oversight, to sign a particular form.

Because this solicitation required separate forms to be executed and Appellant failed to do so, this Board has no alternative but to deny the appeal.

These notes are being prepared for the purpose of providing a summary of the work done during the past year. The notes are being prepared for the purpose of providing a summary of the work done during the past year. The notes are being prepared for the purpose of providing a summary of the work done during the past year.

The following are the results of the work done during the past year.

1. The first part of the work was done during the first quarter of the year. The results of this work are as follows:

2. The second part of the work was done during the second quarter of the year. The results of this work are as follows:

3. The third part of the work was done during the third quarter of the year. The results of this work are as follows:

4. The fourth part of the work was done during the fourth quarter of the year. The results of this work are as follows:

5. The fifth part of the work was done during the first quarter of the next year. The results of this work are as follows:

6. The sixth part of the work was done during the second quarter of the next year. The results of this work are as follows: