

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of WILLIAMS CONSTRUCTION)
COMPANY, INC.)
) Docket No.
Under Maryland State Highway) MSBCA 1611
Administration Contract)
No. P-732-502-371)

December 10, 1991

Responsiveness - Where the IFB requires listing of the firm proposed to perform Washington Suburban Sanitary Commission (WSSC) facilities relocation work and conditions performance of such work on the approval by WSSC of such firm, failure to list such a firm makes the bid nonresponsive.

APPEARANCE FOR APPELLANT:

T. Rogers Harrison, Esq.
Mudd, Harrison & Burch
Towson, MD

APPEARANCE FOR RESPONDENT:

Edward S. Harris
Assistant Attorney
General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY:
Dewey Jordan, Inc.

James K. Stewart, Esq.
Green, Stewart & Farber
Washington, D.C.

OPINION BY CHAIRMAN HARRISON¹

Appellant timely appeals the denial of its bid protest that the apparent low bidders' bid was nonresponsive.

Findings of Fact

1. In the fall of 1990, the State Highway Administration (SHA) advertised the subject contract for improvements to Maryland Route 214 from Brightseat Road to west of Campus Way. As a result of fiscal constraints, bid opening was delayed until October 8, 1991.
2. The Invitation for Bids (IFB) provided that the successful bidder would be determined based upon the lowest evaluated bid. Each bidder was required to include with its bid the estimated number of calendar days required by the bidder to have the project open to unrestricted highway traffic, not to exceed,

¹This opinion was issued as a bench opinion on December 6, 1991.

however, 1,121 calendar days. The number of calendar days proposed by the bidder was to be multiplied by \$3,500.² The product of this calculation (calendar days times \$3,500) was to be added to the bidders' lump sum total and the sum thereof would determine the apparent low bidder.

3. The apparent low bid was submitted by Dewey Jordan, Inc. (Dewey Jordan). Dewey Jordan's lump sum bid, as adjusted by SHA's post-bid opening mathematical audit, was \$18,131,184.05. Dewey Jordan committed to an open to traffic duration of 760 calendar days. Thus Dewey Jordan's total bid, for evaluation purposes, is calculated as follows:

\$18,131,184.05	- corrected lump sum total
\$ 2,660,000.00	- 760 days times 3,500
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\$20,791,184.05	- total evaluated bid

4. The Appellant submitted the second lowest evaluated bid. The lump sum total bid submitted by Appellant, as adjusted by SHA's post-bid opening mathematical audit was \$17,926,701.53. In its bid, Appellant proposed an open to traffic duration of 945 calendar days and Appellant's total bid, for evaluation purposes, was thus calculated as follows:

\$17,926,701.53	- corrected lump sum total
\$ 3,307,500.00	- 945 calendar days times 3,500
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\$21,234,201.53	- total evaluated bid

5. The IFB included specific requirements for work involving installation, relocation and adjustment of Washington Suburban Sanitary Commission (WSSC) facilities. The requirements for this work were set forth in a separate section of the special provisions, entitled "WSSC Utilities." The WSSC special provisions advised bidders that WSSC would have the authority to approve the qualifications of the firm selected by the successful bidder to perform work on WSSC facilities and required that such

² Three thousand five hundred dollars was the average daily road user benefit fee, determined by SHA to be applicable to this project.

firm be identified on a form included with the specifications.

In relevant part, the WSSC special provisions provided:

This proposal contains several items for the installation, relocation and adjustment of Washington Suburban Sanitary Commission (WSSC) facilities. These items shall be considered as part of this proposal and will be included in the total bid price for the contract.

The selected contractor responsible for the relocations of WSSC facilities must have their qualifications to perform this work approved by WSSC. Should the contractor/subcontractor not be acceptable to WSSC, the contractor shall select a contractor/subcontractor which is acceptable to WSSC. (A list of contractors who have done business with WSSC in the past is included in the specifications.) The selection of another contractor will not be a basis for a change in the bid prices or entitle the contractor to compensation resulting from delays in meeting this requirement.

The contractor must submit with his bid the name of the contractor/subcontractor who will perform the WSSC relocation work. The name of this contractor shall be typed in the blank space provided on page 252J of these specifications. This completed page must be included in the bid proposal package. WSSC shall provide written approval or disapproval of the contractor/subcontractor within ten (10) business days of such a request. No contractor or subcontractor shall be allowed to begin work involving WSSC facilities until written approval has been provided by WSSC.

The list of Contractors included in the WSSC special provisions was in the form of a directory and stated that it was a "partial listing of Contractors who frequently do business with WSSC and is provided for Information Only."

6. Appellant completed page 252J as required by the above. However, Dewey Jordan failed to complete page 252J and submitted its bid without identifying the firm that it proposed to utilize for work on WSSC facilities.

7. The scope of the WSSC work was included in bid item numbers 8041 through 8078 and both Dewey Jordan and Appellant included bid prices with their bids for each of these items, totaling

several hundred thousand dollars.

8. On October 8, 1991, appellant protested Dewey Jordan's failure to complete page 252J of the IFB, asserting that Dewey Jordan's bid was not responsive because of the failure to provide on the bid the identity of the firm it intended to utilize to perform work on WSSC facilities.

9. After bid opening on October 8, 1991, Dewey Jordan wrote to SHA and provided the name of the subcontractor it proposed to use for the work on the WSSC facilities. Such subcontractor was on the list included with the WSSC special provisions.

10. On October 11, 1991, the SHA procurement officer issued a final decision. The procurement officer denied the protest, concluding that the identification of the firm performing WSSC work was a matter of bidder responsibility that could be addressed at any time prior to contract award, thus rejecting Appellant's argument that Dewey Jordan's failure to identify the firm performing WSSC work affected the responsiveness of Dewey Jordan's bid.

11. From this final decision denying its protest, Appellant appealed to this Board on October 24, 1991.

Decision

The issue to be determined in this appeal is whether Dewey Jordan's apparent low bid must be rejected because it fails to include the identity of the firm that will be performing WSSC facilities relocation work. We find that the failure to identify such firm in the bid makes the Dewey Jordan bid nonresponsive and, thus, the bid should have been rejected.

SHA argues that Maryland's General Procurement Law, and the cases decided under it, make it clear that a bidder's identification of a particular firm it proposes to utilize for specific work called for by the IFB is a matter of bidder responsibility that can be resolved at any time prior to the award of the contract, notwithstanding a solicitation provision requiring such information with the bid.

Thus, SHA asserts that Dewey Jordan's failure to identify in

its bid the firm it proposed to perform the WSSC work may not be used as a basis for rejection of its bid.

Section 13-103(e)(1) of the State Finance and Procurement Article provides, in pertinent part:

After obtaining any approval required by law, the procurement officer shall award the procurement contract to the responsible bidder who submits the responsive bid that (i) is the lowest bid price; or (ii) if the invitation for bids so provides is the lowest evaluated bid price.

See also COMAR 21.05.02.13.

COMAR 21.01.02.01B(78) defines responsive as "a bid submitted in response to an invitation for bids that conforms, in all material respects, to the requirements contained in the invitation for bids." We have held, in interpreting what constitutes a responsive bid, that responsiveness relates to the bidder's legal obligation to perform the work required under the contract.

National Elevator Company, Inc., MSBCA 1252, 2 MSBCA ¶ 114 (1985). A material deviation affecting the contractor's legal obligation to perform occurs when price, quantity or quality of goods or services is affected. Excelsior Truck Leasing Company, Inc., MSBCA 1102, 1 MSBCA ¶ 50 (1983), and cases cited therein.

A "responsible bidder", on the other hand, is defined as a person who:

- (1) has the capability, in all respects, to perform fully the requirements for a procurement contract
- and (2) possesses the integrity and reliability that will insure good faith performance.

State Finance and Procurement Article Section 11-101(g).

In National Elevator supra, we discussed the distinction between responsiveness and responsibility as follows:

Responsiveness in competitive sealed bid 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).

As we have previously held, a matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation. Aquatel Industries, Inc., MSBCA 1192 (August 30, 1984) p5. Information concerning a bidder's responsibility thus may be submitted after bid opening, notwithstanding a solicitation provision stating that such information must be submitted with the bid as a pre-requisite to a finding of responsiveness. Carpet Land, supra.

National Elevator, supra at p.4.

At issue in this appeal is the failure of the low bidder, Dewey Jordan, to identify with its bid the firm it proposed to utilize to perform work on WSSC facilities. It is undisputed that Dewey Jordan failed to provide the identity of this firm with its bid, despite language in the IFB requiring the information to be submitted with the bid. However, if, as argued by SHA, the information regarding the WSSC contractor relates to bidder responsibility and not bid responsiveness, Dewey Jordan's failure to provide the information with its bid may be addressed at any time prior to award and does not compel rejection of the bid.

Two prior decisions of this Board, in particular, require analysis.³

³ Resort to opinions of the Comptroller General for guidance in this area is not particularly helpful. Unlike the focus of this Board, the focus of the Comptroller General has not been on the question of responsiveness versus responsibility but on the affect on competition of bid shopping, i.e. shopping of lower subcontractor prices after bid opening. The federal government has a procurement regulation which permits but does not require the use of a "Listing of Subcontractors" clause. This clause may be included in a federal invitation for bids. It requires a listing of all subcontractors and is intended to prevent "bid shopping." The Comptroller General has held that the failure to furnish required subcontractor lists requires rejection of a bid as nonresponsive if the "Listing of Subcontractors" clause is contained in the IFB. See Industrial Structures, Inc., COMP. GEN. DEC. B-219500, 85-2 CPD ¶ 165 (1985). However, the Comptroller General has also held that in the absence of the "Listing of Subcontractors" clause that, absent a showing of prejudice, there is no basis to reject a bid as nonresponsive for failing to

In Chesapeake Bus and Equipment Company, MSBCA 1347, 2 MSBCA ¶ 163 (1987), this Board determined that information relating to the identification of subcontractors involved bidder responsibility and not bid responsiveness: "The listing of the (subcontractor) information sought by the (solicitation) pertains to (the bidder's) responsibility and not its responsiveness to the RFB. Who will perform subcontract work clearly relates to the ability of the bidder to perform and not its legal obligation to perform." Chesapeake Bus and Equipment Company, supra, at p. 5.

However, our determination in Chesapeake Bus and Equipment Company should be limited to the specific facts therein. In that appeal, the Mass Transit Administration advertised a request for bids (RFB) to procure 28 customized paratransit vehicles to provide transportation services for elderly and handicapped persons.

By addendum to the RFB, bidders were requested to list, on a form provided with the addendum, the name of the conversion company, chassis manufacturer, air conditioner manufacturer, and lift manufacturer proposed for use in assembly of the vehicles and the nearest warranty and parts representative for each.

The successful bidder supplied more than one proposed subcontractor and/or equipment provider on the forms and was challenged as having thereby submitted a nonresponsive bid.

While our opinion noted that bidder responsibility was involved, we also specifically noted that "there was no limit placed on bidders to supply only one source for each category of subcontractor." The instant appeal, on the other hand, involves a request for the identity of the proposed subcontractor.

In Construction Management Associates, MSBCA 1238, 1 MSBCA ¶ 108 (1985), the University of Maryland issued a solicitation for

identify subcontractors where the IFB otherwise requires the listing of subcontractors with the bid. See e.g. Kora and Williams, Corp., COMP. GEN. DEC. B-200503, 81-1 CPD ¶ 131 (1981).

the replacement of approximately 1,200 windows at an apartment complex. One of the solicitation terms required that each bidder list the window manufacturer whose product was proposed for use. Construction Management Associates (CMA) failed to submit the name of the proposed window manufacturer and, although its bid was low, its bid was rejected as being nonresponsive. CMA then protested and the procurement officer denied the protest on several grounds, one of which being that CMA's failure to identify the window manufacturer rendered its bid nonresponsive.

On appeal, this Board held that the procurement officer erroneously concluded that CMA's bid was nonresponsive because it failed to identify its proposed window manufacturer. In pertinent part, we noted:

While perhaps there may be a question as to whether the requirement to utilize the product of one of the several window manufacturers listed properly relates to responsibility or responsiveness we are of the opinion that the requirement relates to the ability of the contractor to perform the work (responsibility) rather than its commitment to do so in exact conformity with the RFB specifications (responsiveness)....

Nevertheless, since the Appellant was required to use the product of one of the listed manufacturers and since the requirement relates to bidder responsibility, Appellant's bid should not have been rejected solely with respect to this failure without affording it the opportunity to commit to a particular manufacturer's product for evaluation by the University prior to award.

Construction Management Associates at p. 7, citations omitted. Thus, in Construction Management Associates, the focus was on CMA's ability to acquire the product of one of the listed manufactureres whose products were required to be used. Unlike the instant appeal, there was no possibility of use of a nonlisted firm (subject to approval by WSSC). The successful bidder (whomever it was) was required to use only the products of the listed manufacturers. CMA was thus legally obligated, by its bid, to use such products. However, its capability to perform the window replacement work, i.e. a matter of responsibility, was

placed in issue by its failure to name its proposed window manufacturer at the time of bid opening.

Our decision herein, however, does not solely rest on the above noted factual distinctions between the instant appeal and Chesapeake Bus and Construction Management Associates. In the instant appeal, bidders were required to name the firm proposed for the relocation work in the bid itself. However, deviation from use of a firm on the list of contractors included with the WSSC special provisions was permitted, provided WSSC approved. Such approval or disapproval⁴ was to be made by WSSC within ten (10) business days of request by the bidder.

Thus, unlike the situation in Chesapeake Bus and Construction Management Associates, where the IFB sought information from the bidder concerning how it would perform (i.e. what parts, products and services it would use), the instant IFB not only seeks such information but conditions performance on the approval of a nonparty third person, WSSC.

We may not question why SHA included the WSSC provisions in the IFB. However, these provisions were included by SHA in the invitation and when the Dewey Jordan bid was opened, the information concerning whom it proposed to perform the required WSSC facilities relocation work was missing. Therefore, while Dewey Jordan had inserted prices in the bid items for the WSSC relocation work, it had not agreed, in submission of its bid, to use a firm to perform such work that would be approved by WSSC. Accordingly, we find Dewey Jordan did not, by submitting its bid, make an unequivocal and unambiguous commitment to perform the relocation work in exact accordance with the solicitation requirements.

The record does not indicate that it was improper for SHA to require that the facility relocation work be performed by a firm


⁴ It appears that approval was also required for a firm appearing on the list of contractors included with the WSSC special provisions. Such fact, however, is not material to the decision we reach herein.

as approved by a nonparty to the contract. Nor do we conclude that such a requirement, affecting a substantial portion of contract work, was immaterial.⁵

Accordingly, we find that failure by Dewey Jordan to identify, in its bid, the firm proposed to relocate the WSSC facilities results in its bid being not responsive.⁵

The appeal is accordingly sustained.

Dated: *December 10, 1971*




Robert B. Harrison III
Chairman

I concur:



Sheldon H. Press
Board Member



Neal E. Malone
Board Member

⁵ We are advised by counsel that certain of the relocation work would be required to be performed to accommodate the highway work.

⁶ SHA argues, on appeal (although not asserted by the procurement officer), that the acceptance of Dewey Jordan's bid could have also resulted from the minor irregularity provisions of COMAR 21.06.02.04. Such provisions, however, are not available to waive, as a minor irregularity, the omission herein, which affects performance of the substantial amount of work involved in the WSSC facilities relocation.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1611, appeal of WILLIAMS CONSTRUCTION COMPANY, INC., under Maryland State Highway Administration Contract No. P-732-502-371.

Dated: *December 10, 1991*



Mary F. Priscilla
Recorder

