

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of EYRE BUS SERVICE,)
INCORPORATED)
) Docket No. MSBCA 1798
Under MTA Contract No. MTA-)
0513)
)

May 19, 1994

Specifications - Strict Compliance - Two Step Procurement - A step one proposal submitted in response to the IFB requirements for a two step (multi-step) procurement need not comply with all specifications details as in a competitive sealed bid. However, the basic or essential requirements of the specifications must be complied with and such requirements may not be ignored or downgraded to the status of mere expectations. In determining whether a step one response is acceptable, the Procurement Officer is vested with considerable discretion and his determination will not be overturned unless unreasonable.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest in the above captioned procurement for commuter bus service. At the hearing of the appeal the parties advised that the only issues that remain for decision are Appellant's allegations as set forth in its Comments on the Agency Report:

(1) Did the Mass transit Administration ("MTA") act improperly or unlawfully when, having previously (and correctly) found the Step One proposal of Yellow Transportation, Inc. ("Yellow") "to be unacceptable in the... essential area [of] minimum bus requirements," it reversed itself in midstream and invited Yellow to submit a sealed price bid, effectively waiving or modifying the requirements

of the bid package with regard to the "essential area" of "minimum bus requirements."

(2) Did Yellow's submission with its price proposal satisfy the ex post facto February 10, 1994 [suggestion] that the proposal include "a firm commitment...to have the required buses on hand within ten (10) days from Notice of contract Award?"

Findings of Fact

1. This appeal relates to a two step procurement conducted by MTA for the provision of suburban bus service between Columbia, Maryland and Baltimore, Maryland.¹
2. For approximately the last eight years Appellant has operated the service in conjunction with MTA as a result of sole source contracts. However, in 1993 MTA determined that it would not continue renewing these contracts on a sole source basis, and decided to competitively procure the contracts.
3. The procurement was advertised in the Maryland Register on January 18, 1994.
4. On January 27, 1994, Ms. Angela Elswick, Appellant's comptroller, spoke to Mr. Lonny Weaver, Contract Administrator for this procurement, told him that she had not received a bid package, and learned that Step One proposals were required to be submitted by Tuesday, February 1, 1994. Mr. Weaver advised Ms. Elswick that she could use the identical Bidder's

¹ The Notice to Bidders provided:

The Mass Transit Administration has a requirement for Suburban Bus Services between Columbia, MD and Baltimore, MD requiring six (6) morning trips and six (6) evening rush period trips. The contract is for three (3) years plus two (2) option years.

The contract for these services will be awarded by competitive sealed bidding using a two-step (multi-step) process. Step One will include the submission by bidders of technical proposals and other information, and the evaluation by the mass Transit administration of these submissions. Step Two will include an invitation for Sealed Price Bids from those companies who submitted acceptable proposals in Step One. Only bids received from sources invited to bid in Step Two will be considered.

- Questionnaire from another bid package² (which she did have) for filing purposes. Completion of the technical proposals (Step One) was to be accomplished by completing the bidder's Questionnaire included in the IFB.
5. Appellant timely filed its Step One proposal on February 1, 1994. Yellow Bus Service, Inc. (Yellow), the interested party herein, and Gunther Chartered, Inc. (Gunther) also submitted Step One proposals.
 6. The proposals of Gunther and Appellant were found acceptable and they were invited to submit a price bid. However, by letter dated February 4, 1994, Mr. Lonny Weaver of the MTA advised Yellow that all three members of the Step One proposal Evaluation Committee had met and found Yellow's proposal to be "Unacceptable in the following areas: (1) Minimum Bus Requirements."³
 7. Complaint by Yellow over rejection of its proposal led to a reconsideration of the decision to reject and by letter dated February 10, 1994, Yellow was invited to submit a price bid. The letter included a statement that the yellow price bid should "include a firm commitment by Yellow Transportation to have the required buses in hand within ten (10) days from the Notice of Contract Award, should yours be the winning low bid."
 8. At the Step Two sealed price bid opening on February 16, 1994, the two sealed price bids that had been submitted were opened. One was from Appellant in the amount of \$1,069,179.30. The other was from Yellow in the amount of \$813,960.00. The third company, Gunther, whose Step One Proposal had also been found acceptable, elected not to file a price bid.
 9. Appellant protested the proposed award of the contract to Yellow by letters dated February 17 and February 22, 1994.
 10. The Procurement Officer's final decision denying Appellant's protest was issued by letter dated March 11, 1994 and Appel-

² The bid package for the captioned procurement is sometimes referred to herein as the IFB or the bid documents. The Harford County procurement for contract No. MTA-0512, providing commuter bus service between Harford County and Baltimore City, was proceeding under identical bid documents insofar as the issues before the Board in this appeal are concerned.

³ By letter of the same date, Mr. Weaver also wrote to Yellow and advised it in precisely the same words that the same determination had been made in connection with Yellow's Step One Proposal for Contract No. MTA-0512.

lant appealed the denial to the Board on March 18, 1994.

11. In an earlier similar two-step procurement process (Contract No. MTA-0506) advertised in December of 1993 for provision of commuter service from Crofton to New Carrollton, Yellow's Step One Proposal was found acceptable by an evaluation committee⁴ using the same evaluation criteria that led to rejection of Yellow's substantially similar Step One proposal in the instant appeal involving provision of commuter service to Columbia. Yellow elected to submit a no bid as its price bid for the Crofton to New Carrollton procurement.
12. Confusion existed among MTA personnel involved in the commuter bus procurements concerning whether the bid documents required offerors to own or lease the equipment that complied with the performance specifications and that would be dedicated to the commuter service in question at the time the bidder submitted its Step One Proposal or whether such equipment could be obtained at some later time. Confusion also existed as to whether the requirement to own or lease equipment was related to bidder responsibility or bidder responsiveness. This confusion had been the subject of internal discussion, but in the absence of complaint or protest from the bidders had not been resolved. This confusion now needed to be addressed by the Procurement Officer as a result of Yellow's complaint, as set forth in Finding of Fact No. 7 above, that its Step One Proposal in the instant procurement should not have been rejected.⁵
13. We shall now examine in greater detail the confusion that existed concerning any requirement to own or lease equipment at the time the Step One proposal was submitted. As noted

⁴ Two of the three members of this evaluation committee were different people than those on the three member evaluation committee for the instant procurement.

⁵ Yellow had not filed a bid protest but the Procurement Officer recognized that if he did not address the complaint of Yellow he would receive a formal written protest.

above bidders were required to submit their technical proposals by completing a Bidders' Questionnaire included in the IFB. By the due date of February 1, 1994, the MTA received three proposals: from Eyre, Yellow, and Gunther. The proposals were reviewed by a three member evaluation committee consisting of Mr. Weaver, as well as two MTA employees who were responsible for supervising the day-to-day operations of the route. The evaluators determined that Eyre's and Gunther's proposals were acceptable and that Yellow's was not.

14. The Bidders' Questionnaire at page BQ4 required potential bidders to list all vehicles owned or leased by the company, including vehicles which would be assigned to this service, backup vehicles, and other equipment. In its proposal Yellow listed the vehicles it currently owned, and stated that upon award it would "acquire the vehicles necessary to accommodate the requirements of this bid." Yellow also attached to its proposal two letters from bus suppliers indicating that the necessary buses could be acquired by Yellow within one to ten days.
15. When the three evaluators reached page BQ4 in the course of reviewing Yellow's proposal they decided that the proposal was not acceptable because, notwithstanding Yellow's statement on the page that "Upon award Yellow will acquire the vehicles necessary to accommodate the requirements of this bid," Yellow did not currently own or lease buses of the type required by the IFB. The evaluators did not base this decision on any particular provision or requirement of the IFB, but on their general understanding or belief that only companies that currently possessed the necessary buses would have the capability to perform the contract. After making the decision to disqualify Yellow based on the information on page BQ4, the evaluators did not proceed any further with Yellow's proposal and, therefore, did not consider the attached letters from bus suppliers.

16. By letter dated February 4, 1994, Mr. Weaver notified Mr. Ray Nelson, of Yellow, that Yellow's proposal had been determined to be unacceptable because it did not meet minimum bus requirements.
17. When Mr. Nelson received this letter he called Mr. Weaver to question this determination. In this initial conversation and in a second call to Mr. Weaver two days later Mr. Nelson took issue with the evaluators' decision for a number of reasons. Mr. Nelson pointed out that Yellow had committed itself to provide the service with the buses required and directed Mr. Weaver's attention to the two letters from bus suppliers attached to Yellow's proposal. Mr. Nelson also advised that Yellow had submitted the same proposal to MTA in response to an IFB for another commuter bus service contract, and that in that case Yellow's proposal had been deemed acceptable.⁶
18. After talking to Mr. Nelson, Mr. Weaver consulted with Mr. Kiladis, the Procurement Officer. Mr. Kiladis and the evaluation committee members had assumed that any contractor capable of meeting the contract requirements would already be in the bus business and would own the necessary buses. However, after focusing on the Yellow complaint, Mr. Kiladis determined that there was no requirement in the IFB that a contractor be in the bus business or own or lease the required equipment at the time of bid submission.
19. After considering the matter in his role as Procurement Officer Mr. Kiladis concluded that rejecting Yellow's proposal because it did not own or lease the buses at the time of submission of Step One proposals had been erroneous because it

⁶ As noted in paragraph 11 above, Yellow did submit the same proposal in the course of bidding for MTA Contract No. 0506 to provide service between Crofton in Anne Arundel County and the New Carrollton Metro Station. Because this was a D.C. area service the proposals were reviewed by a different committee. This committee did, in fact, find Yellow's proposal to be acceptable even though it did not own the necessary equipment at the time its proposal was submitted.

resulted from the imposition of a requirement not found in the IFB. Acting as Procurement Officer in this matter he determined that Yellow's proposal was acceptable. He instructed Mr. Weaver to notify Yellow that its proposal was acceptable. He agreed with Mr. Weaver's suggestion that Yellow be asked to include in its sealed bid a commitment to have the required buses on hand within 10 days from notice of award.⁷ Mr. Weaver informed Mr. Nelson of Mr. Kiladis' decision by telephone and also by letter dated February 10, 1994.

Decision

This procurement was conducted as a two-step procurement. Step One technical proposals were required to be submitted to MTA by February 1, 1994 and sealed price bids due on February 16, 1994 were to be "confined to those proposed bidders who submitted acceptable technical proposals in Step One." (Instructions to Bidders, §A2). §B3 of the Instructions to Bidders requires that each proposal "be responsive to all requirements stated in these Instructions, the essential requirements of the Scope of Services, Insurance Requirements and Bidder's Questionnaire." According to the Instructions to Bidders, all Step One proposals were to be categorized by MTA as either: "(a) Acceptable (b) Reasonably susceptible of being made acceptable by additional information ...; or (c) In all other cases, unacceptable." (Instructions to Bidders, §D2). The Instructions go on to provide in §D3 that "any proposal which fails to conform to the essential requirements of the specifications may be considered nonresponsive and categorized as unacceptable." In §D1 of the Instructions to Bidders, the MTA reserves the right to request further information from proposers,

⁷ Mr. Kiladis testified that he did not rely on this requirement to have the required buses on hand 10 days from notice of award in making his determination from the face of Yellow's Step One Proposal that it was acceptable. Counsel for MTA agreed that the Procurement Officer properly did not consider this additional requirement imposed on no other offeror/bidder in making his determination that Yellow's Step One Proposal was acceptable (i.e. responsive).

but only where their proposals are considered "reasonably susceptible of being made acceptable by the additional information." MTA did not reserve such a right in connection with proposals found "unacceptable" or which "failed to conform to the essential requirements of the specifications".

The General Information section of the bid package requires in §B that: "A summary of all questions and answers will be distributed to all prospective bidders receiving the IFB." §D of the General Information section provides that: "If it becomes necessary to revise any part of this IFB, addenda will be provided to all prospective bidders who receive the initial IFB."

The Scope of Services section of the bid package specifies the number and type of buses that must be used for the Columbia-Baltimore service. The contractor is required to provide a minimum of five forty-five passenger or larger inter-city or suburban-type buses. The contractor is also obligated to provide backup or spare vehicles in the future if any of the regular vehicles become inoperative or placed out of service. No vehicle can be more than twelve years of age or have more than 700,000 in-service miles at any time during the three year length of the contract. The Vehicle Requirements section of the Scope of Services spells out additional details with regard to the vehicles that are to be used on the service. Additional vehicle requirements relative to wheelchair accessibility are also set forth.

The document constituting the required Step One proposal is a Bidder's Questionnaire, to be submitted by each prospective bidder who wishes to be considered. The Equipment Section of the blank Bidder's Questionnaire is found at §III, pp. BQ 4-6. The first page of the Equipment Section requires the bidder to: "List all vehicles owned or leased by your company," listing first "vehicles assigned to this commuter service," then "back-up vehicles assigned to this commuter service" and finally "other equipment." The page provided for listing this information requires the bidder to identify for each vehicle the type, model, year, and manufacturer of the equipment and to indicate whether each vehicle is lift-

equipped and how many seats it has. §IIID on p. BQ5 of the Bidder's Questionnaire requires the prospective bidder to "attach a copy of your most recent PSC or Maryland Class C Inspection Certificate for each vehicle assigned to this contract, including backup vehicles." §IIIF on p. BQ5 asks a series of questions related to additional service should it be required and gives to a prospective bidder who does not have such additional drivers and buses in hand for such additional service the opportunity to indicate how he would obtain additional drivers and vehicles should they be needed.

The bid package also contains at §J of the General Information section the following:

J. Proposed Start Date

The selected carrier must have the resources required by the MTA, the Public Service Commission and/or the Interstate Commerce Commission, and the ability to start the proposed service by March, 1994.

In its decision in Neoplan USA Corporation, MSBCA 1186, 1 MSBCA ¶76(1984) at pp. 19-20 this Board noted that while a technical proposal need not comply with all specification details as in a competitive sealed bid, and that in that regard considerable discretion is vested in the Procurement Officer, in order to be acceptable a technical proposal must, nevertheless, "comply with the basic or essential requirements of the specifications ...". Basic or essential requirements of a specification may not be ignored or downgraded to the status of mere expectations. The provisions in the bid documents cited above including those set forth in the Bidder's Questionnaire itself, establish that ownership or lease of the necessary equipment here was an "essential minimum requirement" of the specifications and thus involves an issue of responsiveness (acceptability). The seminal question is when do the specifications in this two-step procurement require a bidder to own or lease the necessary equipment; at the time of submission of the Step One proposals in February, 1994, as argued

by Appellant, or at the time of the proposed start date of the contract in March 1994 as asserted by MTA and Yellow?

We find the Procurement Officer reasonably determined the bid documents to only require that the necessary equipment be owned or leased by the start date of the contract in March and that the Yellow Step One proposal on its face was acceptable (responsive).

We shall now revisit the language of the bid documents relied on by the parties to support their respective positions, recalling that no person filed a pre-proposal opening protest concerning such provisions or otherwise inquired as to their meaning.

J. Proposed Start Date

The selected carrier must have the resources required by the MTA, the Public Service Commission and/or the Interstate Commerce Commission, and the ability to start the proposed service by March, 1994.

We find, as asserted by MTA and Yellow, that the Procurement Officer reasonably determined that this provision relates to the proposed start date of the contract, not the submission of technical proposals. It does not state that a bidder must own the buses when it submits its proposal; it states that a bidder must have the required resources and the ability to start service by March, 1994. A reasonable interpretation is that "resources" encompasses the financial and practical ability to obtain the necessary buses before the proposed start date. This is what Mr. Kiladis concluded.

It is true, as Appellant asserts, that the MTA evaluation committee initially imposed a requirement on Yellow to own or lease the buses when it submitted its proposal. However, this was not done based on any particular requirement of the IFB but, as described above, on the assumption that only bus companies would respond to the solicitation. Mr. Kiladis in his capacity as Procurement Officer determined that it was inappropriate to exclude Yellow's proposal on this basis. By law the responsibility for making this determination was his. Neoplan USA Corporation, supra

at p. 20 (whether a proposal is acceptable is a matter up to the reasonable exercise of the Procurement Officer's discretion).

Appellant argues principally that it would be unreasonable to interpret the provisions of the Equipment Section (§III) of the Bidder's Questionnaire as not requiring that a bidder own or lease the required equipment at the time of submission of the Step One proposal. Yellow and MTA disagree. The language of the Equipment Section does not specifically state when the equipment must be owned or leased. Counsel for each party points to various conflicting inferences that might be drawn from the language. As noted, no party sought clarification of the requirements of the IFB prior to the due date for Step One proposals.

A witness, called by Yellow, with experience in competing for and providing bus services similar to the services sought in the instant procurement, testified that in his opinion the language of the bid documents (IFB) as discussed above did not require a bidder to own or lease the equipment at the time of submission of the Step One proposals and that a commitment to obtain the equipment upon award satisfied the requirements of the IFB. Two witnesses called by Appellant, who also had experience in competing for and providing services similar to the services in question reached an opposite conclusion testifying that the bid documents required the bidder to own or lease the required equipment at the time the Step One proposals were due. Ultimately, however, it is the determination of the Procurement Officer that the Board must focus upon.

The Procurement Officer has the discretion both to determine whether a bidder is responsible⁸ and to determine whether an

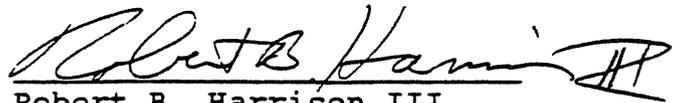
⁸ Md. State Finance and Procurement Code §11-101(q) defines a "responsible bidder or offeror" as a person who has the capability in all respects to perform fully the requirements of a contract. §111-101(r) defines a responsive bid as one that conforms in all material respects to the IFB. In its proposal Yellow agreed to perform the contract in full conformance with the requirement of the IFB by use of the language: "Upon award, Yellow will acquire the vehicles necessary to accommodate the requirements of this bid," as set forth on p. BQ4 of the Bidders Questionnaire. This is a contract to provide bus service and Yellow committed itself in

initial proposal in a multi-step procurement is acceptable, and the Board has held it will not overturn the Procurement Officer's decision unless it is clearly unreasonable, arbitrary, an abuse of discretion or contrary to law. Neoplan USA Corporation, supra at pp. 19-20; Environmental Controls, Inc., MSBCA 1356, 2 MSBCA ¶168 at p. 5(1987). The rationale for this rule is that it is the agency which is in the best position to know its own needs and which must live with the consequences of its decision. Id. It is not enough for Appellant to demonstrate the existence of a legitimate difference of opinion on how persons in the commuter bus service business interpret the IFB requirements relative to having buses on hand at the time the Step One proposals were due. The decision of the Procurement Officer that Yellow's Step One Proposal was acceptable has not been shown to be unreasonable, arbitrary, an abuse of discretion or contrary to law. The Appellant's appeal as to this issue (issue 1) is therefore, denied.

The Appellant also challenges Yellow's price bid as not being responsive to the requirement imposed on Yellow to have buses on hand ten days from contract award (issue 2). The ex post facto requirement that the Yellow Step Two sealed price bid include "a firm commitment ... to have the buses on hand within ten (10) days from Notice of Contract Award" we have determined to be not binding on Yellow. Accordingly, the appeal is denied on this issue as well.

It is therefore, Ordered this ^{19~~th~~} day of May, 1994 that the appeal is denied.

Dated: *May 19, 1994*


Robert B. Harrison III
Chairman

its Step One response to provide the service. Whether or not Yellow thereafter could get the buses to do so is an issue of responsibility. A matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation. Control Systems Services, Inc., MSBCA 1397, 2 MSBCA ¶189 at p. 4(1988).

I concur:

Candida Steel

Candida S. Steel
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 1798, appeal of Eyre Bus Service, Incorporated under MTA Contract No. MTA-0513.

Dated: May 19, 1994

Mary F. Priscilla
Mary F. Priscilla
Recorder