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**BOARD OF CONTRACT APPEALS**
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## SUMMARY ABSTRACT
## DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

| Docket No. 2356 | Date of Decision: 09/08/03 |
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| Appeal Type: [X] Bid Protest | [ ] Contract Claim |
| Procurement Identification: Under DGS Solicitation No. 001IT814396 | |
| Appellant/Respondent: Juice Company, Inc.<br>Department of General Services | |

Decision Summary:

Responsiveness - Samples - Where a sample is required to be submitted with or prior to a bid, failure to submit a sample is a matter of responsiveness, and the bid must be rejected. Where a sample is submitted and accepted prior to bid, the bidder must provide a product that is functionally equal or superior to the sample.

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**BEFORE THE**
**MARYLAND STATE BOARD OF CONTRACT APPEALS**

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| **In The Appeal of Juice Company, Inc.** | ) | |
| | ) | **Docket No. MSBCA 2356** |
| **Under DGS Solicitations No. 001IT814396** | ) | |

**APPEARANCE FOR APPELLANT:** **Ralph K. Rothwell, Jr., Esq.**
**Maslan, Maslan and Rothwell, P.A.**
**Baltimore, Maryland**

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

**OPINION BY BOARD MEMBER HARRISON**

Appellant timely appeals the denial of its bid protest that the Respondent Department of General Services (DGS) should not have found its bid to be nonresponsive because its bid specified "Nicholson or equivalent" in the captioned procurement for juice bases and soft drink bladder boxes for dispensing of juices and soft drinks after the addition of water in a prescribed ratio.

Findings of Fact

1. On July 1, 2003, DGS awarded contracts under the above captioned Invitation to Bid (ITB) to Unique Beverage Concepts (Unique) for bag-in-a-box juice bases and to Dispense-All of MD (Dispense-All) for soft drink bladder boxes.[1] The awards were made in the face of Appellant's protest in accordance with COMAR 21.10.02.11B(1) to protect substantial State interests. Appellant timely appealed the denial of its protest to this

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[1]While we discuss bids for both juice bases and soft drink bladder boxes, it appears that the appeal only involves the bids for juice bases.

Board on June 25, 2003. No comment on the Agency Report was filed. However, a hearing on the appeal was requested by Appellant and was conducted on August 27, 2003.

2. On or about April 25, 2003, DGS issued the above captioned ITB for the procurement of a one-year contract (with renewal options) for furnishing bag-in-a-box juice bases and bladder box soft drink bases, including installation and maintenance of dispensing equipment, for multiple locations throughout the State.
3. The ITB informed bidders that the procurement was being conducted by competitive sealed bidding and that awards would be made to the responsive and responsible bidder or bidders submitting the lowest evaluated bid for all juice bases and the lowest evaluated bid for all soda bases. Bidders had the option of bidding on juice bases, soft drink bladder boxes, or both. For juice bases, vendors could bid all juices at either a 4:1 concentration, a 5:1 concentration, or both. Bids would be evaluated and award would be based on lowest cost-per-serving-ounce of finished product.
4. The ITB required each bidder to submit for approval, by May 16, 2003, two weeks before price bids were due, samples of all products which the bidder intended to furnish under the contract. The five eventual bidders, including Appellant, sent samples for evaluation. On May 27, 2003 DGS was advised that after testing and evaluation of the samples, limited to the testing of one flavor of each type of product from each vendor, all products submitted were considered acceptable. The sample Appellant submitted was manufactured by Nicholson; Appellant submitted no samples of any manufacturer other than Nicholson.
5. The deadline for receipt of price bids was May 28, 2003 at 2:00 p.m. DGS received price bids through eMaryland Marketplace from Appellant, Unique, Dispense-All, Sody Enterprises, Inc. (Sody), and Sysco Food Services of Baltimore (Sysco).

6. The lowest evaluated bid for juice bases was $313,055, submitted by Unique. Appellant's evaluated bid for juice bases was $319,470. However, Appellant is a small business entitled to the 5% small business preference and therefore, would have been entitled to award if its bid had not been rejected. Dispense-All was the responsive and responsible bidder who submitted the lowest evaluated bid for soft drink bladder boxes. Sody bid only on juice bases but its bid was determined to be nonresponsive for failure to bid all line items for either the 4:1 or 5:1 mix. Sysco's evaluated bid was not the lowest for either soft drink boxes or juice bases. For Line Items 4-6 (soft drink) and 9-11 ( juice bases, 5:1 mix), Appellant offered "Nicholson or equivalent." Appellant did not bid on the 4:1 mix. Prior to submission of price bids, Appellant had previously submitted no samples of any equivalent products; the only samples submitted by Appellant were Nicholson products.
7. On or about June 1, 2003, Ms. Catherine Seiler, the DGS Procurement Officer, informed Appellant by telephone that its bid was nonresponsive due to the discrepancy between the Nicholson samples provided for evaluation and the term "Nicholson or equivalent" stated in Appellant's bid. Mr. Michael Dilks, a Vice President of Appellant, responded by fax on June 2, 2003 stating: "Regarding Nicholson or equivalent listed as our manufacturer, we have successfully bid Maryland State business through your office with this notation previously. Further, Nicholson labels include Nicholson, Best Value, and Bombay."
8. By letter dated June 6, 2003, Ms. Seiler gave Appellant written notification of the rejection of its bid on grounds it was nonresponsive due to use of the words "Nicholson or equivalent."
9. By fax dated June 6, 2003, received by the Procurement Officer on June 9, 2003, Mr. Dilks protested the determination that the bid was nonresponsive, saying:

1) JuiceCo is a distributor of Nicholson products and has been selling Nicholson products under numerous state contracts for years including under three existing contracts;
2) JuiceCo submitted Nicholson samples which were accepted for this bid;
3) JuiceCo submitted the low cost bid with Nicholson products listed as the manufacture[r];
4) JuiceCo has successfully submitted bids through your office with the exact language you object to in this bid and you have never mentioned it: we will supply you with those bid documents;
5) We discussed on the telephone our reasons for the language in our bid.

10. By letter dated June 18, 2003, Ms. Seiler, the Procurement Officer, denied Appellant's protest. From that decision Appellant filed its appeal with this Board.

11. COMAR 21.01.02.01B(39) provides the following definition:

> "Equivalent item" means an item of equipment, material, or supply, the quality, design, or performance characteristics of which are functionally equal or superior to an item specified in a solicitation.

Decision

We begin with the principle that in Maryland the State demands that a bid constitute a definite and unqualified offer to meet the material terms of an ITB. COMAR 21.05.02.13; COMAR 21.01.02.01B(78).

Appellant, herein, was required to submit samples of each product which it bid. Appellant submitted samples only of Nicholson products, not samples of an equivalent to Nicholson products. When Appellant subsequently submitted its bid containing the language "Nicholson or equivalent", that language was determined by the DGS Procurement Officer to be in conflict with the samples previously submitted by Appellant.

Respondent argues that, on its face, Appellant's bid reserved to Appellant a right to supply "equivalent" products other than Nicholson despite the fact that Appellant had submitted samples of only Nicholson products. Thus Respondent contends the bid was

ambiguous in its identification of the products which Appellant offered to supply because DGS had no way of knowing from the face of the bid exactly which products of which manufacturer Appellant offered to supply. Because of this asserted discrepancy between the Nicholson samples submitted and the language in the bid, "Nicholson or equivalent," Respondent argues that the bid was ambiguous and, thus, properly rejected as nonresponsive. Respondent points out that bids which are materially ambiguous, i.e. are subject to more than one reasonable interpretation, must be rejected as nonresponsive. *See* Packard Instrument Company, MSBCA 1272, 2 MSBCA ¶ 125 (1986); Long Fence Co., Inc., MSBCA 1259, 2 MSBCA ¶ 123 (1986); National Elevator Company, MSBCA 1291, 2 MSBCA ¶ 135 (1986); The Driggs Corporation, MSBCA 1243, 1 MSBCA ¶ 106 (1985); Free State Reporting, Inc., MSBCA 1180, 1 MSBCA ¶ 75 (1984); Porter Construction Management, Inc., MSBCA 1994, 5 MSBCA ¶ 414 (1997). However, it must be initially determined whether Appellant's bid is, in fact, ambiguous and, for reasons that follow, we conclude that Appellant's bid is not ambiguous.

Respondent argues in the alternative that Appellant's failure to supply samples of the unidentified "equivalent" products mentioned in its bid rendered the bid nonresponsive, and Respondent points out that when a sample is required to be submitted with or prior to a bid, failure to submit a sample is a matter of responsiveness and the bid must be rejected. Merjo Advertising and Sales Promotion Company, MSBCA 1942, 5 MSBCA ¶ 393 (1996); H.L. Frey Corporation, MSBCA 2055, 5 MSBCA ¶ 435 (1998). Respondent also asserts, relying on R & O Industries, Inc.,No. B-175935 (Sept. 25, 1972) 52 Comp. Gen. 155, that when samples are required and a bidder offers more than one product but fails to submit a sample for each product offered, the bid is nonresponsive and must be rejected.

Appellant, on the other hand, argues that the meaning of "Nicholson or equivalent" stated in its bid was explained by a telephone conversation with the Procurement Officer after bids were

opened. However, by law a bid must be judged on it's face. A bidder is not permitted to make a bid which is nonresponsive on its face responsive through subsequent explanation, clarification, or correction. The Board will therefore only focus on the four corners of the bid itself and will not consider any post-bid explanations of what may have been intended. Fortran Telephone Communications Systems, Inc., MSBCA 2068 and 2098, 5 MSBCA ¶ 460 (1999); Substation Test Company, MSBCA 2016 and 2023, 5 MSBCA ¶ 429 (1997); Aepco Incorporated, MSBCA 1977, 5 MSBCA ¶ 415 (1997); Nestle USA, Inc., MSBCA 2005, 5 MSBCA ¶ 424 (1997); Weis Markets, Inc., MSBCA 1652, 4 MSBCA ¶ 305 (1992); Long Fence, *supra*. In this connection, Respondent points out, citing Interface Flooring Systems, Inc., B-206399, B-207258 (April 22, 1983) 83-1 CPD ¶ 432, that where there is a discrepancy between the bid and the samples submitted with the bid, the bidder is not permitted to explain its intention afterward; the bid is nonresponsive and must be rejected.

Appellant argues that its bid should not have been rejected because Appellant used similar language, "Nicholson or equivalent," in prior bids which were not rejected. The record, in fact, reflects that Ms. Seiler, the Procurement Officer herein, previously accepted or failed to reject as nonresponsive previous bids from Appellant that provided "Nicholson or equivalent" where samples were required to be submitted by the winning bidder after the bids were received. However, previous conduct would not authorize DGS to accept a nonresponsive bid for this procurement. By law the procurement officer may award a contract only to a responsive bidder. *Md. Code Ann., St. Fin. & Proc. § 13-103(e)*; COMAR 21.05.02.13A. *See* Fortran, *supra* (where the procurement officer makes an erroneous initial determination that a bid is responsive, the procurement officer is not precluded from later rejecting the bid as nonresponsive). Thus, a bidder has no right to rely on prior unauthorized conduct of a procurement officer in failing to reject a nonresponsive bid in an

earlier procurement.[2] *See* Aepco Incorporated, MSBCA 1844, 4 MSBCA ¶ 370 (1994); Capitol Dental Supply, Inc., et al., MSBCA 1351 and 1355, 2 MSBCA ¶ 161 (1987).

Notwithstanding Respondent's arguments, we conclude that this appeal, based on the oral and written record, must be sustained. This is not because we disagree with the principles advanced by Respondent as set forth above, which are designed to prevent chicanery in the bidding process and to prevent affording a single bidder "two bites of the apple," *see* Porter Construction Management, Inc., *supra* at p. 4, to the prejudice of other bidders and the taxpayer. We agree with such principles and re-affirm them. However, COMAR 21.01.02.01B(39) set forth above defines "Equivalent item" as an item of supply (in this case juice bases) that is functionally equal or superior to an item specified in a solicitation. Herein the bidders specified by sample (assuming acceptance of the sample) the item to be provided. Once accepted, it was as if the characteristics of that sample were specified in the ITB. Appellant specified products manufactured by Nicholson and no other manufacturer. Thus, Appellant was required to provide Nicholson products or, pursuant to COMAR 21.01.02.01B(39) and COMAR 21.04.01.02B,[3] the functional equivalent thereof. We recognize that because samples were required prior to bid, the State was also allowing approved samples to constitute compliance with the specifications. However, the specifications were generic - a

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[2]We make no actual findings concerning whether Ms. Seiler should have rejected Appellant's previous bids because such bids are not before us.

[3]COMAR 21.04.01.02B provides:

> B. Brand Name or Equal. Brand name or equal means a specification that uses one or more manufacturer's names or catalog numbers to describe the standard of quality, performance, and other characteristics needed to meet the procurement agency's requirements. Salient characteristics of the brand name item shall be set forth in the specification.

particular product was not specified. The approved sample became the description of the functional characteristics of the specifications. Had the State specified the product, the words "or equivalent" would have appeared in the ITB; that is if the State had specified XYZ juice product, the words "or equivalent" would have appeared after XYZ so that the specification would have read "XYZ or equivalent." *See* COMAR 21.04.01.02B. We, therefore, read into the specifications the words "or equivalent" as consistent with the ITB requirements to include provision of a sample prior to submission of bids. The approval of a sample was based on functional ingredient characteristics set forth in the ITB; not on the name of the product offered as a sample. The sample, whatever its manufacturer's name, had to possess certain ingredient characteristics as set forth in the ITB, and it was approval of those characteristics, along with any other ingredient characteristic that the sample possessed, that approval of a sample accomplished. Thus, if between approval of Appellant's sample, manufactured by Nicholson, on May 27, 2003 and submission of its bid on May 28, 2003, or at any time during the contract performance, Nicholson changed its name or merged into another entity, Appellant could still provide the product as manufactured under the new name or entity as long as the ingredient characteristics of the product remained functionally equal or superior to the approved sample.

In any event, based on the record herein, we find that Appellant's bid, premised on "Nicholson or equivalent," was responsive and was not ambiguous. This is a procurement for juice bases and soft drink bladder boxes for dispensing of juices and soft drinks after the addition of water in a prescribed ratio. What was approved through the pre-bid submission of samples were the juice base and soft drink bladder box characteristics, not the name of the manufacturer. We do not find that Appellant's use of the words "or equivalent" under these circumstances is ambiguous or renders the bid nonresponsive because Appellant is still promising to provide the

functional characteristics of what the ITB seeks, i.e. its bid constitutes a definite and unqualified offer to meet the material terms of the ITB.

Accordingly, we sustain the appeal.

Wherefore, it is Ordered this day of September that the appeal is sustained.

Dated:

___________________________
Robert B. Harrison III
Board Member

I Concur:

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Michael J. Collins
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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2356, appeal of Juice Company, Inc. under DGS Solicitations No. 001IT814396.

Dated: ______________________________

Michael L. Carnahan
Deputy Recorder