

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

Docket No. 2588	Date of Decision: 11/16/07
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DGS IFB No. 001IT816784	
Appellant/Respondent: Outdoor Outfits Department of General Services	

Decision Summary:

Representation - COMAR 21.10.05.3 A. states that a corporation "Shall be represented by an attorney at law licensed to practice in Maryland." Entities required by COMAR to be so represented must be so represented before the MSBCA.

Responsiveness - required samples - Failure to provide a required sample results in a finding that a bid is nonresponsive.

Responsiveness - required sample which fails to meet specifications - When a sample fails to conform to mandatory detailed specifications contained within an Invitation for Bids, the bid is nonresponsive.

Responsiveness - determination from face of a bid document - Responsiveness of a bid document must be determined from the face of the bid document, not from any other information subsequently gathered.

Invitations for Bids - required conforming to material aspects of solicitation - Maryland law requires rejection of a bid that does not conform in all material aspects to a solicitation's requirements.

Invitations for Bids - material deviation from requirements - A material deviation from an Invitation for Bid's requirements occurs when the price, quantity, or quality of the goods or services is affected.

THESE HEADNOTES ARE PRODUCED FOR ADMINISTRATIVE REFERENCE AND OPERATIONAL USE ONLY AND SHOULD NOT BE CONSIDERED "OFFICIAL TEXT" OF THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS, NOR SHOULD IT BE REFERENCED OR GIVEN ANY LEGAL STATUS. A COPY OF THE FULL AND COMPLETE DECISION SHOULD BE CONSULTED AND REFERENCED. FOR FURTHER INFORMATION, CONTACT THE BOARD OF CONTRACT APPEALS.

4. This IFB, No. 011IT816784, requested bids to provide certain items to DPSCS - winter uniform jackets, clip-on ties and leather belts.
5. IFB listed detailed specifications from DPSCS for all three items.
6. Vendors were required to submit one sample of each item at no cost to the state seven (7) days after bid opening.
7. The purpose of each bid sample was to ensure that the items being offered by the vendor in response to the bid solicitation met the detailed specifications listed in the IFB.
8. Bid opening was held on May 23, 2007.
9. There were nine (9) bids received.
10. The two lowest bids received were found to be nonresponsive.
11. Appellant Outdoor Outfits (Outdoor) was the third lowest bidder.
12. All items supplied by bidders were examined and evaluated to ensure that all color, material and measurement results complied with the specifications contained in the IFB.
13. The uniform sample submitted by Outdoor was found not to meet the specifications for winter jackets.
14. Specifically, the sample did not meet the detailed specification for badge tab measurements.
15. The IFB states, under the heading **UNIFORM CONTRACT SPECIFICATIONS, WINTER JACKET**, Badge Tab, that "[t]he Badge tab shall be made of the outer fabric material, 1" wide and with two metal eyelets spaced

vertically, 1" apart and is to be centered approximately 4 ½" above the left pocket flap."

16. The badge tab on the sample provided by Outdoor was approximately ¾" wide with two metal eyelets spaced approximately ¾" apart vertically.
17. The Procurement Representative obtained a DPSCS badge and tested it to see if it would fit on the jacket sample provided by Outdoor.
18. It was determined that the DPSCS badge did not fit properly on the Outdoor jacket sample.
19. The specification requirement for the badge tab, 1" wide with two metal eyelets spaced vertically 1" apart, must be exact to insure the proper fit of the DPSCS badges.
20. It was found that Outdoor's winter jacket badge tab did not secure the DPSCS badge on the jacket, resulting in the badge hanging loosely.
21. DPSCS also tested the winter jacket sample provided by Outdoor and also found that the badge tab spacing was unacceptable.
22. In addition, the jacket sample submitted by Outdoor had a label, "Outdoor Outfits", sewn on the bottom of the left pocket.
23. This label was also found to violate the specifications of the IFB.
24. On August 3, 2007, the Procurement Specialist sent a letter to Outdoor indicating that the winter jacket sample was not in conformance with the specifications contained in the IFB.
25. Outdoor's bid was, therefore, found to have been nonresponsive.

26. By way of a letter dated August 9, 2007, Outdoor formally protested DGS's decision to reject Outdoor's bid as nonresponsive.
27. DGS denied Outdoor's protest in a letter dated August 30, 2007.
28. Appellant Outdoor timely appealed the denial of its protest by the Procurement Specialist to the Maryland State Board of Contract Appeals (Board) on September 6, 2007.
29. The appeal of Outdoor was signed by Michael Lynett, Vice-President, Sales and Marketing.
30. As of the date of the issuance of this decision, Outdoor is not represented by an attorney at law licensed to practice law in Maryland.
31. Respondent filed a Motion for Summary Decision, or in the Alternative, Motion to Dismiss, on October 3, 2007.
32. No response to the Respondent's Motion was filed by Outdoor.
33. No hearing was requested by either party regarding Respondent's Motion or the appeal itself.

DECISION

Appellant Outdoor contends that its bid should have been found responsive because:

The measurement on the tab holes is a very subjective matter to how/where those holes are measured by. (As in midst of the hole from end to end taking the end of the hole and measuring to the next). Agencies typically make note of minor deviations and get the Vendor to correct them and sign off verifications which is what

we're encouraging Maryland Department of General Services to do in this case.

The Board cannot agree with Appellant. For the reasons that follow, the Board finds in favor of the Respondent and will deny Appellant's Appeal.

The Code of Maryland Regulations (COMAR) provides in 21.05.02.13A. that:

A. General. The contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the most favorable bid price or most favorable evaluated bid price. A bid may not be evaluated for any requirement or criterion that is not disclosed in the invitation for bids.

COMAR defines responsive in 21.01.02.01B.(78) by stating that responsive "means 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." (Underlining added).

As we noted in Nestle USA, Inc., MSBCA 2005, 5 MSBCA ¶424 (1997) at p. 6, a state agency can only award a contract to a bidder whose price is most favorable to the State and whose bid conforms in all material respects to the requirements of the IFB. This regulation is designed to prevent giving an unfair advantage to a bidder who deviates from the IFB *vis a vis* other bidders. Id.

We have found that a requirement that a sample be provided with a bid is a matter of responsiveness and that the failure to provide a required sample properly results

in a finding that the bid is nonresponsive. Merjo Advertising & Sales Promotions Company, MSBCA 1942, 5 MSBCA ¶393 (1996) at p.4.

Similarly, when a sample fails to conform to mandatory detailed specifications contained within an IFB, the bid is nonresponsive. Responsiveness must be judged within the four-corners of a bid and information outside the bid may not be considered. Id. To permit such considerations for one bidder would clearly be unfair to other bidders.

The IFB herein contained mandatory detailed specifications regarding the winter jacket badge tab. The solicitation requires that the badge tab be 1" wide with two metal eyelets spaced vertically, 1" apart. Outdoor's sample badge tab was approximately ¾" wide with two metal eyelets spaced approximately ¾" apart vertically. DGS found Outdoor's bid to be nonresponsive because Outdoor's sample failed to conform with the required specifications.

Outdoor does not dispute the fact that its sample was not in conformance with the specifications. Outdoor refers to the nonconforming nature of the badge tab in its August 9, 2007 letter as a "minor variation".

DGS did not accept Outdoor's offer to easily modify this "minor variation" in production. Frankly, DGS could not accept this offer.

That is because this Board has been very clear that responsiveness of a bid must be determined from the face of a bid document, and not from any other information subsequently gathered through a verification process or through other extrinsic evidence. E.g., AEPCO, Inc., MSBCA 1977, 5 MSBCA ¶415 (1997) at p. 5; Porter Construction Management, Inc., MSBCA 1994, 5 MSBCA ¶414 (1997) at p.3.

With respect to IFB's, Maryland law requires rejection of a bid that does not conform in all material aspects to the solicitation's requirements. Excelsior Truck Leasing Company, Inc., MSBCA 1102, 1 MSBCA ¶50 (1983) at p.4. A material deviation from an IFB's requirements occurs when the price, quantity, or quality of the goods or services is affected. Id.

DSG here found that the quality of the goods (the winter jacket) was affected by the badge tab and the label variations from the specifications. There is no evidence to contradict that determination. Outdoor's post-bid opening offer to correct these variations was not and could not be accepted by DGS. Any such corrections would have been unfair to the other bidders and would have undermined the fairness of this procurement. For the foregoing reasons, Appellant Outdoor Outfits appeal must be denied.

Additionally, Respondent raises an important point in noting that the Appellant remains, apparently¹, in violation of the requirement of COMAR 21.10.05.03A that a corporation, partnership, or joint venture be must represented before the Board by an attorney at law licensed to practice in Maryland.

This is not the first time this failure has been noted in a case before the Board, and the Board notes for the record that this regulation cannot simply be ignored by an appellant to which it applies. Such failure to comply with this requirement will leave such an Appellant with an

¹ A review of Appellant Outdoor Outfits appeal notice letter to the Board reveals that Outdoor Outfits is based in Canada. There is no indication on the letterhead that Outdoor Outfits is a "corporation, partnership, or joint venture". It is, however, clearly not an "individual". The Board, therefore, regards the representation requirements of COMAR 21.10.05.03A as applying to Appellant Outdoor Outfits.

appeal which cannot be successfully pursued before the Maryland State Board of Contract Appeals.

Appellant's appeal is, therefore, denied.

Wherefore, it is Ordered this day of November, 2007 that the appeal of Outdoor Outfits in the above-captioned matter is denied.

Dated:

Michael W. Burns
Chairman

I Concur:

Michael J. Collins
Board Member

Dana Lee Dembrow
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 2499, appeal of Outdoor Outfits under DGS IFB No. 00IT816784.

Dated:

Michael L. Carnahan
Deputy Clerk