



cassette recorders, overhead projectors, amplifiers, mixers and speakers, needed for each classroom and lecture hall, as well as video cameras, special effects generators, microphones and video monitors for each of the two lecture halls. The equipment in each room is to be electronically integrated and controlled from one central source in that room, through a computer operated "media control system." Each classroom is to be equipped and programmed identically, and the lecture halls should be as closely equipped and programmed as possible. The items provided for the equipment pool are to be kept in a storage room for which the vendor must provide shelving and set up for equipment use. The vendor is also required to provide support services including computer programming for the media control systems, training of University personnel in the operation and maintenance (O & M) of the systems, and two years of warranty service.

2. The IFB included bid forms set out in five major sections: Classroom Systems, Lecture Hall Systems, Storage/Equipment Pool System, Support/Programming and Final Price Summary. The System sections included numerous line items for each of the specified items of equipment, lines items for the installation costs, and a line item for the system total.<sup>1</sup> Vendors were not required to provide the referenced item; but were required to list unit and model numbers of proposed alternatives. Likewise, they could develop a variety of media control systems so long as they met the functional requirements of the solicitation.
3. The Support/Programming section contained blanks for unit prices for training, warranty, programming of media control systems, and a total. The Final price summary asked for price

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<sup>1</sup> In the Agency Report, the University set forth the lecture hall bid form as follows:  
**LECTURE HALL SYSTEMS** (2 lecture halls including shared projection booth and separate equipment closets at front of each lecture hall)

1. Video Projector	2 each	\$ _____,	\$ _____	
Reference: Sony VPH 1272Q w/switcher & scan doubler				
Brand Name	_____	Model#	_____	
		* * *		
3. Laserdisk Player	2 each	\$ _____,	\$ _____	
Reference: Pioneer CLD-V2600				
Brand Name	_____	Model#	_____	
		* * *		
18. Media Control System	2 each	\$ _____,	\$ _____	
Attach itemized list per room with unit cost of each component;				
Reference: AMX or Crestron				
Brand Name	_____	Model#	_____	
		* * *		
38. Cables, connectors, plates, hardware	1 lot	\$ _____		
39. Installation	1 lot	\$ _____		
<b>LECTURE HALL SYSTEMS TOTAL</b>			\$ _____	

entries for the totals of the components, classroom systems, lecture hall systems, storage/equipment pool system, and support/programming, with a grand total.<sup>2</sup> By its express terms, however, the solicitation required that the bid price be determined by the individual unit prices.

4. For the purpose of assessing bidder responsibility, vendors were required to submit "preliminary drawings" with their bids. As stated in Section 1.6G of the IFB,

The Bidder shall provide preliminary system functional block diagrams of the proposed systems. These diagrams shall provide information to allow the University to determine that the Bidder is responsible and understands the requirements of these bid documents. In addition, the Bidder shall submit drawings showing the equipment racks and/or equipment consoles with the quantity and location of the equipment.

5. On June 11, 1996, six bids were submitted and opened. The six bidders were AEPCO, Robert Slye Electronics, Inc., Peirce-Phelps, Inc., Professional Products, Inc., Washington Professional Systems, and General Projection Systems.
6. AEPCO did not use the bid forms included in the IFB, and instead created its own forms. There were several problems with its bid as submitted.
7. First, AEPCO attached a Summary as follows:

SUMMARY OF COST AS PROPOSED	
CLASSROOM SYSTEMS	\$469,973.00
LECTURE HALL SYSTEM	\$146,422.00
POOL EQUIPMENT	\$ 42,483.00
<div style="display: flex; justify-content: space-between; width: 100%;"> <span><b>TOTAL FIRM FIXED PRICE</b></span> <span style="text-align: right;"><b>\$658,878.00</b></span> </div>	

8. Next, AEPCO attached a pricing form for the Classroom Systems, then a detailed breakdown of the components and prices for the classroom media control systems; then a line item pricing form for the Lecture Hall Systems, with a breakdown of the components and prices for the media control systems, a line item pricing form for the storage/equipment pool

2 F. FINAL PRICE SUMMARY	
CLASSROOM SYSTEMS TOTAL	\$ _____
LECTURE HALL SYSTEMS TOTAL	\$ _____
STORAGE/EQUIPMENT POOL	
SYSTEM TOTAL	\$ _____
SUPPORT/PROGRAMMING TOTAL	\$ _____
GRAND TOTAL	\$ _____

system, with an additional bill of materials listing product designations, unit costs and extended costs for items added as a result of Addendum 2. These costs had not been included in the \$42,483 sum listed on the "system total" line of the equipment pool system pricing form.

9. AEPCO attached a "Non-Material Cost Summary" sheet setting forth installation, electrical service, shipping and warranty charges for each of the classroom, lecture hall and equipment pool categories. AEPCO submitted 8 drawings with the bid package.
10. Finally, AEPCO's bid contained several unsolicited items. For example, one sheet of paper specifically referenced the solicitation and stated:

**AEPCO STANDARD PAYMENT TERMS:**

- \* 30% OF AWARDED CONTRACT AMOUNT AS DOWN PAYMENT
- \* 30% DUE UPON DELIVERY OF EQUIPMENT TO SITE
- \* 30% DUE AT ACCEPTANCE
- \* 10% DUE UPON DELIVERY OF DOCUMENTATION

AEPCO cross-referenced these standard payment terms (which are in direct contravention of the payment terms set out in Section 5.1 of the IFB) by stating "See AEPCO's Standard Payment Terms Attached" on three of the signed bid forms (Addenda Nos. 1,2, and 3. AEPCO also attached an unsolicited sheet captioned "Clarifications and Assumptions" which included, among other items, the following proviso regarding acceleration costs:

AEPCO's normal work hours are from 8:00,AM to 5:00.PM, Monday through Friday, except Federal holidays. In the event construction delays not caused by AEPCO, require work to be performed, to meet the schedule, outside the above stated normal work hours, an additional cost may be incurred and billed to the University.

11. As the University evaluated AEPCO's bid, several omissions, ambiguities and other mistakes were discovered. Several of the recreated bid forms dropped necessary line items, misdesignated required quantities, and provided incomplete project designations. AEPCO also failed to properly total its bid price. For example, AEPCO's bid failed to designate a price for 1) on the job and maintenance training on the system, or 2) programming of the media control systems.
12. For the Lecture Hall Media Control Equipment, AEPCO bid products manufactured by AMX Corporation. AMX makes both a "card frame" control system and an "integrated control system." The University believed that AEPCO's price list mistakenly identified components for both types of systems creating ambiguity as to what was being offered.
13. Each classroom and lecture hall is to be equipped with an audio/mixer amplifier system. The product designation for the corresponding line items on AEPCO's bid forms lists only the amplifier, and did not list a product designation or price for a mixer.

14. Each lecture hall is to be equipped for an assistive listening device system for hearing impaired users. AEPCO's bid form shows a bid for a transmitter, but fails to list the companion components, a modulator or a receiver.
15. There were several discrepancies in the AEPCO bid regarding quantities. Each classroom is to be equipped with two speakers, for a total of 32. The corresponding line item on AEPCO's bid form mistakenly designates the total quantity to be 16. Each lecture hall is to be equipped with 2 VHS Video Cassette recorders for a total of 4. The corresponding line item on AEPCO's bid form designates the total quantity to be two.
16. Each lecture hall is to be equipped with a slide/video transfer. AEPCO's bid form indicated a unit price of \$339. This is approximately one-tenth the market price for this type of equipment, and the University suspects that AEPCO mistakenly dropped a digit while completing the bid form.
17. On approximately June 27, 1996 the University notified AEPCO that its bid had been rejected because of errors, omissions and ambiguities which caused the bid to be non-responsive. AEPCO was given an opportunity to discuss its bid, and did so by letter of July 1, 1996, and in a meeting with the Procurement Officer on July 2, 1996.
18. AEPCO filed a protest on July 19, 1996, and its protest was denied by the procurement officer on September 27, 1996. Timely appeal to this Board followed, with the Agency Report being filed on November 14, 1996. Appellant having submitted no comment on the Agency Report, and no hearing having been requested by either party, this opinion is based on the written record.

#### Decision

In its appeal, AEPCO, Inc., asserts that it submitted a responsive bid and offered the lowest bid price, and disagrees with the final decision of the procurement officer. AEPCO, Inc. asserted in writing and orally to the procurement officials in July, as well as in its formal protest and formal appeal to this Board, that it intends to provide the products and installation sought for the final lump sum price offered. Such intent is not clear from the face of its bid, and the procurement officer was correct in finding that the bid was not responsive to the IFB.

Under Maryland's General Procurement law, a competitively bid contract may not be awarded to an apparent low bidder unless its bid is "responsive" to the solicitation. To be considered responsive, a bid must "conform in all material respects to the invitation for bids." Md. State Fin. & Proc. Code §13-103(e)(1995). COMAR 21.01.02.01B.

While the State was willing to hold an evaluation meeting with AEPCO, Inc., the State cannot allow a contractor to modify, qualify, (or for that matter, unqualify) its bid after bid submission. As AEPCO, Inc. itself stated at page 4 of its notice of appeal, "the University must determine if a bidder is responsive by information submitted in response to the IFB." This Board has repeatedly held that responsiveness of a bid must be determined from the face of the bid document, and not from any information subsequently gathered in a verification process or through other extrinsic evidence. Porter Construction Management, Inc., MSBCA 1994, 5 MICPEL ¶414

(1997); Calvert General Contractors Corp., MSBCA 1314, 2 MICPEL ¶140 (1986); Inner Harbor Paper Supply Company, MSBCA 1064, 1 MICPEL ¶24 (1982); Excelsior Truck Leasing Company, Inc., MSBCA 1102, 1 MICPEL ¶50 (1983); Long Fence Co., Inc., MSBCA 1259, 2 MICPEL ¶123 (1986). Likewise, an ambiguous bid must be rejected as nonresponsive, unless the ambiguities may be viewed as minor irregularities. Porter Construction Management, Inc., *supra.*, Free State Reporting, Inc., MSBCA 1180, 1 MICPEL ¶75 (1984); Computer Services of America, MSBCA 1465, 3 MICPEL ¶221 (1989).

Many of the discrepancies noted by the Procurement officer, as can be seen by the findings of fact above, consist of missing lines for apparently necessary unit price items, or confusion as to the number of pieces provided for a particular item, etc.<sup>3</sup> This Board need not address in this opinion the myriad details of these discrepancies, however, although it agrees with the Procurement Officer's findings thereon since it is impossible to identify a definitive offer for a definitive price, because of two unsolicited contract terms which conflict with and/or alter the terms of the IFB in a material way. These two items clearly dictate that the Board find that the bid was not responsive, and therefore should be rejected.

The two modifications made in the bid which make the bid non-responsive are the addition of alternate payment terms:

**AEPCO STANDARD PAYMENT TERMS:**

- 30% OF AWARDED CONTRACT AMOUNT AS DOWN PAYMENT
- 30% DUE UPON DELIVERY OF EQUIPMENT TO SITE
- 30% DUE AT ACCEPTANCE
- 10% DUE UPON DELIVERY OF DOCUMENTATION

and the delay/extension of time clause:

AEPCO's normal work hours are from 8:00,AM to 5:00.PM, Monday through Friday, except Federal holidays. In the event construction delays not caused by AEPCO, require work to be performed, to meet the schedule, outside the above stated normal work hours, an additional cost may be incurred and billed to the University.

The Procurement Officer concluded that the unsolicited payment clause rendered AEPCO's bid non-responsive because it materially conflicted with the payment terms set forth in the solicitation. Further, he determined that he could not tell definitely what the delay clause meant, and thus the clause raised an ambiguity as to whether the parties' legal obligations would be altered under it.

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<sup>3</sup> Some of these discrepancies the Procurement Officer found were not significant and could be corrected or waived: "AEPCO's failure to indicate whether rack mounts are included in its price bid for color monitors, AEPCO's failure to indicate whether back boxes are included in its price bid for ceiling speakers; the unsolicited term set forth in APECO's bid regarding the Zenith Cruise Pad." See COMAR 21.05.02.12A. The Procurement Officer noted, however, that the remaining items listed could not be waived because they are material and can not be corrected because the intended corrections are not clearly apparent on the face of the bid document itself.

AEPCO's assertion during a post-bid meeting with the State that it withdrew the proposed alternate payment terms and delay/extension of time clause can have no effect, since the State must evaluate the response to the IFB from its face, not based on any clarifications or modifications made thereafter. To find otherwise would permit the bidder "two bites at the apple". To preserve fairness in the competitive bidding system, bidders must not be allowed to modify bids once they have an opportunity to review the other bids. A bidder must not be permitted to determine if it wants to perform the contract at its price as stated in its bid, or allow award to be made to its competitor by relying on a higher bid price. Allowing pricing terms to be changed after bid opening could give Appellant an unfair advantage and "create an auctionlike atmosphere." A.H. Smith Associated, Limited Partnership, MSBCA 1516, 3 MICPEL ¶250 (1990). Absent evidence that the procurement officer's decision was "fraudulent or so arbitrary as to constitute a breach of trust", the Board will not disturb the Procurement Officer's discretionary determination.

Wherefore, it is Ordered that the appeal is this 29 day of January, 1997, hereby DENIED.

Dated: January 29, 1997

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Candida S. Steel  
Board Member

I concur:

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Robert B. Harrison III  
Chairman

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Randolph B. Rosencrantz  
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 1977, appeal of AEPCO, Inc. under University of Maryland College Park IFB No. 78261-K.

Dated: January 29, 1997

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Mary F. Priscilla  
Recorder