

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of BERNIE'S VENDING  
SERVICE, INC.

Under DPS&CS Solicitation  
No. 8903-05

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) Docket No. MSBCA 1420  
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March 14, 1989

Bid Protests - Timeliness - Bid protests based on alleged grounds of protest which are apparent in the solicitation prior to bid opening are to be filed with the agency procurement officer before bid opening pursuant to COMAR 21.10.02.03.A.

Ambiguities - A bidder has a duty to seek clarification of any ambiguity that it detects in the specifications prior to bid opening. A bidder is entitled to a clarification by the procurement officer and if the clarification is not forthcoming the bidder must file a bid protest before bid opening to protect its competitive position.

Ambiguities - Where a bidder is presented with a patent ambiguity and fails to exercise its duty to inquire prior to bid the bidder becomes responsible for any adverse impact of its erroneous interpretations.

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OPINION BY MR. LEVY

This is an appeal of the procurement officer's final determination denying Appellant's bid protest in a procurement by the Maryland Department of Public Safety and Correctional Services (DPS&CS), Division of Correction (Corrections). The Respondent has filed a Motion to Dismiss the appeal alleging that the protest had not been timely filed.<sup>1</sup>

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<sup>1</sup> A hearing was conducted only for the purpose of presenting arguments on the Motion to Dismiss.

### Findings of Fact

1. The Division of Correction issued Invitation For Bids (IFB) No. 8903-05 for the provision of food vending machine services at the Maryland Correctional Institution for Women, located at Jessup, Maryland. The proposed contract was to be for a three year period with Corrections having the right to renew for three additional one year periods. (Section III C of the specifications, Article II of the contract).

2. Bids were due and the public opening set for October 3, 1988. The award was to be made to the responsible bidder who submitted the largest percentage fee (commission) of gross revenue to be paid to Corrections (Section III B of the specifications).

3. Article IX, Vending Machines, of the specifications provides as follows:

(d) Vending machines installed under the contract shall be of modern design and construction and in good operating condition. Color of the machines shall blend with the decor of the area in which they are to be located.

4. Mr. Ron Abelson (Abelson), Appellant's general manager, attended a pre-bid conference on September 16, 1988 at the location where the machines were to be installed. While there he observed that the existing machines of B&G Vending Co., (B&G) the incumbent operator and the vendor to whom this award is proposed to be made, appeared to be approximately ten years old. At the pre-bid conference Abelson spoke to the procurement officer, Ms. Robin Koontz (Koontz) and inquired what was meant by "modern design and construction" with regard to the vending machines. (Tr. 15). She advised that she would get back to him with an answer.

5. Not receiving a response from the procurement officer, Abelson sent two letters to Koontz, on September 19th and 26th, each time advising that Appellant intended to supply new equipment if awarded the contract. We note the following from Abelson's September 26th letter to Koontz:

We realize this may nor may not have any bearing on the "awarding" by percentage only of the sealed bid opening of October 3, 1988; however, it

is imperative to realize that our type of equipment will hold more products and, therefore, easily generate more sales, thus more revenue for your institution.

The letters were followed by a phone call to Koontz to again clarify the word "modern". It is alleged that Koontz responded that she had no clarification (Tr. 16).

6. In Abelson's Affidavit filed with Appellant's Answer To Motion To Dismiss the following statements are made:

7. I believed that "modern design and construction" meant new or remanufactured machines equipped with dollar bill changers and large capacities, however, the contract was unclear on this point.

8. In an effort to clarify this ambiguity I contacted Procurement Officer Robin Koontz and asked her for clarification. Despite several requests she was unable to provide a response to my inquiries on this matter. (Underscoring added)

7. When bids were opened B&G was the apparent highest bidder, offering the largest percentage fee of gross revenue. Appellant was the apparent third highest bidder.<sup>2</sup> (Tr. 25; 42-43).

8. Appellant's bid protest, dated October 3, 1988, was received at the agency on October 5, 1988. Appellant stated that its letter was a protest "to the award bid [sic] by percentage only and to the incumbent again for another three (3) years after already being there for six (6) years". Appellant then gave the following two reasons in support of its request to have a re-bid:

A) Based on figures available and sent in the bid specs, our bid had to also include a Pro-Forma and P/L Statement for NEW EQUIPMENT, approximately \$40,000 or about 2.5% less than incumbent whose equipment, already paid for or amortized DOES NOT HAVE TO REPLACE WITH NEW EQUIPMENT!

B) Since newer, larger, more capacity equipment is really needed for the job, the STATE MUST LOSE REVENUE FROM SALES, with present equipment, also void of dollar (\$) changes.

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<sup>2</sup> For purposes of deciding this motion the issue of whether Appellant could be awarded this contract and therefore an interested party need not be decided.

9. The procurement officer (for purposes of the bid protest the procurement officer was Mr. Myles Carpeneto) issued his final determination on October 18, 1988. He held that since Appellant was protesting the evaluation criteria and the criteria was apparent before the bid opening, the Appellant had an obligation to file its protest before bid opening. Therefore, the protest was untimely.

10. Appellant filed a timely appeal with the Board on October 28, 1988.

11. Corrections filed its Motion to Dismiss the Appeal alleging that Appellant did not file its bid protest timely with the Agency. At the hearing on the motion Appellant asserted for the first time, after questioning from the Board, its position that the contract should not be awarded to B&G because they were going to supply nonconforming goods; i.e. that the specifications called for new or recently remanufactured machines and that B&G was going to use the same machines that had been on the site and used for six years under the existing contract. Appellant supported its position that new or recently remanufactured equipment was required pursuant to the Article IX(d) language because custom and usage in the trade required that a vendor supply new equipment at the commencement of a new contract period.

#### Decision

In its bid protest filed with Corrections on October 3, 1988 the Appellant appears to raise three grounds of protest. The first two were clearly stated; i.e. (1) that it objected to the award being made based only on a percentage to be paid to Corrections, and (2) that the award should not be made to the incumbent B&G for another three years after already having the contract for six years. The third issue, which was not as clear in the protest letter, was described in Appellant's request that there be a rebid because Appellant prepared

its bid based on supplying new equipment whereas the incumbent B&G was going to use the equipment that had been on the contract location for the past six years. New, more modern, large capacity equipment would provide more revenue for Corrections. This third issue was made more clear in Appellant's notice of Appeal to this Board and at the hearing on Corrections' Motion to Dismiss. What Appellant is really arguing in this third issue is that the language of Article IX(d) of the specifications, requiring that "[v]ending machines installed under the contract shall be of modern design and construction and in good operating condition," calls for the successful vendor to provide new or recently remanufactured equipment. At the hearing Appellant attempted to argue for the first time that the third issue was really its claim that the incumbent B&G was supplying nonconforming merchandise under the contract because it was not supplying new or recently remanufactured equipment. To support its position on this third issue Appellant argued that the custom and usage of the trade required the vendor to supply new or recently remanufactured equipment at the beginning of a new contract period whenever the specification calls for equipment of "modern design and construction".

The first two grounds of protest (contract award based on a percentage to be paid to Corrections and the length and duration of the term of the contract) were apparent on the face of the specifications at Section III B and Section III C respectively. There was nothing ambiguous about the language of these items the import of which were clearly known to the Appellant prior to the bid opening. Any objections by Appellant to these sections for the specifications should have been raised prior to the bid opening. COMAR 21.10.02.03.A provides, in pertinent part, as follows:

Protests based upon alleged improprieties in any type

of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals....

Such protests are required to be in writing and addressed to the procurement officer. COMAR 21.10.02.02B. A protest received after the time limits prescribed may not be considered. COMAR 21.10.02.03.C.

This Board has consistently held that bid protests based on alleged grounds of protest which are apparent in the solicitation before bid opening are to be filed with the agency procurement officer before bid opening. See Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983); Neoplan USA Corporation, MSBCA 1186 and 1202, 1 MSBCA ¶84 (1984); Transit Casualty Company, MSBCA 1260, 2 MSBCA ¶119 (1985); Packard Instrument Company, MSBCA 1272, 2 MSBCA ¶125 (1986). Accordingly, the first two grounds of protest raised after bid opening were not raised timely.

Appellant's third ground of protest (the successful vendor is required to supply new equipment) was not apparent on the face of the specifications. This protest ground is based on Appellant's interpretation of Article IX(d) which calls for vending machines installed under the contract to be of "modern design and construction and in good operating condition". What was apparent on the face of the specifications was that there was an ambiguity with regard to the type of equipment required by the language of Article IX(d). And indeed this ambiguity was recognized by Appellant prior to bid opening. By his own admission, Mr. Abelson stated in his Affidavit (Finding of Fact No. 6) that the contract was unclear whether "modern design and construction" meant new and remanufactured machines equipped with dollar bill changers and large capacities. He also stated that "[i]n an effort to clarify this ambiguity I contacted

Procurement Officer Robin Koontz and asked her for clarification". Abelson also wrote to Koontz on two occasions (Finding of Fact No. 5) each time affirmatively advising that Appellant was going to supply new equipment but in neither letter requesting a clarification of Article IX(d) or indicating he was filing a protest as he did with his October 3, 1988 letter.

This Board has held on several occasions that a bidder has a duty to seek clarification of any ambiguity that it detects in the specifications prior to bid opening. Martin G. Imbach, Inc., MSBCA 1020, 1 MSBCA ¶52 (1983); Dominion Contractors, Inc., MSBCA 1041, 1 MSBCA ¶69 (1984); Concrete General, Inc., MSBCA 1062, 1 MSBCA ¶87 (1984). This duty to inquire where a patent ambiguity exists prevents vendors from taking advantage of the government; it protects all bidders by ensuring that they bid on the same specification; and it aids the administration of government contracts by requiring ambiguities to be clarified before bidding, thus avoiding costly litigation after the fact. George E. Newsom, 230 Ct. Cl. 301, 676 F.2d 647 (1982). And indeed Appellant did orally request clarification from the procurement officer but a response was not forthcoming. Appellant subsequently prepared its bid based on its interpretation of the ambiguous specification.

While we believe that Appellant was entitled to the requested clarification we find that Appellant had a duty to file a written protest prior to bid opening to protect its competitive position when it did not get the requested clarification. Compare William F. Wilke, Inc., MSBCA 1162, 1 MSBCA ¶61 (1983) (it was determined to be a reasonable course of action where a bid protest was filed at last minute and bid opening had to be delayed). Where the vendor is presented with a patent ambiguity and fails to exercise its duty to

inquire prior to the bid the vendor becomes responsible for the adverse impact of its erroneous interpretation. Dominion Contractors, Inc., *supra*. Thus, because of its failure to protect itself by filing a timely protest Appellant is held to Corrections' interpretation of the specification.

Appellant also contends that its protest is really a challenge to Corrections' acceptance of B&G's nonconforming merchandise. It argues that this did not become evident until the bid opening, therefore its bid protest is timely. It is not clear to us how Appellant became aware at bid opening of what type of equipment B&G was going to supply since there was no requirement to list the equipment on the face of the bid. As we stated above, we believe that this is no more than another way of stating Appellant's interpretation of the ambiguous specification. This is made clear because Appellant argues on appeal for the first time that trade usage requires the successful vendor to supply new machines. This is only Appellant's interpretation of the specification. It is not the only interpretation. Even if Appellant could be proven correct in its interpretation based on industry usage, its interpretation of the specification was untimely because it was obvious to Appellant prior to bid, as evidenced by its attempts to secure clarification, that the specification was susceptible to at least another reasonable interpretation. IBI Security Service, Inc., Comp. Gen. Dec. Nos. B-217069 and B-218006, 85-1 CP D ¶473 (1985). Appellant was required to raise this issue prior to bid opening.

Because of the above stated reasons Respondent's Motion To Dismiss is granted.