

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of KONICA BUSINESS)	
MACHINES USA, INC.)	
)	Docket No. MSBCA 2038
Under DGS Invitation To Bid)	
No. 001IT80946)	
)	

March 25, 1998

Responsiveness - Qualified Bid - When a bidder submits a bid which does not follow in a material way the format mandated by an invitation for bid the General Procurement Law and COMAR require that the bid be rejected.

APPEARANCES FOR APPELLANT:	William C. Sammons, Esq. Boyd K. Rutherford, Esq. Tydings & Rosenberg, LLP Baltimore, MD
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APPEARANCE FOR RESPONDENT:	Jennifer L. Forrence Assistant Attorney General Baltimore, MD
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APPEARANCE FOR INTERESTED PARTY: (Pitney Bowes, Inc.)	Grace Bateman, Esq. Seyfarth, Shaw, Fairweather & Geraldson Washington, D.C.
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the final decision of the DGS Procurement Officer that its bid was non-responsive.

Findings of Fact

1. The Department of General Services (DGS) issued an IFB for a statewide contract for copier equipment on September 23, 1997. The bid due date was originally October 14, 1997. It was later extended to October 21, 1997 by Amendment #1, dated October 8, 1997.
2. The contract was to run for a three year period beginning on the date of award through October 31, 2000, and involved the rental of copiers to serve ten volume bands, which are identified in the IFB as Band I (low volume) through Band X (high volume) in six regions,

- which are identified in the IFB as Region A through Region F.
3. The IFB defines for each band a monthly base copy volume and a quantity above base. The IFB specified that the prices will remain fixed for the three year period. Each bidder had to set forth its price for the monthly base charge, which price was to include the base volume of copies, and a price per copy for copies above the base.
 4. The bid price evaluation requirements were set forth at p. 07 as follows:

**PLAIN PAPER PHOTOCOPY EQUIPMENT CONTRACT
AWARD CRITERIA AND EVALUATION FORMULA - RENTAL**

The award shall be made to the responsible and responsive bidder with the lowest evaluated bid (by Band and Region) as determined by extension of the evaluation formula below.

EVALUATION FORMULA:

B = MONTHLY BASE CHARGE INCLUDING ALL MACHINE CHARGES, BASE COPY VOLUME, MAINTENANCE AND SUPPLIES, EXCEPT PAPER, AND STAPLES WHEN STAPLING IS NOT A BASIC MACHINE REQUIREMENT

BAND	MONTHLY BASE	BAND	MONTHLY BASE
I.....	1,000	VI.....	32,001
II.....	3,001	VII.....	40,001
III.....	9,001	VIII.....	55,001
IV.....	17,001	IX.....	70,001
V.....	25,001	X.....	85,001

CPC = COST PER COPY ABOVE BASE INCLUDING MAINTENANCE AND SUPPLIES, EXCEPT PAPER.

Q = QUANTITY ABOVE BASE

BAND	QUANTITY ABOVE BASE	BAND	QUANTITY ABOVE BASE
I.....	2,000	VI.....	9,000
II.....	5,000	VII.....	15,000
III.....	8,000	VIII.....	15,000
IV.....	8,000	IX.....	15,000
V.....	7,000	X.....	15,000

B - B - (CPC)(Q) = EVALUATED BID PRICE

QUOTATIONS MUST BE SUBMITTED ON THE QUOTATION PAGES FURNISHED WITH THIS SOLICITATION AND ALL CALCULATIONS AND ARITHMETIC FUNCTIONS PERFORMED BY THE BIDDER AND ENTERED IN THE APPROPRIATE ENTRIES. ALL QUOTES WILL INCLUDE MONTHLY BASE CHARGE, COST PER COPY ABOVE BASE. IF VENDOR PROVIDES MULTIPLE COST PER COPY CHARGES AT VARIOUS COPY VOLUMES THAT QUOTE WILL BE FOUND NON RESPONSIVE.

5. The IFB further specifies that the following formula would be used in evaluating the bid:
$$\text{MBC} + \text{MBC} + (\text{CPC})(\text{Q}) = \text{EP}$$
where MBC equals the monthly base charge, CPC is the cost per copy above the base charge, Q is the quantity above base, and EP is the evaluated price.
6. By letter dated October 3, 1997, Appellant's local account executive sent to DGS a list of thirty (30) questions requesting clarification on several points in the IFB. None of the thirty (30) questions addresses the issue that is the subject of the instant protest and appeal.
7. By letter to DGS dated October 6, 1997, Appellant's National Account Manager also requested clarification on several points. The only question pertaining to the evaluation formula is, "Pg. 9...why do you list MBC+MBC Isn't this redundant?"
8. Amendment #1 was issued to All Bidders on October 8, 1997. This Amendment addressed some of Appellant's concerns and, as noted above, extended the bid opening date to October 21, 1997.
9. No protest was filed before bids were opened.
10. Bids were opened on October 21, 1997. Sixteen (16) vendors submitted bids.
11. The Bid forms upon which bidders were to enter their bids for Band III and Band IV were as follows.

PLAIN PAPER PHOTOCOPY EQUIPMENT CONTRACT
 QUOTATION PAGE RENTAL

ONLY 1 MODEL PER QUOTATION PAGE

LOW MID-LOW VOLUME FEATURED OFFICE COPIER

BAND III

MAKE AND MODEL QUOTED _____

USE CHARGE

1. MONTHLY BASE CHARGE INCLUDES 9,001 COPIES _____
2. COST PER COPY ABOVE BASE 4 DECIMALS _____

R E G I O N S					
A	B	C	D	E	F
\$	\$	\$	\$	\$	\$
\$	\$	\$	\$	\$	\$

MANUFACTURER'S RECOMMENDED VOLUME RANGE _____ TO _____

VENDOR _____ DATE _____

BY _____
 (SIGNATURE)

LOW MID VOLUME BAND III 8-1/2X11. 8-1/2X14. 11X17. CASSETTES REQUIRED FOR
 FEATURED 9,001-17,000 EACH SHEET SIZE LISTED. BOUND VOLUMES. 2 SIDED
 OFFICE COPIER** AUTOMATIC. REDUCTION. ENLARGEMENT.
 AVERAGE MONTHLY COPIES 13,000 AUTOMATIC DOCUMENT FEEDER. A 10-BIN SORTER.
 SPEED: 24-29 COPIES PER MINUTE*.

THIS IS NOT PART OF BID EVALUATION

AT THE END OF THE 36 MONTH TERM, VENDOR WILL SELL EQUIPMENT TO THE STATE FOR \$1.00. CIRCLE: YES OR NO

PLAIN PAPER PHOTOCOPY EQUIPMENT CONTRACT
 QUOTATION PAGE RENTAL

ONLY 1 MODEL PER QUOTATION PAGE

MID VOLUME FEATURED OFFICE COPIER

BAND IV

MAKE AND MODEL QUOTED _____

USE CHARGE

1. MONTHLY BASE CHARGE INCLUDES 17,001 COPIES _____
2. COST PER COPY ABOVE BASE 4 DECIMALS _____

R E G I O N S					
A	B	C	D	E	F
\$	\$	\$	\$	\$	\$
\$	\$	\$	\$	\$	\$

MANUFACTURER'S RECOMMENDED VOLUME RANGE _____ TO _____

VENDOR _____ DATE _____

BY _____
 (SIGNATURE)

LOW VOLUME
 FEATURED
 OFFICE
 COPIER**
 AVERAGE
 MONTHLY
 COPIES 21,000

BAND IV
 17,000-25,000

8-1/2X11, 8-1/2X14, 11X17. 30UND VOLUMES.
 PAPER TRAY/DECK OR CASSETTES FOR EACH
 SIZE LISTED. 2-SIDED COPYING AUTOMATIC
 REDUCTION. ENLARGEMENT. AUTOMATIC DOCUMENT
 FEEDER. A 10-BIN SORTER. SPEED: 30-34 COPIES

***THIS IS NOT PART OF BID EVALUATION ***

AT THE END OF THE 36 MONTH TERM, VENDOR WILL SELL EQUIPMENT TO THE STATE FOR \$1.00. CIRCLE: YES OR NO

12. Appellant's bid for Band III and Band IV was as follows.

PLAIN PAPER PHOTOCOPY EQUIPMENT CONTRACT
 QUOTATION PAGE RENTAL

ONLY 1 MODEL PER QUOTATION PAGE

LOW MID-LOW VOLUME FEATURED OFFICE COPIER

BAND III

MAKE AND MODEL QUOTED Konica 2330

USE CHARGE

1. MONTHLY BASE
 CHARGE INCLUDES
9,001 COPIES

*Includes 17,000 Copies

2. COST PER COPY
 ABOVE BASE
4 DECIMALS

**Copies 9,001 - 17,000

**Copies 17,001+

		R E G I O N S					
		A	B	C	D	E	F
*	\$	153.	153.	153.	153.	153.	153.
**	\$	N/C	N/C	N/C	N/C	N/C	N/C

*** \$.025 \$.025 \$.025 \$.025 \$.025 \$.025

MANUFACTURER'S RECOMMENDED VOLUME RANGE _____ TO 40,000

VENDOR Konica Business Machines U.S.A, Inc DATE 10/17/97

BY [Signature]
 (SIGNATURE)

LOW MID VOLUME BAND III 8-1/2X11, 8-1/2X14, 11X17. CASSETTES REQUIRED FOR
 FEATURED 9,001-17,000 EACH SHEET SIZE LISTED. BOUND VOLUMES. 2 SIDED
 OFFICE COPIER** AUTOMATIC. REDUCTION. ENLARGEMENT.
 AVERAGE AUTOMATIC DOCUMENT FEEDER. A 10-BIN SORTER.
 MONTHLY SPEED: 24-28 COPIES PER MINUTE*
 COPIES 13,000

THIS IS NOT PART OF BID EVALUATION

AT THE END OF THE 36 MONTH TERM, VENDOR : ... SELL EQUIPMENT TO THE STATE FOR \$1.00. CIRCLE YES OR NO

PLAIN PAPER PHOTOCOPY EQUIPMENT CONTRACT
 QUOTATION PAGE RENTAL

ONLY 1 MODEL PER QUOTATION PAGE

MID VOLUME FEATURED OFFICE COPIER

BAND IV

MAKE AND MODEL QUOTED Konica 2330

USE CHARGE

1. MONTHLY BASE
 CHARGE INCLUDES
17,001 COPIES

*Includes 25,000 Copies

2. COST PER COPY
 ABOVE BASE
4 DECIMALS

**Copies 17,001 - 25,000

***Copies 25,001+

		R E G I O N S					
		A	B	C	D	E	F
*	\$	185.	185.	185.	185.	185.	185.
**	\$	N/C	N/C	N/C	N/C	N/C	N/C

*** \$.025 \$.025 \$.025 \$.025 \$.025 \$.025

MANUFACTURER'S RECOMMENDED VOLUME RANGE _____ TO 40,000

VENDOR Konica Business Machines U.S.A., Inc. DATE 10/17/97

BY *Lucretia Macchia*
 (SIGNATURE)

LOW VOLUME
 FEATURED
 OFFICE
 COPIER**
 AVERAGE
 MONTHLY
 COPIES 21,000

BAND IV
 17,000-25,000

8-1/2X11. 8-1/2X14. 11X17. BOUND VOLUMES.
 PAPER TRAY/DECK OR CASSETTES FOR EACH
 SIZE LISTED. 2-SIDED COPYING AUTOMATIC
 REDUCTION. ENLARGEMENT. AUTOMATIC DOCUMENT
 FEEDER. A 10-BIN SORTER. SPEED: 30-34 COPIES

***THIS IS NOT PART OF BID EVALUATION ***

AT THE END OF THE 36 MONTH TERM, VENDOR WILL SELL EQUIPMENT TO THE STATE FOR
 \$1.00. CIRCLE YES OR NO

13. Thus, Appellant's bid included a base price, a price (N/C no charge) for the quantity above the base price, and in contravention of the specified prohibition in the IFB, a per copy price for each copy above the quantity above base. For Band III, Appellant would charge \$.025 for each copy above 17,000 and for Band IV, Appellant would charge \$.025 for each copy above 25,000. Of sixteen bidders, Appellant was the only one to submit a bid in this manner, although one bidder, Sharp Electronics Corp., hand wrote "Flat Rate - No overage" on all its bid price forms.
14. On November 24, 1997, the DGS Procurement Officer, sent Appellant a certified letter stating that its bid was rejected as non-responsive due to its inclusion of multiple pricing in violation of the IFB restriction regarding multiple cost per copy charges set forth on page 07.
15. Appellant responded by letter to the DGS Procurement Officer dated November 26, 1997, protesting the finding that its bid was non-responsive and requesting that Appellant be awarded the statewide contract for Bands III and IV.¹
16. DGS issued a Final Procurement Officer's Decision on December 24, 1997 denying Appellant's protest because Appellant bid differently than what was required by the IFB. The Procurement Officer stated in part in this Decision that "[Appellant] bid a single price for the base plus a certain volume above base (rather than a single price for the base volume alone) and then a second price for a volume above that (rather than a second price for all volume above base)."
17. Appellant appealed to this Board on January 7, 1998.
18. At the hearing DGS moved for summary disposition following the close of Appellant's case. The Interested Party joined in this motion. The Board granted the motion for reasons set forth herein viewing the evidence and inferences to be drawn therefrom in the light most favorable to Appellant.

Decision

COMAR sets forth the requirements for bidder submissions: "Bids shall be based on the specifications contained in the invitation for bid." COMAR 21.05.02.03.B. COMAR further provides,

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.

B. Determination of Most Favorable Bid. Bids shall be evaluated to determine which bidder offers the most favorable price to the State in accordance with the evaluation criteria set forth in the invitation for bids....

COMAR 21.05.02.13.

Here, the IFB set forth specific evaluation criteria, and specifically warns vendors:

¹ Had Appellant not submitted a non-responsive bid for Bands III and IV by including the 22 cents per copy charge for copies above the quantity above base, Appellant's bid for Bands III and IV would have represented the low bid for Bands III and IV.

IF VENDOR PROVIDES MULTIPLE COST PER COPY CHARGES AT VARIOUS COPY VOLUMES THAT QUOTE WILL BE FOUND NON-RESPONSIVE.

IFB, p.07

Appellant did exactly what the IFB expressly prohibited. Appellant submitted a single price for the base plus a price (N/C no charge) for a certain volume above base and then a second price (\$.025) for all volume above that (rather than only a second price for all volume above base). The result was that there were different prices for various copy volumes in violation of the IFB price evaluation requirements. The result was also an impermissible qualification of Appellant's bid since Appellant refused to agree to the price terms of the bid prohibiting bidders to charge a cost for copies that happened to exceed the stated maximum volumes of 17,000 copies (Band III) and 25,000 copies (Band IV). Had DGS awarded the contract to Appellant, it would have done so in contravention of the rule that an agency may not evaluate bids and make an award in a competitive sealed bid procurement based on requirements differing from those solicited in the invitation for bids. Compare Honeywell, Inc., MSBCA 1317, 2 MSBCA ¶148(1987).

Appellant argues that its appeal would be sustained under the laws of the State of Texas and certain other jurisdictions in which it does business. However, this appeal must be decided pursuant to the laws of the State of Maryland.

When Appellant submitted its bid which did not follow in a material way the format mandated by the IFB, DGS was obligated to reject it as non-responsive under the General Procurement Law of the State of Maryland and the Code of Maryland Regulations. Quaker-Cuisine Service, MSBCA 1083, 1 MSBCA ¶23(1982).

For the foregoing reasons, Appellant's appeal is denied. Therefore, it is Ordered this 25th day of March, 1998 that the appeal is denied.

Dated: March 25, 1998

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

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 2038, appeal of Konica Business Machines USA, Inc. under DGS Invitation To Bid No. 001IT80946.

Dated: March 25, 1998

Mary F. Priscilla
Recorder