

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of MERJO ADVERTISING )  
& SALES PROMOTIONS COMPANY )  
 ) MSBCA Docket No. 1942  
Under Maryland Department of )  
General Services Bid )  
No. 001IT800843 )  
Contract No. Q-627-501-270 )

April 9, 1996

Responsiveness - Bid Samples

If a bid sample is required by an IFB, then failure to submit such a bid sample with the bid is an issue of responsiveness and the bid must be rejected if a bid sample is not submitted with the bid.

APPEARANCES FOR APPELLANT: Thomas P. Lydon, Esq.  
Towson, MD

APPEARANCES FOR RESPONDENT: John H. Thornton  
Assistant Attorney General  
Baltimore, MD

OPINION BY BOARD MEMBER STEEL

Appellant Merjo Advertising & Sales Promotions Company (Merjo) appeals the denial by the Department of General Services (DGS) of its bid protest of a determination that Appellant, the low-bidder, submitted a non-responsive bid.

Findings of Fact

1. In the fall of 1995, DGS issued an Invitation for Bid for the purchase of plastic infant drinking cups with lids to be distributed to patrons of the Women, Infants and Children (WIC) program administered by the Department of Health and Mental Hygiene (DHMH). There were no responses to that IFB.
2. Thereafter, an IFB was reissued, Bid No. 001IT800843, and all bids were rejected following bid opening on October 31, 1995.
3. With its bid on October 31, 1995, Merjo submitted an infant drinking cup for examination by the DGS and DHMH. That infant cup contained an airhole in its lid.

4. DHMH noted by memorandum of December 1, 1995 from the Acting WIC Director to Mr. George Miller of the DGS Purchasing Bureau that most infant cups allow too much liquid to flow out of the spout when an infant drinks from the cup, causing a choking hazard. Therefore DHMH sought an infant cup which contained a slit rather than holes in the spout as well as no additional holes on the lid. In addition, DHMH was looking for a sturdier infant cup with thicker handles than had previously been received. Accordingly, the IFB was revised and reissued.

5. The four page IFB as revised and reissued, contained a bid due date of December 15, 1995. Specifications for the plastic cup in this third IFB stated:

Infant drinking (training) cups: unbreakable plastic, 7 oz. capacity, handles on both sides of cup, approx. 1/3" wide. Snap on lid with tight fit to eliminate leakage. Liquid should not flow from cup when it is turned upside down. Lid is to have no airhole. Cup should be designed so that child must use some of his own ability to remove liquid from cup.

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State manufacturer and submit sample with bid.

6. Appellant's bid as submitted on December 15, 1995 listed Appellant as the manufacturer. At the hearing, Appellant stated that the manufacturer of its product was a "subcontractor". It is apparent from Appellant's exhibit 2, however, that Merjo might not be the primary manufacturer.<sup>1</sup> During his testimony, Appellant's President, Mr. Mervyn Margolies, modified his response to state that he did not list the manufacturer because he believed that that information was a "trade secret".

7. A sample cup did not physically accompany the DGS four-page IFB form submitted by Appellant at bid opening on December 15, 1995. At bid opening on December 15, Appellant was low-bidder.

8. Appellant's Mr. Margolies had shown another sample cup to the procurement officer, Ms. Jednorski on a day subsequent to the rejection of all October 31 bids and prior to December 15, 1995, the day on which the new bid opening was to occur.

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<sup>1</sup> Appellants Exhibit 2, dated March 22, 1996, was a letter from a company in Florida indicating that it had been very successful in selling infant two handled cups and juice cups to many state WIC programs. The implication of Mr. Margolies' testimony was that this company would have manufactured the infant cups if Merjo had won the contract.

9. The cup shown to Ms. Jednorski had an air hole in the top that was covered over with epoxy glue. Mr. Margolies testified that he told Ms. Jednorski the cup to be provided would have no air hole in the top and the glue was just to show that the top would be solid when the cups were delivered. According to Mr. Margolis, Ms. Jednorski advised him that no one would object to the proposed solid top. Ms. Jednorski did not recall approving this cup shown to her on this day before the December 15, 1995 bid opening.

10. Ms. Jednorski testified that two WIC Program personnel who were present at the time the cup was shown disapproved of the glued top. In her testimony at the hearing, Ms. Jednorski suggested that the fact that the cup top fit into the inside of the cup rather than fit over the outside of the cup as a "snap on lid" also made the cup unacceptable. In the procurement officer's final decision denying appellant's protest, Ms. Jednorski stated that she personally advised Mr. Margolies that the cup was not acceptable.

11. The IFB did not provide for a process or procedure for having samples submitted and approved prior to bid opening. By the specific terms of the IFB the sample was to be submitted with the bid. No place, person or area, however, was designated as the repository for samples. Mr. Margolies testified that from his experience, samples, when required by an IFB, were to be show to the agency buyer and that he probably showed the sample to Mr. George Miller of the Purchasing Bureau, the head DGS buyer, on the day of the second bid opening, December 15, 1995. At the hearing, Mr. Miller denied that he had ever been shown a sample cup on bid opening day, December 15, 1995.

12. In the Appellant's written protest<sup>2</sup> of the rejection of its bid as non-responsive for failure to submit a sample with its bid, Mr. Margolies suggests that the buyer he showed the sample to on the day of the second bid opening was Ms. Jednorski, since the letter of protest dated December 20, 1995 is adressed to the attention of "Becky Jednorski, Buyer". Ms. Jednorski testified that she was not shown a sample on the day of the the second bid opening, December 15, 1995.

13. Appellant timely filed an appeal to this Board of the procurement officer's decision.

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<sup>2</sup>

Dated December 20, 1995 and corrected by letter dated December 27, 1995.

## Decision

Respondent DGS (for DHMS) argues that the failure of Appellant to submit a sample cup with its bid on December 15, 1995 made Appellant's bid non-responsive. Low-bidder Appellant Merjo argues that, having shown a modified sample and described his cup to the buyer prior to bid opening, its bid should not have been found non-responsive. The Board must find in favor of the Respondent in this matter.

First, Appellant did not submit a sample of the cup with his bid.<sup>3</sup> Even if at some point in time prior to the bid opening he showed a version of the intended cup, he did not leave that "sample" with the buyer/procurement officer at the time of submitting his bid. Therefore, when the bids were opened in this instance, no cup accompanied the bid for evaluation.

This Board has found that a requirement that a sample be provided is a matter of responsiveness. *Irvin H. Hahn Co., Inc.*, MSBCA 1169, 1 MSBCA ¶67 (1984). Thus, a bid which fails to include a required bid sample is properly rejected as being nonresponsive. *Helmut Guenschel, Inc.* MSBCA 1434, 3 MSBCA ¶211 (1989). Responsiveness must be judged within the four-corners of the bid. Thus, information (in this case -- display of a similar cup the day before bid opening) outside the bid may not be considered. *Orfanos Contractors, Inc.*, MSBCA 1391, 2 MSBCA ¶188 (1988).

While there is disagreement as to whether or when Appellant submitted a sample cup for the third round of bids, it is clear that at no time did Appellant submit a "prototype" sample of the infant cup as it would appear upon manufacture under the contract. Although apparently concerned about the cost of a prototype (several thousand dollars), Appellant did not file a pre-bid protest of the requirement that he provide a sample of the finished product, or protest the requirement that he state the name of his manufacturer.<sup>4</sup> Some time before bid opening, Mr. Margolies showed a stock

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<sup>3</sup> Mr. Margolies testified that on December 15, 1995 "the same cup was brought in with me the day the bid opened [sic], and I wandered upstairs to the state purchasing [sic] and sat down and wasted a few minutes until bid opening, had the cup with me and then went downstairs again."

<sup>4</sup> With regard to provision of the name of his manufacturer, Mr. Margolies testified that he did not provide the name of his manufacturer because that information is proprietary. Similarly, we do not address the reasonableness of the requirement that the name of the manufacturer be supplied, because no pre-bid protest of that requirement was filed. It is noted, however, that at the least, the true name of the manufacturer could have been provided under seal as proprietary information. Appellant, however, simply ignored the requirement and did not list the apparent manufacturer.

cup with the airhole blocked with epoxy and explained that the cup provided in response to the IFB would have no hole in the plastic lid.

In *Helmut Guenschel, Inc.* MSBCA 1434, 3 MSBCA ¶211 (1989) the Board declined to condemn, in the face of the protest, the expense of a prototype (\$20,000 - \$30,000 vs. projected sales of \$1.2 million) where the agency has demonstrated the reasonableness of the requirement.

In the instant appeal, while we cannot find that the agency's requirement that a sample infant cup be submitted is arbitrary or unreasonable, we do not reach the issue for purposes of this decision because no pre-bid protest was filed. The Board cannot consider Appellant's arguments about the sample cup because of his failure to file a pre-bid protest. COMAR 21.10.02.03(A) states

A protest based upon alleged improprieties in a solicitation that 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.

Instead of filing a pre-bid protest, Merjo attempted to get pre-bid opening clearance for his plans for the ostensible finished product. The Board finds, contrary to Mr. Margolies' testimony, that the State, through Ms. Jednorski, informed him that the cup which was shown to a "buyer" and DHMH representatives was not acceptable. The General Procurement Law, Maryland State Finance and Procurement Article 13-201, et seq., is based on the proposition that the State encourage free and open competition in its bidding processes. Such an end would not be served if the State were to permit bidders to secure "pre-approval" of their products without comparison and evaluation simultaneously with other bids (and prototypes) submitted by other bidders with their bids.

We therefore find that the Respondent correctly found that Merjo's bid was non-responsive for failure to submit a sample infant drinking cup with the bid, and deny Appellant's appeal.

Wherefore, it is ORDERED this 9th day of April, 1996, that the appeal is denied.

Dated: April 9, 1996

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Candida S. Steel  
Board Member

I concur:

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Robert B. Harrison III  
Chairman

