

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MIDTOWN STATIONERY  
& OFFICE SUPPLY CO., INC.

Under DGS RFQ No. C-4225

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)  
) Docket No. MSBCA 1461  
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November 9, 1989

Bid Protest - Specifications - Where a solicitation requirement affecting price set forth in the bid specifications contains a latent ambiguity such that bidders may have responded to it based on different but reasonable interpretations of the requirement, competition has been conducted on an unequal basis in violation of the General Procurement Law.

APPEARANCE FOR APPELLANT:

Richard E. Rice  
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Annapolis, MD

APPEARANCE FOR RESPONDENT:

Michael P. Kenney  
Assistant Attorney General  
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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 Department of General Services (DGS). Appellant contends the low bidder was allowed to "buy" the award of the subject contract by not submitting uniformly discounted prices.

Facts

1. DGS issued Request for Quotation (RFQ) No. C-4225 on March 20, 1989 for the procurement of supplies for computer and word processing machines. The Notice to All Bidders which was attached to the RFQ informed bidders that from the numerous items to be supplied under this contract fourteen (14) listed items would be used in evaluation and establishing the low responsive bidder. The Notice to All Bidders further stated:

Bidders bidding, must show price for each [of the fourteen (14) listed items]. Bidders must also submit a catalog and price list with these fourteen (14) items, plus a full line of other commonly used supplies. Bidders must state discount from price list for all items in catalog/price list, which must be the same discount of the fourteen (14) listed items.

3. The RFQ addressed the method of evaluation as follows:

Award will be made on a total low bid basis. The following items [fourteen (14) items listed separately in the Specifications] will be used in evaluation of low responsive bids. Bidders bidding this contract must have printed catalog with other related supplies listed. Catalog must be current and submitted with bid. Bidder must offer price discount from said catalog, which must be the same discount applied to the listed items. Specified items in catalog will be incorporated in contract. Failure of bidder to price each item listed, or submit required catalog will result in bid becoming non-responsive.

4. A pre-bid meeting was held on April 12, 1989, attended by Appellant, International Business Supplies, Inc. ("IBS") and most of the other companies which eventually submitted bids.

5. Seven (7) bids were received and tabulated by the DGS Purchasing Bureau on April 21, 1989. On the original tabulation, IBS was low bidder with an aggregate price for the fourteen (14) items of \$150.02. Appellant was second low bidder at \$218.18.

6. On May 31, 1989, Appellant sent a letter to the Buyer, George Miller, pointing out alleged discrepancies with the IBS bid.<sup>1</sup>

7. In response to Appellant's May 31 letter, the State reviewed the IBS bid and discovered a mistake. The Amarpy 11550 ARY Diskette File bid by IBS did not "fan out" as required by the specifications.<sup>2</sup> The State permitted IBS to correct its bid for this item and substitute a diskette tray that did "fan

<sup>1</sup>The record reflects that Appellant was not permitted to review the bid documents until just prior to sending its letter of May 31, 1989 and the State has not challenged the timeliness of Appellant's protest.

<sup>2</sup>In this regard the specifications provided:

Diskette Storage Tray  
Storage for 5-1/4" diskettes. Diskettes fan out as lid is opened. Smoke plastic top. Tray must hold at least 25 diskettes, and must be individually boxed with labels.

out" which was included in the catalog submitted with IBS' bid. This changed the bid price for this item from \$3.97 to \$12.98 but IBS still remained the low bidder.

8. By letter of June 28, 1989 the State informed Appellant that a purchase order was being released to IBS as of that date.

9. Appellant filed an appeal with this Board on July 21, 1989.

#### Decision

Appellant alleges in its appeal that the State unlawfully permitted IBS to correct its bid with regard to the diskette tray. Furthermore Appellant alleges that IBS did not submit uniformly discounted prices thus allowing IBS to "buy-in" the bid. Appellant also alleges that the specifications were ambiguous in its requirement for a discount from price list/catalog.

The diskette file bid by IBS did not fan out when opened, and, therefore, did not comply with the specifications for that item. However, IBS also submitted with its bid a catalog listing a diskette file complying with the specifications, at a higher price. The Procurement Officer waived this error as a minor irregularity under COMAR 21.06.02.04 and 21.05.02.12A.<sup>3</sup> The.

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<sup>3</sup>21.06.02.04

#### **Minor Irregularities in Bids or Proposals.**

A. A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors.

B. The defect or variation in the bid or proposal is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement.

C. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State.

decision of whether an alleged irregularity either is waivable or fatal to the responsiveness consideration of the proposal rests within the discretion of the procurement officer. And this Board will not disturb the procurement officer's discretionary decision unless it finds that it was fraudulent or so arbitrary as to constitute a breach of trust. Calvert General Contractors Corp., MSBCA 1314, 2 MSBCA ¶140 (1986).

The intent of the solicitation was to establish prices and to contract for all computer and word processing supplies. The list of fourteen items was to be used as a tool in evaluation and establishing the low responsive bidder. (Notice to All Bidders, Agency Report Ex. D). The bid package submitted by IBS included a catalog listing all items to be supplied to the State. The proper diskette file and its price were included in this catalog. The procurement officer, after consulting with IBS made the decision to substitute the correct item in the tabulation. Since the intended bid item and bid amount were based on material supplied with the IBS original bid package there was no prejudice to other bidders and the decision to permit the substitution was within the discretion of the procurement officer.

Next, Appellant alleges that IBS failed to discount its prices uniformly, as required by the RFQ. The Notice to All Bidders stated

Bidder must state discount from price list for all items in catalog/price list, which must be the same discount of the fourteen (14) listed items.

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21.05.02.12

#### **Mistakes in Bids.**

A. General. Technicalities or minor irregularities in bids, as defined in COMAR 21.06.02.04, may be waived if the procurement officer determines that it shall be in the State's best interest. The procurement officer may either give a bidder an opportunity to cure any deficiency resulting from a technicality or minor irregularity in its bid, or waive the deficiency if it is to the State's advantage to do so.

At a pre-bid conference, Mr. Miller informed the bidders that they could use a mark-up from cost as opposed to a discount from list price. Such mark-up would have to be on a uniform basis as well. Appellant prepared its bid on the basis of a mark-up from cost. Appellant made a determination of how much profit it could make and still win the bid and took that particular percentage and applied it across the board for all items in the bid catalog. Bidders were not required to provide their cost figures, their profit margin, their uniform discount or the source of that discounted price.

Appellant attempted to determine the basis for IBS' bid. Appellant compared prices for the Worcester wire products with prices from the 1988 IBS catalog and with prices from Fellows Manufacturing which purchased the Worcester Wire Company and is the manufacturer of the bid products. The results were as follows:

<u>Item No.</u>	<u>IBS Bid Prices</u>	<u>Fellows Price List</u>	<u>IBS Price List</u>	
*40700	\$ 9.75	\$14.60	no price	
*40500	29.95	37.13	\$51.96	(+73%)
40550	25.73	20.68	28.91	(+12%)
40555	6.78	5.29	6.47	(- 1%)

\*Items used in evaluating bids.

The above comparison indicates that IBS did not offer a uniform discount from the manufacturer's price list nor from its catalog of the previous year.

The procurement officer's letter of June 28 stated:

Our decision is that International Business Supplier did in fact give the State of Maryland a uniform discount, Their published quantity discount carried by their sales personnel offers the State of Maryland the maximum quantity discount, which meets the uniform discount requirement as discussed in the pre-bid conference.

The IBS bid contained a handwritten note at the bottom of page 5 which stated:

discount is already taken. These are net prices using our 5th column in our price book.

According to the procurement officer, this meant that IBS was offering a zero percent discount. Mr. Miller stated at the hearing:

And personally [a zero percent discount] is what I like, that way my Agencies do not have to figure, this is the price they pay, they don't have to deduct it, you know, 25%, 10% or 22%, these are the prices the State will pay.

(Tr. 80).

In effect, the procurement officer, by allowing and in fact preferring IBS to submit a zero discount bid allowed IBS the opportunity to "buy-in" the bid. The purpose of requiring a uniform discount or mark-up was to make sure that the bidders did not submit a below cost bid on the fourteen items to be evaluated with the expectation of an increase in the contract amount through excessively priced items in the remainder of the catalog. While the concept of "buying-in" the bid is not illegal (See Command Systems, B-218093, 85-1 CPD ¶205) it certainly circumvents the intent of the procurement officer to provide for uniform discounting and, as we explain below, by permitting this method of structuring bids does not permit bidders to compete on an equal basis.

Furthermore, it became evident at the hearing of this appeal that the specifications contained a latent ambiguity. The Specifications stated:

Bidder must state the discount from price list of all items in catalogue/price list which must be the same discount of the 14 items listed.<sup>4</sup>

A question arose at the hearing as to which catalogue/price list the specification referred to. Mr. Miller stated:

<sup>4</sup>At the prehearing conference bidders were given the option of using a mark-up from cost.

At the pre-bid meeting it was discussed, brought up and it was said, if someone uses an established catalogue such as United or one of the other three [wholesalers] which is what we expected many people to bid on, then we expected to have a uniform discount from those. (Underscoring added)

(Tr. 84-85).

Mr. Miller also stated that a bidder could submit prices based on an established price list that the bidder itself published.

Q I think, when I read that, you're talking about your normal catalogue that IBS is putting, IBS' Catalogue or Midtown's Catalogue, they're saying if you look at my catalogue, I am giving you a price that will be 15% off my, whatever, fifth column price and that discount will be consistent all the way across.

A We could be saying that, yes. But we didn't definitely say that. In the pre-bid conference that was brought out, o'kay.

(Tr. 77).

Furthermore Mr. Miller agreed that there were no standards for determining an established price list. A bidder could type up a price list the day before bid opening, submit that price list with his bid and that would become his established price list upon which his bid is based. (Tr. 101). The State did not check the source of the bid prices and thus had no way of determining which catalog/price list any bidder used. The bidder's could have been relying on catalogs from wholesalers, catalogs used by bidders in a prior year or catalogs made up specifically for this bid. Mr. Miller did not check the source of the bids but merely whether the bids were consistent with the prices of the other bidders. (Tr. 88). Thus there was nothing to prevent a bidder from making a price list specifically for this procurement and offering the State a zero discount. In that case a bidder could "buy-in" the bid by

providing low list prices for the 14 evaluated items and artificially inflating the prices for the remaining numerous items to be supplied under the terms of the contract.

Thus the specifications contained a latent ambiguity in that they were subject to two or more reasonable interpretations regarding the catalog/price list to be used. The latent ambiguity was not apparent until the hearing. Appellant had relied on the procurement officer's prebid statements that a mark-up from cost would be acceptable. Had Appellant known that it could submit a price list specifically for this bid and use a zero percent discount the results of the bidding might well have been different. In cases such as this, where the solicitation requirement is ambiguous, with the result that bidders responded to it based upon different, albeit reasonable assumptions as to what the requirement was, the competition has been conducted on an unequal basis. Flow Technology, Inc., B-228281, December 29, 1987, 87-2 CPD ¶633. Moreover, the ambiguity in the specifications may have resulted in the "buying-in" of the bid in contravention of the policy of Maryland procurement law which seeks "to maximize to the full extent the purchasing power of the State". COMAR 21.01.01.03E.

For the foregoing reason, the appeal is sustained.