

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MIDTOWN STATIONERY )  
& OFFICE SUPPLY CO., INC. ) Docket No. MSBCA 1461  
)  
Under DGS RFQ No. C-4225 )

June 26, 1990

Bid Protest - Board Jurisdiction - The Appeals Board only has jurisdiction over a timely appeal from final agency action on a bid protest. The Appeals Board found that the agency correctly determined that Appellant's letter to the procurement officer which questioned award of contract to a competitor on responsiveness grounds constituted an inquiry rather than a protest. Accordingly, the Appeals Board lacked jurisdiction over an appeal from the agency's response to the inquiry.

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MEMORANDUM DECISION

The Maryland State Board of Contract Appeals (Appeals Board) has been directed by the Circuit Court for Howard County, Maryland to determine various issues pursuant to the following Order:

After a hearing and upon the consent of all parties, it is by the Circuit Court for Howard County this 6th day of April, 1990, ORDERED that the administrative appeal captioned "Appeal of Midtown Stationery & Office Supply Co., Inc. Under DGS RFQ No. C-4225, Docket no. MSBCA 1461," be, and it hereby is, remanded to the Maryland State Board of Contract Appeals ("MSBCA") for decision of the following issues:

1. Whether the MSBCA denied any due process rights of International Business Supplies Co., Inc. ("IBS")?
2. Whether IBS is entitled to present evidence to the MSBCA on the issue of the responsiveness of its bid and, if so, whether its bid was responsive?

3. Whether Midtown Stationery & Office Supply Co., Inc. ("Midtown") filed a timely written bid protest and, if so, whether the State Department of General Services ("DGS") made a decision constituting final action from which an appeal could be taken to the MSBCA?

4. Whether Midtown filed a timely appeal to the MSBCA?

5. Whether the contract awarded by DGS to IBS is illegal and void?

The foregoing Order was issued pursuant to an appeal by International Business Supplies Co., Inc. (IBS) and a cross appeal by Midtown Stationery & Office Supply Co., Inc. (Midtown) from the decision of the Appeals Board issued on November 9, 1989<sup>1</sup> sustaining the bid protest appeal of Midtown pursuant to the General Procurement Law, Division II, State Finance and Procurement Article. Pursuant to the Order, a three day evidentiary hearing was conducted on May 29, 30 and June 22, 1990 in which Midtown, IBS and DGS participated. Based on the hearing on remand and the record as a whole the Appeals Board answers the certified issues seriatim as follows.

1. Whether the MSBCA denied any due process rights of International Business Supplies Co., Inc. ("IBS")?

IBS was awarded the captioned contract on June 28, 1989. On July 21, 1989, Appellant noted an appeal with the Appeals Board contending that the IBS bid was "unresponsive." IBS received a copy of the Agency Report compiled pursuant to Appeals Board procedures (see COMAR 21.10.07.03) on August 15, 1989 and was otherwise notified by DGS of the pendency of the Midtown appeal. However, the notice of the date and time of the hearing of the appeal was only sent by the Appeals Board to DGS and Midtown. Pursuant to this notice the appeal was heard on September 1, 1989. On

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<sup>1</sup>The decision of the Appeals Board issued on November 9, 1989 is attached hereto as Exhibit A and incorporated herein by reference.

September 22, 1989, counsel for IBS wrote to Mr. Allan S. Levy<sup>2</sup> a member of the Appeals Board stating that IBS had not received prior notice of the hearing and requested that the hearing be reopened. By letter dated September 29, 1989, counsel for DGS advised the Appeals Board that DGS had not notified IBS of the hearing "contrary to what I mentioned to Mr. Levy before the hearing." The Appeals Board did not reopen the hearing and issued its decision on the appeal on November 9, 1989. The instant appeal and cross appeal to the Circuit Court for Howard County was timely taken therefrom.

The Appeals Board did not deny any due process rights of IBS. IBS was on notice that an appeal had been taken by Midtown by virtue of its receipt of the Agency Report from DGS on August 15, 1989, seventeen days prior to the hearing on September 1, 1989. See COMAR 21.10.07.03. However, COMAR 21.10.07.06B states that "interested parties<sup>3</sup> shall be notified as to the time and place of the hearing." Here no written notice as to the time and place of the September 1, 1989 hearing at the Appeals Board's offices was provided IBS by the Appeals Board because of the Appeals Board's mistaken belief that such notice had been provided by DGS. Although the Appeals Board finds that IBS had constructive notice of the appeal process by virtue of its receipt of the Agency Report from DGS, IBS was not specifically notified by the Appeals Board of the time and place of the hearing pursuant

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<sup>2</sup>Mr. Levy was the presiding Appeals Board member to whom the appeal had been assigned. Mr. Levy and Mr. Ketchen the Appeals Board members who heard the appeal on September 1, 1989 are no longer members of the Appeals Board, having departed in mid-November, 1989.

<sup>3</sup>Because IBS had been awarded the contract at issue at the time of the Midtown appeal, IBS was clearly an interested party and pursuant to COMAR 21.10.07.03A should have been notified of the appeal by DGS, furnished a copy of the appeal by DGS and instructed by DGS to communicate further directly with the Appeals Board. IBS never communicated with the Appeals Board prior to the hearing on September 1, 1989. IBS apparently first communicated with the Appeals Board when counsel for IBS wrote Mr. Levy on September 22, 1989.

to COMAR 21.10.07.06B. Notwithstanding this defect, IBS has been permitted to present such evidence on remand as it desires on the issues on remand and on the merits of the Midtown bid protest appeal and IBS has continued without interruption as the DGS vendor for the procurement under the contract awarded on June 28, 1989. Accordingly, any prejudice to IBS from not receiving written notice pursuant to COMAR 21.10.07.06B has been cured.

2. Whether IBS is entitled to present evidence to the MSBCA on the issue of the responsiveness of its bid and, if so, whether its bid was responsive?

At the hearing on remand, and over the objection of Midtown, the Appeals Board permitted IBS to present evidence on the responsiveness of its bid, the bid protest appeal of Midtown generally and the other issues remanded by the Circuit Court for Howard County. The Appeals Board finds that IBS was entitled to present such evidence due to the inadvertant failure to give IBS written notice of the time and place of the September 1, 1989 hearing of the Midtown bid protest appeal, notwithstanding that IBS had constructive notice of the appeal. Concerning the responsiveness of the IBS bid, the Appeals Board finds that it was not responsive; nor was any bid received by DGS for the instant procurement responsive because of a defect in the request for quotation (RFQ) as noted in the decision of the Appeals Board issued on November 9, 1989. Specifically, the Board held in its November 9, 1989 decision that the RFQ contained a latent ambiguity in that it was subject to two reasonable interpretations. See Exhibit A. Under one interpretation, a bidder could reasonably have understood the RFQ to permit it to submit a catalog/price list that it prepared specifically for the procurement and offer DGS a zero percent discount on the fourteen evaluated items. Under another reasonable interpretation, a bidder may have believed

that the RFQ prohibited use of a catalog/price list prepared for the particular procurement at issue and required offer of a uniform discount from a pre-existing price list or catalogue. Thus no bid (including Midtown's) could be technically responsive because of the defect in the RFQ where bidders could respond to it based upon different, albeit reasonable assumptions as to what the RFQ requirements regarding uniform pricing were.

3. Whether Midtown Stationery & Office Supply Co., Inc. (Midtown) filed a timely written bid protest and, if so, whether the State Department of General Services ("DGS") made a decision constituting final action from which an appeal could be taken to the MSBCA?

This issue (which involves Appeals Board jurisdiction over the appeal) was not previously considered by the Appeals Board because although mentioned in the Agency Report<sup>4</sup> there was no follow through by DGS at the hearing by way of preliminary argument or motion. With the exception of some brief testimony, the only mention of the issue at the September 1, 1989 hearing came in closing argument of counsel for DGS who stated the issue was "moot". Accordingly, the Appeals Board determined that DGS had found subsequent to the filing of the Agency Report that a valid protest had been filed and final agency action taken thereon. Therefore, the Appeals Board heard the merits of the appeal and issued its decision. However, in answer to a petition for declaratory and injunctive relief filed by Midtown with the

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<sup>4</sup>The Agency Report contained the following observation:

Finally, Midtown notes in its Notice of Appeal that the award was made in the face of a protest, contrary to COMAR 21.10.02.11. DGS, however, never treated the May 31 letter as a formal protest. It did not contain the word "protest" but was phrased more in terms of an inquiry, which the Procurement Officer addressed and answered in his response letters. The response letters were not phrased as a Procurement Officer's final decision. Treating the May 31 letter as an inquiry, and resolving the pointed-out discrepancy with the IBS bid, as stated above, DGS proceeded to make the award to the low bidder.

Circuit Court, DGS asserted that there had never been a bid protest<sup>5</sup> and final agency action thereon such as to confer jurisdiction over the dispute on the Appeals Board. The following has now been determined on the basis of the hearing on remand and the record as a whole.

Midtown's President, Mr. Mark Stein, wrote a letter dated May 31, 1989 to Mr. George Miller, the DGS buyer responsible for the instant RFQ questioning whether among other things the IBS bid provided DGS with a uniform discount. In this regard Mr. Stein stated:

Since the only items which at first appear to be out of line are those higher priced products which throw the most weight on the bid's bottom line, we must question their validity as well as their compliance with your rules as to the bid's award. Inasmuch as the apparent low bidder does not have either a uniform discount from list, a uniform mark-up from cost, or a uniform discount from cost, then unless verified differently, that bid should not be considered as a responsive bid.

A copy of Mr. Stein's letter was also sent to Mr. Paul Harris, the DGS procurement officer.<sup>6</sup> The envelopes for the May 31 letter to Mr. Miller and copy to Mr. Harris are missing, and there is otherwise no evidence from which the Board may determine whether either of the envelopes were labelled "Protest", a possibility suggested by counsel for Midtown. See COMAR 21.10.02.04 (To expedite handling of protests, the envelopes should be labeled "Protest.").

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<sup>5</sup>The parties at the hearing on remand agreed that assuming arguendo that Midtown filed a protest that it was timely. The dispute is over whether Midtown filed a protest or a mere inquiry with DGS.

<sup>6</sup>See footnote 4 above in which it is implied by DGS in its Agency Report that Mr. Miller, the author of the responses to Mr. Stein's letter of May 31 is the procurement officer. Based on the evidence adduced at the hearing on remand, however, the Board finds that Mr. Harris was the procurement officer.

Mr. Miller and Mr. Harris conferred about the matters raised in Mr. Stein's May 31, 1989 letter and determined that the letter constituted an inquiry rather than a protest. DGS receives hundreds of inquiries on procurements annually and only received a few protests. On June 6, 1989, Mr. Miller wrote to Mr. Stein stating the following:

Responding to your letter dated May 31, 1989, we are inquiring to the items you surfaced. Sample of product has been requested and I will be meeting with Mr. Harris [the procurement officer] to discuss this bid in detail. I will keep you abreast of any happenings [sic].

On June 28, 1989, Mr. Miller again wrote Mr. Stein and stated in material part:

The Purchasing Bureau has reviewed your comments in your letter dated May 31, 1989. Our decision is that International Business Supplies 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.

COMAR 21.10.02.09 requires that a decision on a protest shall include a description of the controversy, a statement of the decision with supporting material and, if the protest is not sustained, a statement that the decision constitutes final agency action and may be appealed to the Maryland State Board of Contract Appeals in accordance with COMAR 21.10.07.02. While describing the controversy and DGS's determination thereon, the June 28, 1989 letter did not include notice that it constituted final agency action from which an appeal could be taken because Mr. Miller and Mr. Harris the procurement officer did not believe they were dealing with a protest but with an inquiry.

Midtown appealed to the Appeals Board upon receipt of the June 28 letter. As noted above, the Agency Report questioned whether a protest and final agency action as distinct from an inquiry and answer thereto were

involved. However, it is customary when an agency has a question concerning Board jurisdiction, i.e. as in this case where there was a question concerning whether a bid protest and final agency action were involved, for the agency, through counsel, to file a motion to dismiss or otherwise address the question as a preliminary matter at the hearing. Neither occurred here. At the September 1, 1989 hearing the evidence concerning the matter consisted of brief direct examination of Mr. Stein in which he stated that the May 31, 1989 letter was intended to be a bid protest and brief cross-examination of Mr. Stein in which counsel for DGS elicited from Mr. Stein that his May 31 letter to Mr. Miller did not contain the word protest.<sup>7</sup> Thereafter in closing argument on the merits of the Midtown appeal counsel for DGS stated:

With regard to considering the May 31st letter a protest, we don't have anything more to say about that than the facts in testimony here show today. It seems like its kind of moot because were here and were arguing the points.

Emphasis supplied.

Accordingly, the Appeals Board concludes that DGS through counsel had determined to treat the matter as if a bid protest had been filed on May 31, 1989 and as if the June 28, 1989 letter from Mr. Miller to Mr. Stein had constituted final agency action.

However, testimony received on the issue pursuant to the remand makes it clear that Mr. Miller and Mr. Harris, the DGS procurement officer, did not treat the letter of May 31, 1989 as a protest but as an inquiry and that the June 28, 1989 letter was intended as a response to the inquiry and not final agency action pursuant to COMAR 21.10.02.09. The Appeals Board finds that although the May 31, 1989 letter is susceptible of either construction, i.e. as a protest or an inquiry, Mr. Miller and Mr. Harris reasonably

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<sup>7</sup>Failure to use the word "protest" does not preclude a finding that a written communication constitutes a valid protest under COMAR 21.10.02.04.



concluded that the May 31, 1989 letter did not constitute a protest but only an inquiry. Therefore, it follows that the June 28, 1989 response was not final agency action on a bid protest but only a response to an inquiry. Accordingly, the Appeals Board lacks jurisdiction since there has been no appeal from final agency action constituting the denial of a bid protest. See § 15-211, § 15-217 and § 15-220, Division II, State Finance and Procurement Article.

4. Whether Midtown filed a timely appeal to the MSBCA.

Prior to the answer of DGS to the Midtown petition for declaratory and injunctive relief in Circuit Court no one had raised an issue concerning the timeliness of the Midtown appeal to the Appeals Board. The Midtown appeal was filed (by hand delivery) with the Appeals Board on the afternoon (3:52 p.m.) of Friday, July 21, 1989 and notice of docketing was sent to Midtown and DGS the following Monday, July 24, 1989.

Assuming arguendo that the June 28, 1989 letter from Mr. Miller to Mr. Stein constituted a final agency decision on a bid protest (which we have found in answer to the certified question it did not) the record reflects that the appeal was filed twenty-three (23) days after the date appearing on the letter. The record does not reflect when Midtown received the June 28, 1989 letter.<sup>8</sup> Mr. Miller testified that he mailed the letter on June 28, 1989. However, the letter is postmarked (regular mail) July 5, 1989. DGS argues that it should be legally presumed that Midtown received the June 28, 1989 letter (postmarked July 5, 1989) at least ten days before Midtown filed its appeal with the Appeals Board on July 21, 1989. The Board declines to find in the absence of evidence concerning actual receipt that it shall be presumed

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<sup>8</sup>The letter was received on or before July 21, 1989, because a copy of the letter was attached to Midtown's appeal hand delivered to the Appeals Board on the afternoon of July 21, 1989.

that the June 28, 1989 letter was received by Midtown more than ten days prior to the date it filed its appeal. However, nearly a year has now passed since Midtown received the June 28, 1989 letter (which was at least received on or before July 21, 1989, because a copy of it was attached to the appeal). The Appeals Board has determined in answer to the third certified question that Midtown has never filed a bid protest. It clearly cannot now meet the timeliness requirements for filing a bid protest which at the latest would have required filing a bid protest with DGS within seven days from its receipt of the June 28, 1989 letter. Thus application of the rule requiring a bid protest appeal to be filed within ten days from the date the protester receives notice of the final agency action on the protest becomes academic and may not be met. Midtown did not and may not file a timely appeal because it has never properly filed a bid protest and it is too late to do so now.

5. Whether the contract awarded by DGS to IBS is illegal and void?


Based on the Appeals Board's decision of November 9, 1989, the contract would have been void subject to being treated as voidable had the Appeals Board decision become final pursuant to the provisions of Section 11-204, Division II, State Finance and Procurement Article, Annotated Code of Maryland. Section 11-204 provides that a unit may not enter into a procurement contract except as provided in Division II of the Article, i.e. the General Procurement Law. The Appeals Board found that because the RFQ contained an ambiguity concerning what would constitute an acceptable price list the procurement had been conducted on an unequal basis in violation of the General Procurement Law. Thus any contract entered into, assuming finality of the Appeals Board decision, would have been subject to the provisions of Section 11-204 which provides that whenever a procurement

violates the General Procurement Law the Board of Public Works,<sup>9</sup> or the procuring agency under particular circumstances, may treat a contract as voidable rather than void. Such power is specifically conferred on the Board of Public Works or the agency and not on this entity the Appeals Board. No such action has been taken by the Board of Public Works or DGS because the Appeals Board decision of November 9, 1989 was appealed and thus has never become a final decision. Therefore in the absence of a final decision the contract awarded by DGS to IBS is not illegal and void.

The Appeals Board was further Ordered by the Circuit Court for Howard County to decide the appeal as expeditiously as possible. The Appeals Board concluded in answer to the third certified question that the Appeals Board lacks jurisdiction because there has been no bid protest nor final agency action constituting the denial of a bid protest. Therefore, the appeal is dismissed.

Dated: *June 26, 1990*

  
Robert B. Harrison III  
Chairman

  
Sheldon H. Press  
Board Member

  
Neal E. Malone  
Board Member

<sup>9</sup>The word "Board" is defined in Section 11-201(d) of the General Procurement Law to mean the Board of Public Works. This agency is defined in Section 15-201 et. seq. of the General Procurement Law as the "Appeals Board."

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals memorandum decision in MSBCA 1461, appeal of MIDTOWN STATIONERY & OFFICE SUPPLY CO., INC., under DGS RFQ No. C-4225.

Dated: *June 26, 1990*

*Mary F. Priscilla*  
Mary F. Priscilla  
Recorder

BEFORE THE  
 MARYLAND STATE BOARD OF CONTRACT APPEALS

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

Docket No. MSBCA 1461

Under DGS RFQ No. C-4225

APPEARANCE FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

Michael P. Kenney  
 Assistant Attorney General  
 Baltimore, MD

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 Amarp 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 shall be considered a  
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 procure-  
ment 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	(+49%)	no price	(+73%)
*40500	29.95	37.13	(+24%)	\$51.96	(+12%)
40550	25.73	20.68	(-19%)	28.91	(- 1%)
40555	6.78	5.20	(-22%)	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 1205) 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).

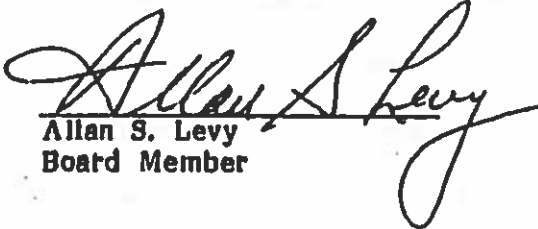
Furthermore Mr. Miller agreed that there were no standards for determining an established price list. A bidder could type up a price list the day before bid opening, submit that price list with his bid and that would become his established price list upon which his bid is based. (Tr. 101). The State 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 1633. 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.

Dated: *November 9, 1989*

  
Allan S. Levy  
Board Member

I concur:

  
Robert B. Harrison III  
Chairman

  
Edward G. Ketchen  
Board Member

\* \* \*

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1461, appeal of MIDTOWN STATIONERY & OFFICE SUPPLY CO., INC., under DGS RFQ No. C-4225.

Dated: November 9, 1989

  
Mary F. Priscilla  
Recorder

