BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of N.B.R. Incorporated	)	
	)	Docket No. MSBCA 1728
Under DGS Project SC-93-511	)	

August 11, 1993

Specifications - Brand Name or Equal - When a specification sets forth particular features of a brand name item, those features are presumed to be the salient characteristics in compliance with COMAR 21.04.01.02 (B) even though the word "salient" does not appear in the specification.

APPEARANCE FOR APPELLANT: Ali Nademin
President
N.B.R., Incorporated
Washington, D.C.

APPEARANCES FOR RESPONDENT: Jay N. Bernstein
Doris F. Low
Assistant Attorneys General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest on various grounds including the finding that its bid was non-responsive.[1]

Findings of Fact

1. On March 22, 1993, the Department of General Services (DGS) issued on behalf on the Department of Human Resources (DHR) an invitation for bids (IFB) for installation of carpet at DHR's 311 West Saratoga Street building. Bids were due on April 19, 1993.
2. The IFB carpet specifications specified the carpet's trade name (Network), style name (Mercury), style number (59126), color (Smoked Bronze), and color number (86550). The IFB carpet specifications also set forth a number of other characteristics of the carpet to be provided, and provided that "[s]ubstitutes or as equal may be considered but shall be accepted solely at the discretion of the Department of General Services."

[1] Appellant was found to be non-responsive and its bid was rejected on such grounds as well. Since we find Appellant's bid was non-responsive, we will not discuss the issue of Appellant's responsibility nor the refusal of the Procurement Officer to permit an upward amendment of Appellant's bid price after bid opening.

3. No protest concerning the carpet specifications was filed prior to bid opening.

4. Appellant submitted a timely bid which included two books of carpet samples for carpets manufactured by Wellco Business Carpet (Wellco) and a statement that the samples "meet the requirements as you have delineated in the referenced contract detailed specifications. The sole purpose of providing you with these two carpet samples is to offer you a greater choice of color as well as texture." The colors of the carpet samples submitted with Appellant's bid differed from the smoked bronze color of the carpet described in the IFB.

5. By letter dated May 7, 1993, DGS notified Appellant that its bid was "rejected as non-responsible and non-responsive." Specifically as to rejection on grounds the bid was non-responsive, the letter provided:

> *The bid your submitted on the above referenced solicitation included two carpet substitutes for consideration "as equal". The determination of this Agency is that the two substitutes are unacceptable by this Agency in color, pattern, and style. Therefore, your bid is non-responsive."*

6. Appellant timely protested the rejection of its bid on May 13, 1993. Respecting responsiveness, Appellant asserted that because no characteristic on performance was labeled as "salient" in the carpet specifications only functional equivalency was required for substitute products. Appellant also asserted that Wellco, the manufacturer of the proposed substitutes, (1) denied any claimed deficiencies in the pattern and style of the carpet and (2) that as to color Wellco had "expressed desire and willingness to provide you with any color you so desire."

7. By letter dated May 25, 1993, DGS denied Appellant's protest as to responsiveness on grounds that the carpet samples submitted by Appellant with its bid differed in appearance and color from the specification requirements, and would not be acceptable as a substitute.

9. Appellant appealed to this Board on June 7, 1993.

Decision

Appellant argues that color was not named as a salient characteristic in the IFB carpet specifications and therefore may not be considered as a basis for rejecting its proposed substitute carpet.

Maryland procurement law allows the State to procure a product by use of a "brand name or equal" purchase description which uses a manufacturer's product to describe the standard of quality, performance or other characteristics needed to meet the agency's needs. The specification must also set forth which characteristics of the brand name product are "salient." COMAR 21.04.01.02(B). The agency is obligated to evaluate responsiveness on the basis of the enumerated salient characteristics. Automated Telecommunications, Inc., MSBCA 1439, 3 MICPEL ¶219 (1989). The record reflects that the color of the carpet to be procured was important to the State. Color may properly be listed as a salient characteristic. Appellant asserts, however that the failure to use the word "salient" in the specification precludes the State from considering color.

In this solicitation, specifications were provided for a brand of carpet called "Network." Many characteristics of this carpet, including its style name (Mercury), style number, color (Smoked Bronze), and color number were specifically enumerated, and thereby became the salient characteristics standard required by the agency[1]. The fact that these characteristics were not labelled "salient" does not preclude the State from relying upon them. When a solicitation sets forth particular features of a brand name item, "these features are presumed to be material and essential to the government's needs." Western Graphics, Inc., B-216948, B-217353,

---

[1] Any protest by Appellant that these specifications are unduly restrictive is untimely pursuant to COMAR 21.10.02.03(A), which requires protests based upon alleged improprieties apparent on the face of the solicitation to be filed prior to bid opening. See, National Elevator Company, MSBCA 1251, 2 MICPEL ¶115 (1985).

85-1 CPD ¶381. COMAR 21.04.01.02B in its entirety provides:

> E. Brand Name or Equal. Brand name or equal means a specification that uses one or more manufacturer's names or catalog numbers to describe the standard of quality, performance, and other characteristics needed to meet the procurement agency's requirements, and which provides for the submission of equivalent products. Salient characteristics of the brand name item shall be set forth in the specification.

There is no requirement that the salient characteristics set forth be labelled as such with the word "salient."

The color specified by the IFB, Network's "Smoked Bronze," is a pattern of shades of black, white, grey and bronze. The IFB need not have listed the "salient characteristics" of the referenced Network color.

While the IFB allowed bidders to substitute manufacturers, the "Smoked Bronze" appearance was a salient characteristic, and "bids which fail to show conformance with the salient characteristics specified in a solicitation are non-responsive and cannot be accepted," NJCT Corporation, B-216919, 85-1 CPD ¶33, p.2, and as this Board noted in Adden Furniture, Inc., MSBCA 1219, 1 MICPEL ¶93 (1985), the determination of whether a product, which varies from the exact requirements of a specification, is equal or better than the specified product is solely for the procurement officer to make.

None of the color samples submitted by Appellant with its bid of carpeting manufactured by Wellco match the Network "Smoked Bronze" specified in the IFB. The closest color offered by Appellant with its bid contained only shades of gray, and lacked the range of colors interwoven in Network's "Smoked Bronze".

Appellant's claim in the Notice of Appeal and at the hearing that it will provide DGS with any color desired cannot render its bid responsive. "(C)onformance with salient characteristics must be determined from the face of the bid itself without resort to explanations furnished after bid opening." NJCT Corporation, supra. at p.2.

Appellant's bid was properly found to be non-responsive by the Procurement Officer and its appeal is thus denied.

Therefore, it is Ordered this 11th day of August, 1993, that the above captioned appeal is dismissed with prejudice.

Dated: August 11, 1993

Robert B. Harrison III
Chairman

I concur:

Neal E. Malone
Board Member

Sheldon H. Press
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 B4 Time for Filing

a. Within Thirty Days

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that where the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent, or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date of the receipt of such notice.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1722, appeal of N.B.R. Incorporated under DGS Project SC-93-511.

Dated: August 11, 1993

Mary F. Priscilla
Recorder