

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of)
)
 NESTLE USA, INC.) MSBCA Docket No. 2005
)
 Under Department of Health and)
 Mental Hygiene WIC Infant)
 Formula Rebate Program)
 IFB No. 97-4275)

September 2, 1997

Responsiveness - Material Deviation - A bid which materially deviates from the requirements expressed in the invitation for bids is not responsive.

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OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on the Appeal of Nestle USA, Inc. (Nestle), from a decision by the Department of Health and Mental Hygiene (DHMH) Procurement Officer denying its bid protest on the grounds that its bid was non-responsive.

Findings of Fact

1. The federally funded WIC (Women, Infants and Children) program provides health care referral, nutritional education and food to financially qualified pregnant women, infants and

children. The products are distributed to participants through a voucher or check system. WIC participants receive checks which they then take to participating retail stores to purchase approved WIC products such as infant formula. WIC has developed a method for procuring infant formula. The Federal regulations require that states participating in the WIC program obtain the "lowest net wholesale cost per unit" for infant formula from a manufacturer through a competitive sealed bid process. 7 C.F.R. §246.16(k)(1). The U.S. Department of Agriculture and the states, including Maryland, have developed a method to determine the "best price", i.e., a method to determine the "lowest net wholesale cost" whereby manufacturers of infant formula bid a rebate amount for each type of product purchased by a WIC participant. Sealed bids for the bid rebate amount are submitted along with a current wholesale price sheet, so that the procurement officer may determine the composite wholesale price for each manufacturer. Manufacturers are evaluated on the combination of the bidder's wholesale costs and the offered rebate amount (i.e. the lowest net wholesale cost).

2. The current wholesale price sheet submitted along with the sealed bids for the rebate rate was required in order for the Procurement Officer [in Maryland] to determine the "lowest net wholesale cost per unit."
3. The WIC program initially pays the retail amount for the product but subsequently receives a rebate from the manufacturer for each product purchased. The cost to the state is actually the retail amount minus the rebate it receives from the manufacturer.
4. In November, 1996, the Maryland WIC program¹ ("WIC program") issued an Invitation for Bids (IFB) for "A WIC Infant Formula Rebate System" under Procurement DHMH-DCT-97-4275. Bid opening was scheduled for January 8, 1997.
5. IFB Section II.A.2.d.i. (as amended) instructed bidders to "submit a wholesale price list effective January 1, 1997" along with the rebate bid submission. The IFB explained the evaluative formula to be used as the "Net wholesale Truckload Price List Cost - [minus] composite rebate = [equals] net wholesale cost for each type of formula." IFB Section II.C.1.b.i.
6. A prebid conference was held on December 3, 1996 to answer submitted written and oral questions from bidders' representatives. Nestle was represented at this prebid conference by Ms. Carol Savage.
7. At the prebid conference, the following question was read, and answered in the affirmative by the Maryland WIC Program Assistant Director:

Point II.C.1.b.i on page 5 of the IFB references net wholesale truckload price list cost. Please detail exactly what the states define as truckload. As you are aware, manufacturers have varying levels of wholesale price brackets for truckloads. . . . Please confirm that consistent with standard WIC usage, the states will use the manufacturer's 40,000 pound truckload price to compute the net wholesale truckload price list cost. **Yes, we will.**

¹The State of Maryland issued the IFB on behalf of itself, West Virginia, Delaware, the District of Columbia and the Virgin Islands so as to gain volume advantage in purchasing. This Board has determined that since each State's procurement is based on the IFB but independent of each other, that the Maryland State Board of Contract Appeals does have jurisdiction to hear this appeal.

Ms. Savage did not question this clarification, or ask any follow-up questions.

8. Following the prebid conference, on December 30, 1996, the aforementioned Section II, C.1.b.i. of the IFB was amended, to provide as follows: "Net wholesale 40,000 pound Truckload Price List Cost - [minus] composite rebate = [equals] net wholesale cost for each type of formula." (Emphasis in the original). This language clarified that the wholesale price that would be used to evaluate bidders was that which represented a purchase of 40,000 pounds of formula. The 40,000 pound clarification was added to ensure that the States would be able to compare bidders based on uniform criteria.
9. Nestle did not file a protest nor raise any questions regarding this clarification, but submitted a bid on January 8, 1997, along with Mead-Johnson Nutritionals, Inc. (Meade-Johnson), and Ross Products, Inc.
10. Nestle's bid was as follows:

<u>Section II Rebate Amount (Carried to three decimal places)</u>		
<u>Milk-based</u>	<u>Can Size</u>	<u>Soy-based</u>
<u>Rebate Amount</u>		<u>Rebate Amount</u>
\$1.910	13 oz. Concentrate	\$1.700
\$4.947	12 oz. Powder 14oz	\$5.040
\$2.340	32 oz. Ready to feed	\$2.000
\$.585	8 oz. Ready to feed	\$.500

The above-bid prices are for standard milk-based and soy-based formulas carrying the following Brand or Trade Names: Carnation Good Start (milk-based), Carnation A Soy (soy-based).

11. Nestle did not submit its current wholesale price list with its bid. Instead Nestle submitted the following "customized" price list with its bid by utilizing its 44,000 pound truckload price for the 40,000 pound truckload.

NESTLE FOOD COMPANY PRICE LIST

Effective 1/1/97

<u>Order Unit</u>	<u>Order Unit</u>	<u>Order Unit</u>	<u>UPC Consumer</u>	<u>UPC</u>	<u>Case</u>	<u>Unit</u>
<u>Description</u>	<u>Price Code</u>	<u>Packsize</u>	<u>Unit Scanner</u>	<u>Ck</u>	<u>Fulltrk</u>	<u>Fulltrk</u>
			<u>Code</u>	<u>Det</u>	<u>40,000+</u>	<u>40,000+</u>
GOOD START						
GOOD START PWDR	50000-12121-00	6/12 oz	050000-12051	5	36.78	6.13
GOOD START RTF	50000-12151-00	6/32 oz	050000-12021	2	18.54	3.09
GOOD START CONC	50000-12161-00	12/13 oz	050000-12061	1	25.08	2.09
GOOD ST RTF	50000-12251-00	24/8.45 oz	050000-12351	3	27.36	1.14
ALSOY						
CARN ALSOY CON	50000-05494-00	12/13 oz	050000-05490	9	22.56	1.88
CARN ALSOY RTF	50000-05553-00	6/32 oz	050000-05550	0	16.50	2.75
CARN ALSOY PDR	50000-05603-00	6/14 oz	050000-05600	2	39.24	6.54
CARN ALSOY RTF	50000-05622-00	24/8.45 oz	050000-05602	0	24.24	1.01

12. Nestle's current standard wholesale price list, as provided by Nestle's local regional office in Columbia, Maryland at the Procurement Officer's request after bid opening was as follows:²

² Certain numbers in the exhibit provided the Board are very difficult to read and may reflect error in the Board's attempt to copy for this decision. Any such error would be immaterial to the substance of the Board's decision.

NESTLE FOOD COMPANY PRICE LIST

Order Entry Effective Date: 01/01/97

Pricing Categories and Gross Order Weight Brackets in Pounds

Price List Replacement Date: 11/04/96

<u>Order Unit Description</u>	<u>Order Unit Price Code</u>	<u>Order Unit Packsize</u>	<u>UPC Consumer Unit Scanner Code</u>	<u>UPC Ck Dgt</u>	<u>Case Fulltrk 40,000+</u>	<u>Unit Fulltrk 40,000+</u>
CARNATION FOLLOWUP FORMULA						
CARN F/U RTF	50000-12101-00	6/32 oz	050000-12001	7	15.86	16.24

<u>Order Unit Description</u>	<u>Order Unit Price Code</u>	<u>Order Unit Packsize</u>	<u>UPC Consumer Unit Scanner Code</u>	<u>UPC Ck Dgt</u>	<u>Case Fulltrk 40,000+</u>	<u>Unit Fulltrk 40,000+</u>
CARN F/U PWDR	50000-12111-00	6/12 oz	050000-12011	6	20.56	20.64
CARN F/U CONCENT	50000-12141-00	12/13 oz	050000-12041	3	21.64	22.08
CARN F/U PWD TR	50000-12261-00	8/24 oz	050000-12081	8	48.08	49.14
CARN F/U SOY PDR	50000-12741-00	8/14 oz	050000-12841	8	39.24	39.36

<u>Order Unit Description</u>	<u>Order Unit Price Code</u>	<u>Order Unit Packsize</u>	<u>UPC Consumer Unit Scanner Code</u>	<u>UPC Ck Dgt</u>	<u>Case Fulltrk 40,000+</u>	<u>Unit Fulltrk 40,000+</u>
GOOD START						
GOOD START PWDR	50000-12121-00	6/12 oz	050000-12021	5	36.78	36.90
GOOD START RTF	50000-12151-00	6/32 oz	050000-12051	2	18.54	18.84
GOOD START CONC	50000-12161-00	12/13 oz	050000-12061	1	25.08	25.32
GOOD ST PWD TR	50000-12251-00	8/24 oz	050000-12611	8	60.65	60.84

CARNATION F/U PALLET						
CARN F/U 2 PLT	50000-12271-00	48/6/24 oz	050000-12081	8	2350.08	2350.08

GOOD START PALLET						
GOOD ST 2 PLT	50000-12831-00	48/8/24 oz	050000-12611	8	2911.68	2911.68

<u>Order Unit Description</u>	<u>Order Unit Price Code</u>	<u>Order Unit Packsize</u>	<u>UPC Consumer Unit Scanner Code</u>	<u>UPC Ck Dgt</u>	<u>Case Fulltrk 40,000+</u>	<u>Unit Fulltrk 40,000+</u>
ALSOY						
CARN ALSOY CON	50000-05494-00	12/13 oz.	050000-05490	9	22.56	22.80
CARN ALSOY RTF	50000-05553-00	6/32 oz.	050000-05550	0	16.50	16.74
CARN ALSOY PDR	50000-05603-00	6/14 oz.	050000-05600	2	39.24	39.36

13. Using the wholesale price list submitted after bid opening, the Procurement Officer determined that Nestle's composite price (wholesale price minus rebate bid) was as follows:

<u>Rebate Amount</u>	<u>Formula Type</u>	<u>Can Size</u>
<u>per can</u>		
\$1.858	Concentrate	13 oz.
\$4.970	Powder	12 and 14 oz.
\$2.255	Ready-to-feed	32 oz.
\$0.564	Ready-to-feed	8 oz.

14. The Procurement Officer further determined that since Nestle's composite price was lower than other bidders, Nestle offered the lowest composite net wholesale cost to the State. The contract required approval of the Board of Public Works (BPW). A contract was thus prepared for BPW approval and sent to Nestle for signature.
15. Before the contract was approved by the BPW, however, the Procurement Officer became aware that the document submitted by Nestle as its wholesale price list with its bid was not reflective of a 40,000 pound truckload as required by the IFB, but was instead those prices

- which Nestle, effective January 1, 1997, was charging to its wholesale customers for a minimum 44,000 pound truckload.
16. Nestle does have nationally published price lists which it provides to its retail and wholesale vendors.³ Ms. Carol Scoville, Director of Planning and Control at the Nestle Nutrition Division, testified that she personally prepared the price list submitted with Nestle's bid by taking a Nestle standard national price list for a 44,000 pound truckload and customizing it (by labeling it as a 40,000 pound truckload) to conform with the 40,000 pound truckload requirements of the IFB.
 17. Although Nestle submitted a notarized statement on February 10, 1997 indicating that it stood by the price list submitted with the bid, and further verified on February 18 that the price list submitted with the bid contained its wholesale prices in effect on January 1, 1997, the State properly determined that its standard price list in fact referenced a 44,000 pound truckload for the favorable price shown on the price list submitted with the bid labeled or "customized" as a 40,000 pound truckload.
 18. Therefore, the Procurement Officer, by letter of February 26, 1997, and by denial of a protest in a final decision letter dated March 17, 1997, determined that Nestle failed to provide a standard published wholesale price list reflecting a 40,000 pound truckload as required by the IFB and therefore determined that its bid was non-responsive.
 19. This timely appeal followed.

Decision

Timeliness

Respondent DHMH argues initially that the protest appeal must be dismissed on the grounds that the issues raised by Appellant concern the specifications set forth in the IFB, and, in order for a protest thereon to be timely, must have been raised prior to bid opening. For example, Respondent argues that Nestle was aware, especially following the pre-bid conference, that the WIC program was seeking bids on rebates from a net wholesale 40,000 lb. truckload price. It is Respondent's position that if Nestle did not wish to submit a current published price list based on a 40,000 lb. truckload it should have protested prior to bid opening.⁴ This they did not do.

Nestle now argues that it did not see any improprieties in the solicitation but, because its best wholesale price would be more advantageous to the State, it should be awarded the contract based on its customized price list.

This Board has consistently held that bid protests based upon alleged improprieties apparent before bid opening "are to be filed with the agency procurement officer before bid opening."

³ It should be noted that the other bidders did submit published standard wholesale price lists. See, Mead Johnson Exhibit 1.

⁴ Ms. Scoville testified at the hearing that "The IFB also asked for two forms of 8.45 ounce ready-to-feed that I don't sell on a national price list and I added that to the [submitted] price list to be in conformance with the IFB." Arguably, Nestle should have inquired of the Procurement officer as to this requirement, prior to bid submission.

Bernie's Vending Services, Inc., MSBCA 1420, 3 MICPEL ¶207(1989). See also Merjo Advertising and Sales Promotion Company, MSBCA 1466, 3 MICPEL ¶223(1989); Chimney Restorations, Inc., MSBCA 1476, 3 MICPEL ¶230 (1989); Millar Elevator Co., MSBCA 1621, 3 MICPEL ¶291(1991); Homecoming Inc., MSBCA 1647, 4 MICPEL ¶309(1992); Enterprise Systems Incorporated, MSBCA 1807, 4 MICPEL ¶361(1994).

This Board, drawing all inferences in favor of Nestle that it was not aware of "improprieties" prior to bid opening, as it must when it considers Respondent's timeliness motion, will not find that the protest was untimely filed and now addresses the merits of this appeal.

Responsiveness of the Bid

COMAR 21.05.02.13A addresses the question of responsiveness of bids:

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.

"Responsive" means a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements contained in the invitation for bids. COMAR 21.01.02.01B (78).

Consequently, the Department can only award a contract to a bidder whose bid price is most favorable to the State and whose bid conforms in all material respects to the requirements of the IFB.

This regulation is designed to prevent giving an unfair advantage to a bidder who deviates from the IFB vis a vis the other bidders.

Rather than submitting its standard published price list with an effective date of January 1, 1997, Nestle customized its submitted price list by offering the lower price normally offered for a 44,000 lb. truckload rather than the price normally offered for a 40,000 lb. truckload as required by the IFB. Nestle clearly has deviated from the IFB, and the Board must consider whether a reasonable, experienced bidder under these circumstances would have interpreted the IFB to permit submission of a customized price list. We find for the following reasons that a reasonable bidder would not have interpreted the IFB in the fashion argued by Nestle.

The IFB does not invite the submission of "offered" wholesale prices. Although the IFB does not specifically include the terms "nationally published" in connection with the wholesale price list, numerous provisions of the IFB support Respondent's, Mead-Johnson's and Ross Products, Inc.'s interpretation that prices from standard published wholesale price lists were required to be submitted as part of the IFB. Specifically, there was no place to include an "offered" price on the bid sheet; the only reference to "offered" is in connection with rebates, not prices; there would be no need for the IFB to require bidders to submit a rebate amount as the bid if the State could bind an bidder to a wholesale price; and there would be no need to include a reference to an "effective date" of the wholesale price list if the bidder could submit "offered" wholesale prices, since the effective date would be the date the State could bind the bidder to its "offered" price. Finally, other WIC

procurements have required the submission of published wholesale price lists. Bidders have provided these lists in the past.

There is substantial evidence, including the IFB, pre-bid opening documents, discussions at the pre-bid conference, post-conference documents, correspondence between Nestle and the Agency, statements made in documents submitted by Nestle in this bid protest appeal, customs of the trade and other evidence, demonstrating that the IFB required, and Nestle had a clear understanding, that the wholesale price list which should have been filed with its bid submission was its current wholesale list, effective January 1, 1997 (prior to the bid opening date), that was already actually being used by retailers, wholesalers and other customers of Nestle. This was the understanding of the Respondent and the other bidders.

In fact, at the pre-bid conference, bidders were advised as follows:

Q: Since there is no place for bidders to provide their net wholesale truckload price list cost on the bid sheet, please confirm this is the reason that prospective bidders need to submit their current wholesale price list along with their bid proposal document in order for the State to properly perform the calculations necessary in computing a bidder's net wholesale truckload price list.

A: Yes, that's why you have to submit your wholesale price list.

This position was confirmed after the prebid conference in a document sent to all bidders: "The reason a bidder must submit its current wholesale price list in addition to its Bid proposal [is] so that the States may compute the bidder's net wholesale truckload price list cost."

If we did not deny this appeal, Nestle would gain an unfair competitive advantage over its competitors in this bid. It would be permitted to offer a lower wholesale price, which when evaluated with the rebate offered on the bid sheet, results in the low-bid. The other bidders constrained by the intent and the language of the IFB, by necessity had higher bids than Nestle.

Advancing the goal of securing fair competition in public procurements is the underlying rationale for rejecting a bid when a material deviation occurs. A similar rationale supports the rule that a contract is void if it was awarded on a bid that materially deviated from the IFB. As noted by the Court of Appeals in Konig v. Mayor and City Council, 126 Md. 606 (1915) at 623-624:

There can be no competition as to a thing or things indefinite and undetermined, and if, where they are determined, the proposals or contract awarded could depart from the specifications, it would defeat the competition sought to be obtained, and result in a contract for a thing for which there had been no competitive bidding.

Rejection of Nestle's bid is necessary in order to preserve the fairness of the competitive bidding process required for the procurement in this case. As stated by the procurement officer in her letter of March 17, 1997 denying Nestle's bid protest:

The purpose of this amendment was to enable the Department to fairly and uniformly evaluate the bids by eliminating any variance in how manufacturers define the term “truckload.” The addition of the term “40,000 pounds” made any definition used by a particular manufacturer irrelevant for purposes of its bid submission. Indeed, it was precisely to eliminate any ambiguity or differences in manufacturer definitions that the clarification was made. [Footnote 1: I would note that the term “full truckload” that you use throughout your protest letter appears nowhere in the original or amended IFB. If your protest is limited to the argument that the term “full truckload” has an accepted and understood meaning in the industry, this argument certainly must fail because the term is never used by the Department.]

* * *

Nestle’s failure to submit a price for 40,000 pounds of formula made it impossible to calculate a “net wholesale cost,” based on the formula set forth in the IFB at page 5, II.C.1.b. To use the 44,000+ pound price which Nestle submitted would have been inconsistent with the evaluative formula established by the amended IFB.

* * *

Again the purpose of the amendment was to be able to evaluate the bidders based on a single standard. That standard was clearly defined in the IFB as a 40,000 pound truckload. Nestle’s failure to submit a price for this defined standard leaves the State with no option but to deem Nestle’s bid non-responsive.

A bid which contains terms that materially deviate from the requirements expressed in the invitation for bids is not responsive and may not be accepted. Solon Automated Services, Inc., MSBCA 1046, 1 MICPEL ¶10 at pp. 16-17 (1982). See Arnessen Marine Systems, Inc., B-186691, 76-2 CPD paragraph 351 (1976) recon. denied, Redifon Computers Limited, B-186691, 77-1 CPD paragraph 463 (1977). In this regard, a material deviation occurs when as the facts reveal has taken place in this procurement, the price, quantity, or quality of goods or services offered is affected. Solon Automated Services, Inc., supra, at p. 17, citing Prestex, Inc. v. United States, 162 Ct. Cl. 620, 320 F.2d 367 (1963); COMAR 21.06.02.05.

Wherefore, for the foregoing reasons, the appeal of Nestle USA, Inc. is denied.

It is therefore Ordered this 2nd day of September, 1997 that the appeal is denied.

Dated: September 2, 1997

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

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 2005, the Appeal of Nestle USA, Inc., under the Department of Health and Mental Hygiene WIC Infant Formula Rebate Program, Invitation for Bid No. 97-4275

Dated: September 2, 1997

Mary F. Priscilla
Recorder