

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Quaker-Cuisine Services)

Under Morgan State University)
Food Service Facilities Procurement)

Docket No. MSBCA 1083

September 7, 1982

Responsiveness — Where a food service contract was to be awarded based in part on a percentage rate of return from a food service operation, a bid based on a pricing scheme which materially deviated from the requested pricing format was non-responsive.

APPEARANCE FOR THE APPELLANT:

Mr. Richard J. Battista
Philadelphia, Pennsylvania

APPEARANCE FOR THE RESPONDENT:

Susan B. Blum
Assistant Attorney General
Baltimore, Maryland

OPINION BY MR. KETCHEN

This appeal is taken from the final decision of a State procurement officer that Appellant submitted a non-responsive bid under a solicitation for food service operations at the Morgan State University Campus. Appellant maintains that it was the low responsive and responsible bidder under this solicitation and, accordingly, should have received a contract award. Respondent contends, however, that Appellant's bid was non-responsive since its bid deviated materially from the requirements of the solicitation. Respondent further asserts that Appellant's bid, even had it been responsive, was not the lowest of those received.

FINDINGS OF FACT

1. On March 16, 1982, Morgan State University issued an invitation for bids (IFB) to provide food services for Morgan State University students. The IFB required submission of bids by 10:00 a.m. on May 5, 1982.

2. The IFB requested food services for two University programs, the "Dining Hall Program" and the "University Center Program."

3. Under the "Dining Hall Program", the successful contractor was to provide meals to on-campus students subscribing to the meal plans described in the IFB. These meal plans were as follows:

A. Dining Hall Program

Item I. Meal service for students hold (sic) tickets for 21 meals per week for the regular school year (excluding Summer Session): The University shall pay the Operator

_____ per week for
breakfast, lunch and
dinner for each
student holding a
meal ticket.

Item II. Meal service for students holding tickets for 15 meals per week for the regular school year, Monday through Friday, (excluding Summer Session): The University shall pay the Operator

_____ per week for
breakfast, lunch and
dinner for each
student holding a
meal ticket.

Item III. Possible Alternatives to 21-Meal Plan. Meal service for students holding tickets for 19 meals per week for the regular school year (excluding Summer Session): The University shall pay the Operator

_____ per week for
breakfast, lunch and
dinner for each
student, Monday-
Friday; Brunch and
Dinner, Saturday and
Sunday.

Item III. Meal Service for Students in Apartment-Style Housing (Monday through Friday). Selection of any option would require student obligation for a complete semester.

_____ per week,
breakfast only
_____ per week,
lunch only
_____ per week,
dinner only

Student would have option to select any combination.

4. Under the "University Center Program", the successful contractor was "to provide quality food at a reasonable price on a cash basis in the Snack Bar and Rathskeller areas, and to provide for a variety of catered affairs for students, faculty, staff and outside organizations and individuals." (p. 3, Agency Report). Bids under this program were to be structured as follows:

Item I. OPERATION OF THE SNACK BAR AREA:

The Operator shall pay _____ % of total gross sales (Exclusive of any sales tax) to the University Center each billing period.

Item II. OPERATION OF THE RATHSKELLER:

The Operator shall pay _____ % of total gross sales (Exclusive of any sales tax) to the University Center each billing period.

Item III. CATERED SERVICES (Bidder shall submit)

The Operator shall pay _____ % of total gross sales of that area for the University Center operation referred to as "Special Functions/ Catered Services" to the University Center each billing period under the terms and conditions of the current existing food service contract.

5. The cover letter to the IFB provided, in pertinent part, as follows:

The evaluation of this bid will be based on the following projected volumes in addition to an evaluation of requirements within the Bid solicitation and Contract.

<u>Contract Feeding</u> [Dining Hall Program]	21-meal plan 530 students x 33 weeks x contract rate = _____
	15-meal plan 130 students x 33 weeks x contract rate = _____
	TOTAL CONTRACT FEEDING _____
<u>Other Food Service</u> [University Center Program]	Catering \$100,000 x contract rate = _____
	Canteen (Snack Bar) \$245,000 x contract rate = _____
	Reflections (Rathskeller) \$60,000 x contract rate = _____
	TOTAL OTHER FOOD SERVICE _____

The low evaluated bid, therefore, was to be determined based on the net estimated cost to the University as derived by subtracting "TOTAL OTHER FOOD SERVICE" from "TOTAL CONTRACT FEEDING" (i.e., the Dining Hall Program).

7. On March 24, 1982, the University held a pre-bid conference attended by, among others, Appellant's representatives and the eventual low bidder, Exquisito Services, Inc. In a March 26, 1982 letter to all bidders summarizing matters and providing written answers to questions raised at this pre-bid conference, the procurement officer stated that the most recent annual sales volume under the University Center Program amounted to \$206,896 for fiscal year 1981. The evaluation criteria of the IFB, however, was based on an annual sales volume of \$405,000.

8. Appellant submitted a bid dated May 3, 1982 on the bid form included by the University in the IFB. Instead of filling in the appropriate blanks in the IFB provided for the University Center Program, however, Appellant's bid specified an alternate commission schedule as follows:

UNIVERSITY CENTER COMMISSION SCHEDULE

Based on actual sales figures received in the bid amendments compared to projected volumes proposed by the University, Quaker-Cuisine feels the need for a sliding scale commission schedule. We are confident that we can maximize sales, however, the discrepancy between the two figures (\$198,104) along with the prices being charged creates a large risk to the contractor.

Quaker-Cuisine will pay commissions on total cash sales from the Snack Bar, the Rathskellar (sic) and Catering. The commissions will be paid in the combined total of the three operations. The schedule and an example follows.

<u>Total Combined Sales</u>	<u>Commission Paid</u>
Under \$340,000	0%
Next \$60,000 to \$400,000	6%
Next \$100,000 to \$500,000	8%
Over \$500,000	12%

Example - Using University's projected volume

Catering	\$100,000	
Snack Bar	245,000	
Reflections	<u>60,000</u>	
	\$405,000	
 Commissions		
\$400,000 x .06 =	\$24,000	
\$ 5,000 x .08 =	<u>400</u>	
	\$24,400	Commissions paid to University

9. Bids were opened on May 5, 1982. Upon seeing the commission schedule submitted by Appellant for the University Center Program, the procurement officer determined Appellant's bid to be non-responsive.

10. On May 11, 1982, Appellant protested the procurement officer's refusal to award it a contract.

11. The procurement officer issued a written decision on May 27, 1982 denying Appellant's protest on the ground that its bid was non-responsive since it offered only one percentage rebate for the three University Center Program areas combined and required that a minimum sales volume be reached before any rebate would be given. In addition, the procurement officer determined that the responsive and responsible bid of Exquisito Services, Inc., at \$557,067.72, was lower than Appellant's evaluated bid of \$578,110.70.

12. By mailgram received by the Board on June 11, 1982, Appellant filed a timely appeal.

DECISION

The central issue raised by the instant appeal is whether Appellant's bid was responsive to the requirements set forth in the IFB. In this regard, COMAR 21.01.02.60 provides that a "[r]esponsive bidder' means a person who has submitted a bid under procurement by competitive sealed bidding which conforms in all material respects to the requirements contained in the invitation for bids." See Md. Ann. Code, Art. 21, Section 3-101(i) (1981 Repl. Vol., 1981 Supp.); COMAR 21.06.02.02 B(2); COMAR 21.06.02.03. Similarly, COMAR 21.05.02.13 A defines a responsive bid as a bid which "meets the requirements and evaluation criteria set forth in the invitation for bids..." A bid which contains terms that materially deviate from the requirements expressed in the invitation for bids, therefore, is not responsive and may not be accepted. Solon Automated Services, Inc., MSBCA 1046, (January 20, 1982) at pp. 16-17; 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 the price, quantity, or quality of the 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).

In response to the instant solicitation, Appellant's bid offered a percentage rebate to the University based on the total combined sales volume for the three University Center Program areas. Appellant's pricing scheme not only was inconsistent with the rebate schedule provided in the IFB but had a significant effect relative to price. Under Appellant's pricing scheme the University would not receive any payment based on a percentage of sales until the total combined sales for the three University Center Program areas reached \$340,000. The risk, therefore, of disastrously low sales was transferred from Appellant to the University. Other bidders, however, assumed this risk and presumably structured their bids accordingly. It is axiomatic, we think, that a bidder who is asked to assume a large financial risk will be less able to promise a high rate of return to the University than one who avoids that risk by restructuring the bid format.

For these reasons Appellant's bid materially deviated from the IFB requirements regarding price and the procurement officer thus acted reasonably in rejecting Appellant's bid as non-responsive.

1. The first part of the report is devoted to a general survey of the situation in the field of international law.

2. The second part of the report is devoted to a detailed study of the various aspects of the problem.

3. The third part of the report is devoted to a study of the various aspects of the problem.

4. The fourth part of the report is devoted to a study of the various aspects of the problem.

5. The fifth part of the report is devoted to a study of the various aspects of the problem.

6. The sixth part of the report is devoted to a study of the various aspects of the problem.

7. The seventh part of the report is devoted to a study of the various aspects of the problem.

8. The eighth part of the report is devoted to a study of the various aspects of the problem.

9. The ninth part of the report is devoted to a study of the various aspects of the problem.

10. The tenth part of the report is devoted to a study of the various aspects of the problem.

11. The eleventh part of the report is devoted to a study of the various aspects of the problem.

12. The twelfth part of the report is devoted to a study of the various aspects of the problem.

13. The thirteenth part of the report is devoted to a study of the various aspects of the problem.

14. The fourteenth part of the report is devoted to a study of the various aspects of the problem.

15. The fifteenth part of the report is devoted to a study of the various aspects of the problem.

16. The sixteenth part of the report is devoted to a study of the various aspects of the problem.

17. The seventeenth part of the report is devoted to a study of the various aspects of the problem.

18. The eighteenth part of the report is devoted to a study of the various aspects of the problem.