BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ROCKVILLE PARTITIONS, INCORPORATED	)	
	)	Docket No. MSBCA 1835
Under University of Maryland Bid No. 7705-P	)	

September 16, 1994

Responsiveness-Brand Name or Equal- The determination by the procuring agency concerning whether a product submitted as "an equal" meets the enumerated salient characteristics set forth in the invitation will not be disturbed absent a clear showing that the agency acted unreasonably or otherwise abused its discretion in making such determination.

APPEARANCE FOR APPELLANT: Karl R. Henry, President
Rockville Partitions, Inc.
Gaithersburg, MD

APPEARANCE FOR RESPONDENT: Leigh S. Halstad
Asst. Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the finding by the University of Maryland Procurement Officer that its bid was non-responsive because it failed to offer the integral hinge system specified and that the bid by its competitor was responsive. Neither party requested a hearing and the appeal is decided on the written record.

1. The above captioned solicitation was issued May 9, 1994 for furnishing and installing toilet partitions in eleven locations in Hornbake Library at the University of Maryland.

2. The toilet partition panels, doors and pilasters were required to be made of a waterproof nonabsorbent high density polyethylene with a Class B flamespread fire rating. Santana Polymar HD or equal was referenced in regard to these requirements. The specifications also required that door hinges be designed as an "integral hinge system."

3. Seven bids were received. Appellant, offering a product of its own manufacture, was the apparent low bidder with a price of $35,642. The apparent second low bidder was Greenwald

Industrial Products Co. Inc. (Greenwald) at $35,750. Greenwald offered the brand product (Santana) named in the specification. As noted in the specification also permitted use of an approved equal in lieu of the brand name product.

4. After bids were opened on May 19, 1994, Greenwald immediately filed a bid protest on the basis that the product offered by Appellant was not "equal" to the brand name product, asserting that the surface finish was inferior, the polyethylene used was not high density, the material was not properly stress relieved, and the flamespread test performed on Appellant's product was not properly certified. Greenwald reasserted its protest on June 30, 1994.

5. The University considered and found no merit in Greenwald's protest. However, the University determined that Appellant's bid was non-responsive because the hinge it offered is not an integral hinge system. The University found that Appellant offered a wrap around hinge set which looks and operates differently from the specified system.

6. Appellant timely protested this determination asserting that the integral hinge system called for by the specifications is interior to the Appellant's standard hinge.[1]
In its protest, Appellant also asserted that Greenwald's bid was non-compliant in regard to the Class B fire rating requirement. Appellant noted that the test report Greenwald submitted with its bid indicates that the material it submitted for flamespread rating was not one inch thick material, the thickness of the material to be installed. Appellant also asserted that the test results on this material show a smoke developed value of 625, outside of the standard Class B material. In this regard Procurement Officer opined in his final decision dated July 29, 1994 that:

> *We agree with you that the fire rating test results that Greenwald submitted with its bid were based on a sample that was one-half inch thick. However, Greenwald has since provided us with test results on the appropriate thickness material which support a finding that the product to be installed meets the Class B flamespread rating specified. In regard to your further assertion that the Greenwald product does not meet the Class B smoke developed value standard, we must point out to you that our specifications only call for a flamespread rating, not a smoke developed value rating. We cannot find Greenwald non-compliant with a requirement that we did not make. Again, if you saw a failing in our specification, it would have been appropriate to have brought it to our attention before bid opening when we could have done something about it.*

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[1]Appellant, in this post bid opening protest offered to provide its standard hinge with a ten year warranty and a "credit" of$ 500.00 to the University.

On August 25, 1994, an Assistant Attorney General wrote Greenwald and requested that it provide any additional test results in its possession which reflected the smoke developed values of the one inch partition identified in its bid. This letter also requested Greenwald's position on whether the partitions it offered violated the fire code. The record does not contain the response, if any, to the Attorney General's request.

Decision

The General Procurement Law and COMAR do not allow the State to accept a product that does not conform to the material requirements of an invitation to bid. See COMAR 21.05.02.13; Section 13-103(e), Division II State Finance and Procurement Article.

Maryland procurement law allows the State to procure a product by use of a "brand name or equal" purchase description, but the solicitation must set forth which characteristics of the brand name product are salient. COMAR 21.04.01.02(B). The State is then obligated to evaluate responsiveness of the bid on the basis of the enumerated salient characteristics and has no discretion to waive compliance with a named characteristic.

In this procurement, the technical specifications of the bid request require an integral hinge system and describe the characteristics of such a system:

> *Hinges shall be integral hinge system. Pilaster to be machined to accept door and hinge mechanism. Hinge mechanism consists of a 2 piece 1/2" diameter nylon pin with "Cam Action" and a 3/16" stainless steel pin*

inserted into lower portion of pilaster and door. A one piece 1/2" diameter, 4" long nylon pin to be inserted into the top portion of the pilaster and door.

Appellant declined to provide this type of hinge; instead it offered its own standard wrap around hinge and agreed to provide, after bid opening, a $500 credit and ten year warranty. Appellant concedes in its protest that its wrap around hinge does not meet the specifications of an integral hinge system[2] arguing that it should be accepted as "an equal" as permitted by the specifications. The University reviewed a sample hinge provided by Appellant and determined that the hinge was not in compliance with the specifications; i.e. that it was not "an equal."

The Board has articulated a narrow standard of review over determinations that a bid does not conform to specifications. The Board has stated:

> *The factual determination as to whether any product conforms to design specifications and thus is responsive to a solicitation primarily is a matter within the jurisdiction of the procuring activity. [citation omitted]. We will not substitute our judgment for that of the procuring agency in absence of a clear showing that it acted unreasonably or otherwise abused its discretion in determining that a product did not comply with specifications. [citation omitted]. Where there is a difference of expert technical opinion we will accept the technical judgment of the procuring agency unless clearly erroneous. [citation omitted].*

Adden Furniture, Inc. MSBCA 1219, 1 MSBCA ¶ 93 at p. 4 (1985). See also: Excelsior Truck Leasing Co., MSBCA 1102, 1 MSBCA ¶ 50 (1983); The Trane Company, MSBCA 1264, 2 MSBCA ¶ 118 (1985); N.B.R., Inc., MSBCA 1728, 4 MSBCA ¶ ____(1993). The fact that the offered product would have achieved the same functional results as the product specified is not a basis for finding conformance to the

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[2] On appeal, Appellant asserts its wrap around hinge is an integral hinge based on the dictionary definition of "integral" as "complete or necessary to completion, essential part of the whole." However, this characterization cannot change the fact that Appellant's wrap around hinge does not comply with the University's detailed description of an integral hinge.

specifications. Capitol Dental Supply, Inc., et al., MSBCA 1351 & 1355, 2 MSBCA ¶ 161 (1987). In Capitol Dental, the Board found that where the specifications required a hydraulic base to a dental chair, an electromechanical base which functioned in the same manner did not meet the specifications. Id. at 4. The Board observed that "Maryland procurement law requires that the bidders compete on an equal footing, and that one bidder not be accorded a competitive advantage to the prejudice of the other bidders...." Id. To allow a bidder to obtain a contract without meeting the specifications expected to be met by the other bidders would give that bidder an unfair advantage.

The Board also noted in Capitol Dental that "any material change to a request for bids or quotations resulting from prebid inquiry is required to be communicated to all other prospective bidders...." Id. In this case, Appellant had an opportunity to request an amendment to the hinge specifications and chose not to do so; had such an amendment been made, pursuant to COMAR 21.05.02.07 and.08 it would have been circulated to all bidders. Now that the bids have been opened it would be improper for the University to accept an amendment of the hinge specifications from integral to wrap around. Because Appellant offered a hinge materially different from the one specified, its bid was properly determined to be non-responsive. Therefore, Appellant's appeal must be denied.

Appellant also protested award of a contract to Greenwald asserting that the Greenwald bid was non-compliant in regard to the Class B fire rating requirement. The Procurement Officer denied this protest for the reasons set forth above. However, the Board shall not review the correctness of such decision.

Under Maryland procurement law, only an "interested party" may protest against the award or proposed award of a contract. COMAR 21.10.02.02A. An interested party is "an actual or prospective bidder, offeror, or contractor who may be aggrieved by the solicitation or award of a contract, or by the protest." COMAR 21.10.02.01.B(1).

In this case, Appellant cannot be "aggrieved" by the award of the contract to Greenwald within the meaning of this definition because even if Greenwald's bid were to be rejected the contract would not be awarded to Appellant because its bid is non-responsive. Rather, the award would be made to the next lowest responsive and responsible bidder among the five remaining bidders. Appellant has not challenged those bids nor asserted that a common defect exists that requres a rejection of all bids and a resolicitation. Thus, Appellant is not an interested party and therefore is not entitled to protest the award of the contract at issue once the rejection of its bid has been affirmed. Compare Erik K. Straub, Inc., MSBCA 1193, 1 MICPEL ¶ 83 (1984); Adell Food Service, MSBCA 1802, 4 MSBCA ¶ _____ (1994).

Accordingly, it is Ordered this 16th day of September, 1994 that the Appeal is denied.

Dated: September 16, 1994

Robert B. Harrison III
Robert B. Harrison III
Chairman

I concur:

Candida Steel
Candida S. Steel
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 1835, appeal of Rockville Partitions, Inc. under University of Maryland Bid No. 77075-P.

Dated: Sept. 16, 1994

Mary G. Priscilla
Mary G. Priscilla
Recorder