

MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of SERVICE AMERICA)
CORPORATION)

) Docket No.
) MSBCA 1606

) Under Univ. of Md. at College)
) Park Solicitation No. 72765-V)

January 16, 1992

Protest Jurisdiction - COMAR 21.10.02.04 C. requires a statement of reasons for the protest to be given to the procurement officer. If a reasonable reading of the protest limits it to a single reason of protest then any other "reasons" not stated in the protest cannot later be raised on appeal.

APPEARANCE FOR APPELLANT:

Leslie H. Wiesenfelder,
Esq.
Stephen C. Crampton,
Esq.
Dow, Lohnes & Albertson
Washington, D.C.

APPEARANCE FOR RESPONDENT:

Mark S. Dachille
Assistant Attorney
General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTIES:
ARA Services, Inc.

William D. Blakely, Esq.
James S. Ganther, Esq.
Piper & Marbury
Washington, D.C.

Joan C. Mazzotti
Associate General Counsel
Philadelphia, PA

OPINION BY MR. MALONE

Appellant timely appeals the denial of its bid protest by the University of Maryland at College Park (University). The University filed a Motion to Dismiss any ground listed in the appeal not set forth in the original bid protest. Following a hearing on the Motion to Dismiss, the parties rested and the Board has been asked to rule on the record.

Findings of Fact

1. On September 28, 1990, the University issued Request for Proposal (RFP) No. 72765-V for vending services for the University of Maryland, College Park, Maryland.
2. This RFP provided for evaluation and selection procedures. A

proposal must first be qualified by the Evaluation Committee for compliance with the requirements of the RFP. Then each proposal would be scored. The Technical Proposal and Financial Proposal were each to be weighted 50% in the overall evaluation.

3. The Financial Proposal would be evaluated separately, and after, from the evaluation of the Technical Proposal. The RFP further provided the manner in which this would be done.

4. The RFP also provided for the inclusion of an Exhibit II, found in the Agency Report at Exhibit I, which is recited in full as follows:

Exhibit II - VENDED PRODUCT AND CURRENT VENDED PRICE

<u>Product</u>	<u>Price</u>
Cigarettes	\$1.60
Candy	.50
Gum/Mints	.40
Pastry	.65
Chips/Bag Snacks	.45
Microwave Popcorn	.80
Soup	.60
Stews	.80
Cup Soda 16 ounce	.55
Hot Beverages	.30
Bottle Fruit Juice, 10 ounce	.65
Can Fruit Juice, 12 ounce	.75
Ice Cream	.50
Milk	.45
Vended Food	.90 to 2.25

The RFP further discussed Exhibit II as follows:

3. PRODUCT PRICES AND COMMISSIONS
 - 3.1 EXHIBIT II contains specifications for sizes, sources and quality control for commodities to be vended. The price of products vended shall not exceed the price being charged for equivalent products sold through other vending machines located in the Metropolitan area.
 - 3.2 EXHIBIT II identifies the current vending prices at the University.
 - 3.3 Vending prices can be adjusted to reflect changes in product cost and industry standards only through

written approval by the University.

5. Bids were received and evaluated resulting in the following cumulative point scores.

<u>VENDOR NAME</u>	<u>TECH. PTS.</u>	<u>FINANCIAL PTS.</u>	<u>TOTAL PTS.</u>
Canteen	184	175	359
ARA Services	186	186	372
Service America I	182	170	352
Service America II	182	166	348

6. In response to the Exhibit II requirement, ARA responded as follows.

VENDING PRODUCT PORTION & PRICING SCHEDULE

Candy:	All National Brands: Hershey, Nestle, M&M, Mars, Mounds, Almond Joy, etc. Accepted Trade Standard Size	\$.55
Gum/Mints:	Life Savers, Beechnut, Wrigleys, etc. Accepted Trade Standard Size	\$.40
Chips/Snacks:	Complete Line of Frito-Lay 1 oz. to 1.75 oz. bags	\$.45
Pastries:	Tasty Kake, Hostess, Sara Lee Dolly Madison, etc. 2.4 oz. to 4 oz. packages	\$.65
Hot Canned Food:	Soups/Stews (All National Brands): Hormel, Heinz, Campbell's Doxee, etc. 7.5 oz. can	\$.60 (Soups) \$.85 (Stews)
Cold Juice:	Natural (100%) Fruit Juice: Very Fine, Bluebird & Juice Bowl Brands 12 oz. can	\$.75
Ice Cream:	All National Brands	\$.50

Good Humor and Jack &
Jill Brands
Accepted Trade Standard Size

Cigarettes: 22 National Brands: \$ 1.75
Winston, Salem, Marlboro,
Newport, Kent, Camels,
Benson & Hedges, etc.
Accepted Trade Standard Sizes

Hot Beverage: ARA Special Blend Coffee; \$.35
a blend of Brazilian,
Columbian & Central American
Milds-No Robustas are used; Tea
(Lipton); Hot Chocolate
(Swiss Miss) 8-1/4 oz. cup

General Milk \$.50
Merchandise: West Dairies
1/2 pint container

Fresh Fruit \$.50
Apples, Oranges, Pears etc.
one piece

Microwave Popcorn \$.80
Golden Valley, etc.
3.5 oz. bag

Cold Food \$.75 to \$2.95
Breakfast, Luncheon, &
Dinner Sandwiches/Platters,
Pizza, Pancakes, Salads,
Yogurt, Desserts, Specialty
Items, etc.

7. Appellant responded to the Exhibit II requirement as follows:

EXHIBIT II - PROPOSED VENDED PRODUCT

<u>Product</u>	<u>Price</u>
Cigarettes	\$1.75
Candy	.50
Gum/Mints	.40
Pastry	.65
Chips/Bag Snacks	.45
Microwave Popcorn	.80
Soup	.65
Stews	.85
Cup Soda, 16 ounce	.55

Hot Beverages		.40
Bottle Fruit Juice, 10 ounce		.75
Can Fruit Juice, 12 ounce		.80
Ice Cream		.50
Milk		.50
Vended Food	various	

See Merchandising Program Vended Food Menus

The pages of Daily Merchandising Programs Vended Food Menus are not provided herein since they are not relevant to the determination of the issues in this appeal.

8. Appellant filed a letter of protest dated June 28, 1991 which is recited in detail herein in light of the Motion to Dismiss filed in this appeal.

Mr. Ron Jones
 Directing of Purchasing
 Procurement and Supply
 2113-R Administrative Services Bldg.
 University of Maryland
 College Park, Maryland 20742-3111

RE: University of Maryland
 Request for Proposal #72765-V - Vending Services

This letter is to serve a notice of Protest from Service America Corporation with respect to the award of a contract pursuant to RFP 7265-V

It is our understanding, based upon information obtained during yesterday's meeting, that the contract will be awarded to ARA Services as a result, in part, of the ranking of bids on the financial criteria.

The criteria for financial evaluation are contained in RFP Section V. Paragraph F. (pages 38 and 39). "Competitiveness of proposed product pricing" is listed as the first criteria by which the financial portion of bids would be evaluated.

Appendix B, Paragraph 1.03 of the RFP provides that the "... approved selling prices..." for the products to be sold under the contract are as listed in Exhibit No. II.

To the extent that the ARA proposal, or that of any other bidder, includes product prices substantially higher than those listed in Exhibit No. II, it is not responsive to the RFP. Any increase in revenues promised to the University by such proposals must be discounted because of the increase in

gross revenues resulting from higher selling prices.

It is our belief that Service America's proposal provides the best overall product pricing, and most closely complies with the terms of the RFP. We therefore respectfully request that the contract be awarded to Service America Corporation.

Sincerely,

Patrick O'Malley
Vice President Sales

cc: Mark L. Kreiser, Esq.

This protest letter was filed after the debriefing session, which Appellant attended on June 27, 1991, at which Appellant had availability to all information concerning this procurement and its evaluation.

9. The procurement officer by letter dated September 20, 1991 denied the protest and stated that the only ground of protest made by Appellant, that a bid is nonresponsive if any proposal included substantially higher product prices than those set forth in Exhibit II, was an incorrect contention as it ignored the express language of the RFP.

10. Appellant's protest letter limits the protest to one single issue which was addressed by the procurement officer and which formed the basis of his decision, (i.e. responsiveness of a bid which provides prices substantially higher than the product prices set forth in Exhibit II of the RFP). While Appellant suggests that other issues were raised by the protest letter, the Board finds that the only issue raised by a reasonable reading of the protest letter was the issue of responsiveness as described above. While a protest need not follow any specific format, it must set forth the reason for the protest. COMAR 21.10.02.04.

11. The plain language of the RFP and its comments cannot be reasonably read to require bidders to respond with prices less than those on the RFP's Exhibit II. In fact, all of the bids,

including the Appellant's, offered some prices higher than the current vended prices on the RFP's Exhibit II. Exhibit II was a required format only. The approved prices to be provided by bidders were obviously the approved current prices of each offeror.¹ The only restriction as to prices on Exhibit II was that they, "shall not exceed the price being charged for equivalent products sold through other vending machines located in the Metropolitan Area."

Decision

COMAR provides for a two-tiered administrative review of protests: first before the agency procurement officer, and then before the Board of Contract Appeals. Only those issues raised before the procurement officer in the original protest can be brought before this Board. T.E.U. Incorporated MSBCA 1530, MICPEL, (1990).

The sole issue properly before the Board is whether the RFP requires bidders to provide prices on an Exhibit II which are less than those given on the RFP's Exhibit II, Vended Product and Current Vended Price.

The fact that other issues exist and may have merit is not to be considered. The right to protest is given in COMAR to the individual protestor who perfects his rights by conforming to COMAR requirements. In its appeal to this Board, the Appellant lists nine (9) separate issues. However, only one central issue was protested originally. Appellant was aware of all necessary facts in this case following the debriefing meeting on June 27, 1991. It nevertheless elected to proceed on one issue alone in its protest of June 28, 1991. The issues cannot now be expanded. Chesapeake Bus and Equipment Company, MSBCA 1347, 2 MICPEL 163 (1987). The Board now addresses the merits of the sole issue before it.

¹ Since the parties used the terms of art "bidders" and "offerors" interchangeably, the Board will continue that convention in this decision.

An RFP will be read by its plain express terms in the absence of some finding of ambiguity. Cam Construction Company, Inc., MSBCA 1088, 1 MICPEL 62 (1983). Adolph Baer and Apothecaries, MSBCA 1285, 2 MICPEL 146 (1987).

The RFP is not ambiguous. Exhibit II is a format for each offeror to list the approved current prices of its items to be vended, and that is precisely what the bidders did in response to the RFP. The RFP does not expressly or impliedly require bidders to give prices on their Exhibit II less than those listed in the RFP's Exhibit II.

The RFP made clear that Exhibit II merely identified the current vended prices at the University and called for offerors to provide their current vended prices for those items. Such an exhibit would make comparison and evaluation of proposals more practical and uniform. The objective test of contract interpretation mandates that the written language governs the rights of the parties unless it is not susceptible of a clear and definite understanding or unless there is fraud, duress or mutual mistake. Ray v. William G. Euvie & Bros., 201 Md. 115, 93 A. 2d 272 (1952); Kasten Construction Co., Inc. v. Rod Enterprises, Inc. 268 Md. 318, 301 A. 2d 12 (1983). Cited in Fruin-Colnon Corporation and Hahn Construction Co., Inc., MSBCA 1001, 1 MICPEL 1 at page 6. (1979). The language of the RFP was clear and definite in its intention to a reasonably intelligent bidder. Exhibit II was clearly used to foster competition and encourage responses from offerors.

Wherefore the appeal is denied.

Dated: 1/10/92

15/
Neal E. Malone
Board Member

I concur:

SI

Robert B. Harrison III
Chairman

SI

Sheldon H. Press
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1606, appeal of SERVICE AMERICA CORPORATION, under University of Maryland at College Park Solicitation No. 72765-V.

Dated: *1/16/92*

SI

Mary F. Priscilla
Recorder

