

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of
THE CTC MACHINE & SUPPLY CORPORATION) Docket No. MSBCA 1049
)
Under Department of General Services)
RFQ #7017)

April 20, 1982

Multiple Bids — Where a bidder submits multiple bids, COMAR 21.05.02.2 only permits consideration of the lowest bid. For purposes of this regulation, the lowest bid received from a single bidder is defined as the "base bid."

Multiple Bids — The term multiple bids refers solely to the separate submittal of two or more responsive bids by a single bidder or affiliate companies in response to an IFB.

Construction of Regulations — The construction of a State procurement regulation by a using agency is entitled to controlling weight where it is not plainly erroneous, unreasonable, or inconsistent with the language of the regulation or State law.

Procedure - New Issues On Appeal — Where an issue previously has not been presented to the procurement officer for decision, the Board will not consider it if the State is prejudiced thereby.

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APPEARANCES FOR THE INTERESTED PARTIES:

Saxon Business Products, Inc. Thomas L. Bell
William Layman

3M Business Products Sales, Inc. Mike Edgell

APPEARANCES FOR THE RESPONDENT: Varda N. Fink, Esq.
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OPINION BY CHAIRMAN BAKER

This appeal arises from a bid protest concerning the award of a contract for the rental of photocopier machines to State agencies, universities and political subdivisions. Appellant contends that the Maryland Department of General Services (DGS) improperly considered the multiple or alternate bids submitted by its competitor, Saxon Business Products (Saxon), and thereafter erroneously awarded that firm a contract for the supply of three classes of photocopier machines. Appellant requests that we now order DGS to take the necessary steps to award it a contract as the lowest responsive and responsible bidder for class 1 and 2 photocopiers.

Findings of Fact

1. On September 8, 1981, DGS issued an invitation for bids (RFQ #P-7017) for the monthly rental and maintenance of plain paper photocopiers to State agencies, universities and political subdivisions.

2. The contract period was to extend from November 1, 1981 through October 31, 1982.

3. DGS described four separate classes of photocopy machines in the invitation for bids (IFB). These classes were defined as follows:

<u>Equipment Class</u>	<u>Minimum Required Capabilities</u>
Volume Band I Class 1	8-1/2 x 11, 8-1/2 x 14, use recycled bond with acceptable copy quality
Volume Band I Class 2	8-1/2 x 11, 8-1/2 x 14, use recycled bond with acceptable copy quality, bound volumes, 2 sided copying
Volume Band II Class 3	8-1/2 x 11, 8-1/2 x 14, use recycled bond with acceptable copy quality, bound volumes, 2 sided copying
Volume Band II Class 4	8-1/2 x 11, 8-1/2 x 14 use recycled bond with acceptable copy quality, bound volumes, 2 sided copying, document handling assist device, minimum 10 bins collating/sorting

Volume Band I included photocopier machines having the capability to reproduce 1000 to 7000 copies per month. Volume Band II included photocopier machines with the capability to process 7001 to 20,000 copies per month.

4. Bids were solicited for the furnishing and maintenance of each class of photocopier by region. The regions specified were:

- A. Western (Garrett, Allegany, Washington counties).
- B. Central (Frederick, Montgomery, Carroll, Howard, Baltimore counties, Baltimore City).
- C. Southern (Anne Arundel, Prince George's, Calvert, Charles, St. Mary's counties).
- D. Upper Chesapeake and Lower Eastern Shore (Harford, Cecil, Kent, Queen Anne's, Caroline, Talbot, Dorchester, Wicomico, Somerset, Worcester counties).

SW (Statewide) — All counties and Baltimore City. The IFB expressly stated that "[a] contract resulting from the bid invitation may be by region(s) or statewide, whichever serves the best interests of the state." (IFB, p. 9)

5. Award was to be made to the responsive and responsible bidder(s) who submitted the lowest evaluated bid per equipment class and region. All pricing criteria and an evaluation formula were set forth in the IFB.

6. The printed Request for Quotation form utilized by DGS in its IFB contained the following instruction to bidders:

"...Quotations must be submitted on this form. Unless otherwise indicated, equivalent items shall be considered but only if accompanied by specifications and/or descriptive literature." IFB, p. 1)

7. Included in the IFB were four quotation pages, one for each class of photocopier machine being solicited. (IFB, pp. 18-21) At the top of each of these printed pages, bidders were instructed to include only "1 model per quotation page."

8. Bids were opened on October 19, 1981. For purposes of this appeal, it is sufficient to list the lowest evaluated statewide bids for class 1 and 2 photocopiers. These were:

	<u>Class 1</u>
<u>Vendor</u>	<u>Evaluated Price/mo.</u>
Saxon Business Products	\$154.05
CTC Machine & Supply Co.	180.00
Savin Corporation	186.53
Canon	238.40
Monroe Sys. For Bus.	251.57
Pitney Bowes	316.00
3M Company	329.80

	<u>Class 2</u>
Saxon Business Products	\$154.05
CTC Machine & Supply Co.	163.00
Savin Corporation	186.53
Canon	238.40
Monroe Sys. For Bus.	251.57
Ropho Sales, Inc.	316.00
3M Company	428.00

9. The Saxon low bids for class 1 and 2 photocopiers were premised upon the supply of a Saxon SX-20 photocopier. However, with regard to class 1 photocopiers, Saxon also submitted a second bid based upon the supply of a Saxon SX-18 photocopier. This bid was listed on a separate quotation page and labelled "Alternate Bid (A)." While the record does not disclose whether the bid for the Saxon SX-18 was accompanied by specifications or other descriptive literature, the procurement officer did testify that he had determined that this model met the minimum required specifications for class 1

photocopiers. (Tr 38) However, because the evaluated price for the Saxon SX-18 was higher than that quoted for the Saxon SX-20, DGS neither tabulated this higher bid nor considered it for award.

10. By letter dated November 2, 1981, Appellant filed a bid protest with the DGS procurement officer, Mr. Kenneth Webster. Appellant alleged in this bid protest that the procurement officer improperly considered the multiple or alternate bids submitted by Saxon. Appellant also contended that multiple awards should not have been made and that the 5% Small Business Preference, provided for under Maryland law, should have been considered.

11. The procurement officer denied the bid protest in a written decision dated November 6, 1981.

12. On November 9, 1981, contract awards were made to Saxon Business Products for the rental of class 1, 2 and 3 photocopier machines on a statewide basis. Awards also were made to the 3M Company and Delmarva Business Products, on a regional basis, for class 4 photocopiers.

13. Appellant filed a timely appeal from the procurement officer's decision on November 12, 1981. During the hearing in this appeal on January 5, 1982, Appellant stated that it would not pursue the issues concerning multiple awards and the 5% Small Business Preference previously raised before the procurement officer. (Tr 53, 83)

14. The Board issued a proposal for decision, pursuant to the requirements of Article 41, Md. Ann. Code, § 253, on March 5, 1982. This proposed decision denied Appellant's appeal. A subsequent hearing was conducted on March 29, 1982 in order to permit Appellant to argue its exceptions to the proposed decision.

DECISION

COMAR 21.05.02.21¹ provides that:

"unless multiple or alternate bids are requested in the solicitation, these may not be accepted. However, if a bidder clearly indicated a base bid, it shall be considered for award as though it were the only bid submitted by the bidder. The provisions of this regulation shall be set forth in the solicitation and, if multiple bids are allowed, it shall specify their treatments."

Pursuant to this regulation, Appellant contends that DGS wrongfully accepted the multiple or alternate bids submitted by Saxon. DGS however contends that the terms "multiple" and "alternate" bids refer only to bids submitted for items varying from the requirements of the specification. Since Saxon's two bids on class 1 photocopiers both complied with the requirements of the specification, it is argued that they should not be considered either as multiple or alternate.

The Maryland procurement regulations define an alternate bid as "...a dollar amount to be added to or subtracted from the bid for a variation in the item being bid

¹See 8:9 Md. R. S-49 (May 1, 1981).

upon." COMAR 21.01.02.01.² An alternate bid, therefore, is a non-responsive bid in that it offers to provide something other than what specifically is requested in the IFB.³ Here, however, Saxon's additional bid for class 1 photocopiers, although labelled "Alternate Bid (A)," offered to provide a machine which complied, in all material respects, with the requirements of the IFB. Accordingly, Saxon's bid was not an alternate bid as that term is used in the regulations.

We now consider whether Saxon's two bids for class 1 photocopiers were multiple bids. While the term "multiple bids" is not defined either in Maryland's procurement law or regulations, it may be understood in a literal sense to mean more than one bid submitted by a single bidder in response to an IFB. This broad definition, however, would include alternate bids. Therefore, the term multiple bids must have been intended to refer solely to the separate submittal of two or more responsive bids by a single bidder or affiliate companies in response to an IFB. This construction of COMAR 21.05.02.21 ascribes distinct meanings to the terms multiple and alternate bids and comports with accepted trade usage. Compare 39 Comp. Gen. 892 (1960); 51 Comp. Gen. 403 (1972); Shnitzer, Government Contract Bidding, p. 132 (Federal Publications, Inc. 1976). Accordingly, we find that the two bids submitted by Saxon for class 1 photocopiers were multiple bids.

We now turn to the issue of whether Saxon's multiple bids, submitted for class 1 photocopiers, should have been considered by DGS. Although COMAR 21.05.02.21 expressly states that these bids generally may not be accepted, it further provides that "... if a bidder clearly indicates a base bid, it shall be considered for award by the bidder." In construing this language, therefore, we first must determine what the promulgating authorities intended by the term "base bid."

The term "base bid" is another phrase which is not defined by Maryland's procurement law or regulations. With regard to alternate bids, where an amount is added to or subtracted from the bid price depending upon the variation proposed in the item being bid upon, the term "base bid" has obvious meaning. A "base bid" simply is that bid price to which an amount is added to or subtracted from in order to determine the alternate bid.⁴ With regard to multiple bids, however, the meaning of the term "base bid" is not immediately clear. DGS contends that the term "base bid" should be construed to mean the lowest of the multiple bids submitted. Appellant submits that such an

²See 8:9 Md. R. S-6 (May 1, 1981).

³A responsive bid is one submitted under a procurement by competitive sealed bidding which conforms in all material respects to the requirements in the IFB. A non-responsive bid is one which does not conform in all material respects to the requirements contained in the IFB. See COMAR 21.01.02.60 and Solon Automated Services, Inc., MSBCA 1046 (January 20, 1982) at p. 17.

⁴This is how the term "base bid" is utilized in federal procurements where the government is unsure of the exact funding for a project at the time it issues the IFB. Under these circumstances, a base bid is requested for certain essential items with additive bids being requested for other desirable items. If sufficient funds become available to award on the basis of the additive items, the base bid is adjusted by the additive bids for purposes of award. See Comp. Gen. Dec. B-181545 (31 Oct. 1974), 74-2 CPD para. 233, Comp. Gen. Dec. B-171813 (19 Feb. 1971).

interpretation is unreasonable since it renders meaningless other language requiring the bidder to indicate its base bid clearly.

We conclude that DGS reasonably construed the term "base bid" to mean the lowest of the multiple bids submitted. This construction precludes any bidder who submits multiple bids from obtaining a competitive advantage over another and further comports with the following requirement of COMAR 21.05.02.13A⁵:

General. The contract is to be awarded to the responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the low bid price or lowest evaluated bid price... See also Art. 21, Md. Ann. Code, § 3-202(g). (Underscoring added.)

Additionally, since price or evaluated price is determinable from the face of a bid, the lowest bid received from a single bidder always would be clear to the procurement officer. Accordingly, since the DGS interpretation of COMAR 21.05.02.21 is not plainly erroneous, unreasonable, or inconsistent with the language of the regulation or State law, it is entitled to controlling weight. Compare *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Suburban Uniform Company*, Docket No. ___ MSBCA 1053 (March 19, 1982) at p. 9.

Finally, during the hearing in this appeal, Appellant's counsel alleged, for the first time, that the IFB improperly omitted the provisions of COMAR 21.05.02.21 concerning multiple and alternate bids. For this reason, the photocopy contracts entered into by DGS further were said to be void pursuant to COMAR 21.03.01.OIB.⁶ Without responding to the substantive aspects of this argument, DGS objected, on jurisdictional grounds, to its consideration by this Board.

Maryland's procurement law and regulations expressly require bid protests to be filed initially with the using agency procurement officer. Art. 21, Md. Ann. Code, § 7-201 (1980 Repl. Vol.); COMAR 21.10.03.09A (8:9 Md. R. S-100 (May 1, 1981)). The Board's jurisdiction later may be triggered by an appeal taken from a written decision of the agency procurement officer concerning the bid protest. Art. 21, Md. Ann. Code § 7-202(c)(1) (1980 Repl. Vol.). The initial issue for resolution here thus concerns whether the Board, on appeal, is constrained to consider only those issues previously presented to the procurement officer.

Generally, where a special statutory remedy is provided, that remedy is usually deemed exclusive and a litigant may not by-pass the administrative body or official authorized to hear and decide its claim. *Soley v. State Commission On Human*

⁵See 8:9 Md. R. S-48 (May 1, 1981).

⁶This provision states that: "Except as otherwise provided in Article 21 of the Code, a contract which is entered into in violation of the Article or these regulations is void, unless it is determined in a proceeding under the Article or subsequent judicial review that good faith has been shown by all parties, and there has been substantial compliance with the provisions of the Article and regulations. However, if a contract is void, a contractor who has entered into the contract in good faith, without directly contributing to a violation, and without knowledge of any violation of the Article or regulations before the award of the contract shall be compensated for costs actually incurred."

Relations, 277 Md. 521, 356 A.2d 254, 257 (1976); DuBois v. City of College Park, 280 Md. 525, 375 A.2d 1098, 1104 (1977). This rule is not absolute, however, and a number of well recognized exceptions have been established. Compare Soley V. State Commission On Human Relations, supra at 356 A.2d 258; Harbor Island Marina, Inc. v. Board of County Commissioners of Calvert County, Md., 407 A.2d 738 741 (1979); Appeal of Evergreen Engineering, Inc., IBCA 994, 78-2 BCA 13226 (1978); Appeal of Pilcher, Livingston & Wallace, Inc., ASBCA 13391, 70-1 BCA 8331 (1970); Appeal of Bendix Field Engineering Corp., ASBCA 10124, 66-2 BCA 5959 (1966). These exceptions each have resulted from the exercise of judicial and administrative discretion under particular circumstances where the ends of justice have required the reviewing board or court to act immediately. Compare Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719, 721 (1941); American Electric Contracting Corporation v. U.S., 579 F.2d 602, 217 Ct. Cl. 338, 354 (1978). We likewise conclude that principles of fundamental fairness preclude a strict construction of Maryland's procurement law and regulations so as to require that, in all cases, the procurement officer decide issues before this Board may take jurisdiction.

In the instant appeal, Appellant has presented a novel and important issue for resolution. This issue, however, is one which Appellant was obligated to raise either before bid opening or no later than 7 days after the basis for protest was known.⁷ While Appellant had or should have had knowledge of the alleged IFB defect by the time it filed its original bid protest with the procurement officer on November 6, 1981, it nevertheless waited nearly two months to raise the issue. During this time, DGS considered the original bid protest grounds, issued its decision thereon, and then awarded contracts to three different vendors.⁸ Under these circumstances, it would be prejudicial to the State and its three vendors, one of whom did not even appear at the hearing in this appeal, to now consider Appellant's latest grounds for protest. Since Appellant had ample opportunity to address its claim concerning the IFB to the procurement officer before the positions of the interested parties had changed, fairness and justice do not require us to grant the exception prayed for.

For the foregoing reasons, Appellant's claim is, in all respects, denied.

⁷COMAR 21.10.01.03 provides, in pertinent part, that:

- "A. Protests based upon alleged improprieties in any type of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated in it shall be protested not later than the next closing date for receipt of proposals following the incorporation.
- B. In cases other than those covered in § A, bid protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier."
8:9 Md. R. S-117 (May 1, 1981).

⁸The award of a contract during the pendency of an appeal is not prohibited by the regulations. COMAR 21.10.03.09B (8:9 Md. R. S-119 (May 1, 1981)).

