

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeals of THE FECHHEIMER )  
BROS. CO. AND HARRINGTON )  
INDUSTRIES )

) Docket Nos. MSBCA 1181  
) & 1182  
)

Under DGS Quotation No. )  
P-28630 )

June 8, 1984

Rejection of All Bids - Salient Characteristics - The procurement officer reasonably rejected all bids where the invitation for bids failed to list the salient characteristics of the brand name or equal uniform items that bidders were required to meet.

APPEARANCE FOR THE FECHHEIMER  
BROS. CO.

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Regional Sales Manager  
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APPEARANCE FOR HARRINGTON  
INDUSTRIES

Mr. Ronald W. Scott  
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APPEARANCE FOR RESPONDENT:

Edward S. Harris  
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OPINION BY MR. KETCHEN

The appeals<sup>1</sup> of The Fechheimer Bros. Co. (Fechheimer) and Harrington Industries (Harrington) are taken from a Department of General Services (DGS) procurement officer's final decision to reject all bids submitted under the captioned solicitation. DGS contends that its action in rejecting all bids and cancelling the procurement was reasonable since the procurement documents failed to specify the salient characteristics of the uniform items listed by brand name or equal description. Both Fechheimer<sup>2</sup> and Harrington contend that the procurement should not have been cancelled since the salient features of the brand name uniforms were ascertainable from catalog descriptions and the uniforms offered by Harrington were consistent therewith.

<sup>1</sup>The appeals were consolidated since they both involve the same procurement and raise the same issue.

<sup>2</sup>Fechheimer submitted a bid and is also the manufacturer of several of the uniform items specified by Harrington in its bid.

## Findings of Fact

1. On October 26, 1983, DGS issued a request for quotations (RFQ) for the supply of guard uniforms, consisting of shirts, pants, toppers, ties, and hats to listed State correctional facilities. The uniforms were to be supplied under a requirements type contract for a one year period. A single award was to be made to the responsive and responsible bidder who submitted the lowest total bid price.

2. Vendors were to bid on six different uniform items by providing a unit price for the following items listed in the RFQ:

Shirts:	Five Star Z 959, Navy, to match existing
Pants:	Horace Small 909, Navy #7433, to match existing
Toppper:	Horace Small 3679, Navy Blue, to match existing
Ties:	Choke proof, bend over styles, metal clip, 3" width, fabric to match shirts
Hats:	Uniform see attached specs., fabric to match shirts
Hats:	Winter, as per attached specs.

No other requirements for the shirts, pants, or toppers were specified. The RFQ, however, required bidders offering uniform items equivalent to the brand name items listed to provide cuts, sketches, descriptive literature and/or complete specifications with their bids. The RFQ also required bidders to explain in detail the reasons why the proposed equivalent would meet the specifications and not be considered an exception to the specifications.

3. Bids were received and opened on November 29, 1983 with the following results:

<u>Bidder</u>	<u>Lump Sum Bid</u>
Harrington	\$247,830.00
Howard Uniform Co.	250,250.00
Suburban Uniform Co.	253,180.00
Fechheimer	256,300.00
Eastern Shore Uniforms	265,485.00
F&F and A. Jacobs & Sons, Inc.	274,175.00
DRL Associates	370,315.00

4. Although all other vendors, including Fechheimer, submitted bids based on the manufacturer's models identified in the RFQ for the shirts, pants, and toppers, Harrington submitted its bid based on other brand names as follows:

Shirts: "Command 12000"

Pants: "Fechheimer 3900"

Topper: "Fechheimer 38150"

Harrington further did not submit with its bid either specifications or descriptive literature describing the garments it was offering.

5. In a letter dated December 21, 1983, the DGS buyer requested Harrington to provide detailed specifications for its uniform items, including information concerning fabric type and weight, tensile strength of the fabric, type of thread, sewing technique, and any tests done on the fabric used. The information to be provided was to cover pockets, collars, zippers, and buttons as well as the basic uniform items. In response, Harrington submitted samples of the Fechheimer shirts, pants, and toppers which it intended to supply. The DGS buyer consulted with the previous supplier of the shirts, pants, and toppers (Howard Uniform Co.) concerning whether Harrington's uniforms were equal based on the samples it submitted. The Howard Uniform Co. was the second low bidder in the instant procurement. After these discussions, the DGS buyer determined that Harrington's shirts, pants, and toppers were not equal to the brand name shirts, pants and toppers specified in the RFQ. However, following discussions with the DGS buyer, Harrington agreed that modifications would be made to the shirts, pants and toppers to be manufactured by Fechheimer to make these uniform items meet DGS requirements. Mr. Bender, who represented Fechheimer and testified on Harrington's behalf at the hearing, stated that with the modifications agreed to with the DGS buyer, the Fechheimer uniform items were equal to the brand name uniform items described in the RFQ.

6. On February 10, 1984, the DGS buyer sent a letter to all bidders informing them that DGS was cancelling the procurement "[ d]ue to inconsistencies in the wording on our bid document." The inconsistencies referred to were not further described.

7. By letter dated February 23, 1984, Harrington protested the DGS decision to reject all bids and cancel the procurement.

8. In a final decision issued on March 28, 1984, the DGS procurement officer denied Harrington's bid protest. The DGS procurement officer determined that the RFQ was defective since it did not list the salient characteristics of the brand name uniform items specified in the RFQ as required by COMAR 21.04.01.02B. According to the DGS procurement officer, without a listing of the salient characteristics, DGS could not determine whether the uniforms offered by Harrington met or exceeded DGS's minimum needs. He further noted that the samples submitted by Harrington deviated from the uniform items described by brand name. He thus concluded that it would have been improper to allow Harrington after bid opening to modify the uniform items it offered in order to eliminate the identified differences.

9. Although Fechheimer did not protest to the procurement officer when all bids were rejected, it did note an appeal of the DGS procurement officer's final decision on Harrington's protest in its capacity as a manufacturer who would supply the uniforms to Harrington.

10. Harrington submitted a timely appeal of the DGS procurement officer's final decision to this Board on April 16, 1984.

### Decision

The primary issue we are required to address is whether the DGS procurement officer acted properly in rejecting all bids and cancelling the solicitation. Rejection of proposals and cancellation of a solicitation is permitted by Md. Ann. Code, Article 21, §3-301,<sup>3</sup> and by COMAR 21.06.02.01C as follows:

(1) After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement officer, with the approval of the agency head or his designee, determines that this action is fiscally advantageous or otherwise in the State's best interest. Reasons for rejection of all bids or proposals include but are not limited to:

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(c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;

The determination of whether it is fiscally advantageous or otherwise in the State's best interest to reject all proposals and cancel a solicitation has been left to the collective discretion and judgment of the procurement officer and agency head. Under Maryland law, this Board only may review the exercise of such discretion to ascertain whether it was fraudulent or so arbitrary as to constitute a breach of trust. Machinery & Equipment Sales, Inc., MSBCA 1171 (February 20, 1984); Solon Automotive Services, Inc., MSBCA 1046 (January 20, 1982) at 10, rev'd on other grounds, UMBC v. Solon Automated Services, Inc., Misc. Law No. 82-M-38, 82-M-42 (Cir. Ct. Baltimore, Co., October 13, 1982); William F. Wilke, Inc., MSBCA 1162 (October 3, 1983).

Here DGS contends that it could not determine whether bids for the uniform shirts, pants, and toppers offered by bidders were equivalent to the shirts, pants, and toppers listed in the RFQ by brand name description since the RFQ failed to list the salient characteristics for these uniform items. It, therefore, argues that it had a compelling reason to reject all bids and cancel the procurement as not being in the State's best interest.

<sup>3</sup>Article 21, §3-301 provides:

"If the procurement officer, with the approval of the agency head or his designee, determines that it is fiscally advantageous or is otherwise in the best interest of the State, an invitation for bids, a request for proposals, or other solicitation may be cancelled, or all bids or proposals may be rejected."

Although cancellation of an advertised solicitation after bid opening is not favored, use of inadequate specifications provides a reasonable basis for such cancellation. In this regard, bidders offering equal products in a brand name or equal solicitation should not have to guess at the essential qualities of the brand name item that the State is seeking in the product. Under the regulations, bidders are entitled to be advised of the particular features or characteristics of the referenced item which they are required to meet.<sup>4</sup> Otherwise, they are not competing on an equal basis and competition is restricted. An invitation which fails to list all the characteristics deemed essential thus is defective. Jarrett S. Blankenship Co., Comp. Gen. Dec. B-212167, 83-2 CPD ¶509. Further, since bids already have been opened, it no longer is possible to amend the specification to permit fair competition. Accordingly, rejection of all bids under such circumstances both is reasonable and consistent with the State's interest in fostering competition. Compare 41 Comp. Gen. 242 (1961); 38 Comp. Gen. 291 (1958); 38 Comp. Gen. 345 (1958); Telex Computer Products, Inc., MSBCA 1110 (May 25, 1983); Inner Harbor Paper Supply Co., MSBCA 1064 (September 9, 1982).

Harrington contends, however, that it was the victim of a "conflict of interest" and "discrimination" and that rejection of all bids was merely a procedural device to avoid an award to it as the low responsive bidder. The conflict of interest is evidenced by the discussion between the DGS buyer and the second low bidder concerning whether certain uniform items Harrington offered were equivalent to the brand name items listed. The second low bidder was the supplier of the brand name items in the previous procurement of the uniforms. Discrimination allegedly occurred here because in other State procurements contract awards apparently have been made even though the solicitations contained defective specifications. In view of our holding that DGS's cancellation was proper and required, we need not consider these allegations substantively. Compare Meds Marketing, Inc., Comp. Gen. Dec. B-213352, 84-1 CPD ¶318.

A number of comments nevertheless are in order. Initially, Harrington's bid, in any event, should have been rejected as non-responsive. In this regard, we note that the uniform items Harrington offered became acceptable only after inappropriate post-bid discussions with the DGS buyer. During these discussions it was agreed that modifications would be made to the uniform items Harrington offered in order to make them match the uniform items identified by brand name in the RFQ.

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<sup>4</sup>COMAR 21.04.01.02B provides:

"Brand name or equal means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet the users requirements, and which provides for submission of equivalent products. Salient characteristics of the brand name supply item shall be set forth in the specification."

(Underscoring added).

Next, we concur with Harrington that the DGS buyer's discussions with the previous uniform supplier, who was also the second low bidder, regarding whether Harrington's uniform were equivalent to the brand name items described was ill-advised and inappropriate. However, Harrington was not prejudiced in any way because the DGS procurement officer subsequently rejected all bids and cancelled the solicitation when he became aware that improper procedures were being followed and that the brand name specifications were defective in not delineating the required salient characteristics.

Finally, as to Harrington's argument that it was discriminated against because the State in the past has awarded contracts where the specifications were defective,<sup>5</sup> it goes without saying that issues concerning the failure to observe Maryland's procurement law in other solicitations are not before the Board pursuant to any valid appeal by an interested party participating in those procurements. However, assuming, arguendo, that awards were made in other State procurements where the solicitations were defective for some reason, this only would show that Maryland's procurement law may not have been complied with in those procurements, not that Harrington was in any way unfairly treated in the instant procurement. Such proof, therefore, is insufficient to support Harrington's claim that it was discriminated against here.

For all the foregoing reasons, therefore, the appeals of Fechheimer<sup>6</sup> and Harrington are denied.

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<sup>5</sup>In fact, one of these contracts was awarded to Harrington even though there were no salient characteristics specified for the brand name items sought.

<sup>6</sup>Although Fechheimer sent a representative to the hearing who was called as a witness by Harrington, Fechheimer did not call witnesses on its behalf or proffer any other evidence.