BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF JUICE COMPANY, INC.	)	
	)	Docket No. MSBCA 2356
Under DGS Solicitations No. 001IT814396	)	

September 8, 2003

Responsiveness - Samples - Where a sample is required to be submitted with or prior to a bid, failure to submit a sample is a matter of responsiveness, and the bid must be rejected. Where a sample is submitted and accepted prior to bid, the bidder must provide a product that is functionally equal or superior to the sample.

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OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its bid protest that the Respondent Department of General Services (DGS) should not have found its bid to be nonresponsive because its bid specified "Nicholson or equivalent" in the captioned procurement for juice bases and soft drink bladder boxes for dispensing of juices and soft drinks after the addition of water in a prescribed ratio.

Findings of Fact

1. On July 1, 2003, DGS awarded contracts under the above captioned Invitation to Bid (ITB) to Unique Beverage Concepts (Unique) for bag-in-a-box juice bases and to Dispense-All of MD (Dispense-All) for soft drink bladder boxes.[1] The awards were made in the face of Appellant's protest in accordance with COMAR 21.10.02.11B(1) to protect substantial State interests. Appellant timely appealed the denial of its protest to this Board on June 25, 2003. No comment on the Agency Report was filed. However, a hearing on the appeal was requested by Appellant and was conducted on August 27, 2003.

[1] While we discuss bids for both juice bases and soft drink bladder boxes, it appears that the appeal only involves the bids for juice bases.

2. On or about April 25, 2003, DGS issued the above captioned ITB for the procurement of a one-year contract (with renewal options) for furnishing bag-in-a-box juice bases and bladder box soft drink bases, including installation and maintenance of dispensing equipment, for multiple locations throughout the State.

3. The ITB informed bidders that the procurement was being conducted by competitive sealed bidding and that awards would be made to the responsive and responsible bidder or bidders submitting the lowest evaluated bid for all juice bases and the lowest evaluated bid for all soda bases. Bidders had the option of bidding on juice bases, soft drink bladder boxes, or both. For juice bases, vendors could bid all juices at either a 4:1 concentration, a 5:1 concentration, or both. Bids would be evaluated and award would be based on lowest cost-per-serving-ounce of finished product.

4. The ITB required each bidder to submit for approval, by May 16, 2003, two weeks before price bids were due, samples of all products which the bidder intended to furnish under the contract. The five eventual bidders, including Appellant, sent samples for evaluation. On May 27, 2003 DGS was advised that after testing and evaluation of the samples, limited to the testing of one flavor of each type of product from each vendor, all products submitted were considered acceptable. The sample Appellant submitted was manufactured by Nicholson; Appellant submitted no samples of any manufacturer other than Nicholson.

5. The deadline for receipt of price bids was May 28, 2003 at 2:00 p.m. DGS received price bids through eMaryland Marketplace from Appellant, Unique, Dispense-All, Sody Enterprises, Inc. (Sody), and Sysco Food Services of Baltimore (Sysco).

6. The lowest evaluated bid for juice bases was $313,055, submitted by Unique. Appellant's evaluated bid for juice bases was $319,470. However, Appellant is a small business entitled to the 5% small business preference and therefore, would have been entitled to award if its bid had not been rejected. Dispense-All was the responsive and responsible bidder who submitted the lowest evaluated bid for soft drink bladder boxes. Sody bid only on juice bases but its bid was determined to be nonresponsive for failure to bid all line items for either the 4:1 or 5:1 mix. Sysco's evaluated bid was not the lowest for either soft drink boxes or juice bases. For Line Items 4-6 (soft drink) and 9-11 (juice bases, 5:1 mix), Appellant offered "Nicholson or equivalent." Appellant did not bid on the 4:1 mix. Prior to submission of price bids, Appellant had previously submitted no samples of any equivalent products; the only samples submitted by Appellant were Nicholson products.

7. On or about June 1, 2003, Ms. Catherine Seiler, the DGS Procurement Officer, informed Appellant by telephone that its bid was nonresponsive due to the discrepancy between the Nicholson samples provided for evaluation and the term "Nicholson or equivalent" stated in Appellant's bid. Mr. Michael Dilks, a Vice President of Appellant, responded by fax on June 2, 2003 stating: "Regarding Nicholson or equivalent listed as our manufacturer, we have successfully bid Maryland State business through your office with this notation previously. Further, Nicholson labels include Nicholson, Best Value, and Bombay."

8. By letter dated June 6, 2003, Ms. Seiler gave Appellant written notification of the rejection of its bid on grounds it was nonresponsive due to use of the words "Nicholson or equivalent."

9. By fax dated June 6, 2003, received by the Procurement Officer on June 9, 2003, Mr. Dilks protested the determination that the bid was nonresponsive, saying:

> 1) JuiceCo is a distributor of Nicholson products and has been selling Nicholson products under numerous state contracts for years including under three existing contracts;
> 2) JuiceCo submitted Nicholson samples which were accepted for this bid;
> 3) JuiceCo submitted the low cost bid with Nicholson products listed as the manufacture[r];
> 4) JuiceCo has successfully submitted bids through your office with the exact language you object to in this bid and you have never mentioned it: we will supply you with those bid documents;
> 5) We discussed on the telephone our reasons for the language in our bid.

10. By letter dated June 18, 2003, Ms. Seiler, the Procurement Officer, denied Appellant's protest. From that decision Appellant filed its appeal with this Board.
11. COMAR 21.01.02.01B(39) provides the following definition:

> "Equivalent item" means an item of equipment, material, or supply, the quality, design, or performance characteristics of which are functionally equal or superior to an item specified in a solicitation.

Decision

We begin with the principle that in Maryland the State demands that a bid constitute a definite and unqualified offer to meet the material terms of an ITB. COMAR 21.05.02.13; COMAR 21.01.02.01B(78).

Appellant, herein, was required to submit samples of each product which it bid. Appellant submitted samples only of Nicholson products, not samples of an equivalent to Nicholson products. When Appellant subsequently submitted its bid containing the language "Nicholson or equivalent", that language was determined by the DGS Procurement Officer to be in conflict with the samples previously submitted by Appellant.

Respondent argues that, on its face, Appellant's bid reserved to Appellant a right to supply "equivalent" products other than Nicholson despite the fact that Appellant had submitted samples of only Nicholson products. Thus Respondent contends the bid was ambiguous in its identification of the products which Appellant offered to supply because DGS had no way of knowing from the face of the bid exactly which products of which manufacturer Appellant offered to supply. Because of this asserted discrepancy between the Nicholson samples submitted and the language in the bid, "Nicholson or equivalent," Respondent argues that the bid was ambiguous and, thus, properly rejected as nonresponsive. Respondent points out that bids which are materially ambiguous, i.e. are subject to more than one reasonable interpretation, must be rejected as nonresponsive. *See* Packard Instrument Company, MSBCA 1272, 2 MSBCA ¶125

(1986); Long Fence Co., Inc., MSBCA 1259, 2 MSBCA ¶123 (1986); National Elevator Company, MSBCA 1291, 2 MSBCA ¶135 (1986); The Driggs Corporation, MSBCA 1243, 1 MSBCA ¶106 (1985); Free State Reporting, Inc., MSBCA 1180, 1 MSBCA ¶75 (1984); Porter Construction Management, Inc., MSBCA 1994, 5 MSBCA ¶414 (1997). However, it must be initially determined whether Appellant's bid is, in fact, ambiguous and, for reasons that follow, we conclude that Appellant's bid is not ambiguous.

Respondent argues in the alternative that Appellant's failure to supply samples of the unidentified "equivalent" products mentioned in its bid rendered the bid nonresponsive, and Respondent points out that when a sample is required to be submitted with or prior to a bid, failure to submit a sample is a matter of responsiveness and the bid must be rejected. Merjo Advertising and Sales Promotion Company, MSBCA 1942, 5 MSBCA ¶393 (1996); H.L. Frey Corporation, MSBCA 2055, 5 MSBCA ¶435 (1998). Respondent also asserts, relying on R & O Industries, Inc., No. B-175935 (Sept. 25, 1972) 52 Comp. Gen. 155, that when samples are required and a bidder offers more than one product but fails to submit a sample for each product offered, the bid is nonresponsive and must be rejected.

Appellant, on the other hand, argues that the meaning of "Nicholson or equivalent" stated in its bid was explained by a telephone conversation with the Procurement Officer after bids were opened. However, by law a bid must be judged on it's face. A bidder is not permitted to make a bid which is nonresponsive on its face responsive through subsequent explanation, clarification, or correction. The Board will therefore only focus on the four corners of the bid itself and will not consider any post-bid explanations of what may have been intended. Fortran Telephone Communications Systems, Inc., MSBCA 2068 and 2098, 5 MSBCA ¶460 (1999); Substation Test Company, MSBCA 2016 and 2023, 5 MSBCA ¶429 (1997); Aepco Incorporated, MSBCA 1977, 5 MSBCA ¶415 (1997); Nestle USA, Inc., MSBCA 2005, 5 MSBCA ¶424 (1997); Weis Markets, Inc., MSBCA 1652, 4 MSBCA ¶305 (1992); Long Fence, *supra*. In this connection, Respondent points out, citing Interface Flooring Systems, Inc., B-206399, B-207258 (April 22, 1983) 83-1 CPD ¶432, that where there is a discrepancy between the bid and the samples submitted with the bid, the bidder is not permitted to explain its intention afterward; the bid is nonresponsive and must be rejected.

Appellant argues that its bid should not have been rejected because Appellant used similar language, "Nicholson or equivalent," in prior bids which were not rejected. The record, in fact, reflects that Ms. Seiler, the Procurement Officer herein, previously accepted or failed to reject as nonresponsive previous bids from Appellant that provided "Nicholson or equivalent" where samples were required to be submitted by the winning bidder after the bids were received. However, previous conduct would not authorize DGS to accept a nonresponsive bid for this procurement. By law the procurement officer may award a contract only to a responsive bidder. Md. Code Ann., St. Fin. & Proc. § 13-103(e); COMAR 21.05.02.13A. *See* Fortran, *supra* (where the procurement officer makes an erroneous initial determination that a bid is responsive, the procurement officer is not precluded from later rejecting the bid as nonresponsive). Thus, a bidder has no right to rely on prior unauthorized conduct of a procurement officer in failing to

reject a nonresponsive bid in an earlier procurement.[2] *See* Aepco Incorporated, MSBCA 1844, 4 MSBCA ¶370 (1994); Capitol Dental Supply, Inc., et al., MSBCA 1351 and 1355, 2 MSBCA ¶161 (1987).

Notwithstanding Respondent's arguments, we conclude that this appeal, based on the oral and written record, must be sustained. This is not because we disagree with the principles advanced by Respondent as set forth above, which are designed to prevent chicanery in the bidding process and to prevent affording a single bidder "two bites of the apple," *see* Porter Construction Management, Inc., *supra* at p. 4, to the prejudice of other bidders and the taxpayer. We agree with such principles and re-affirm them. However, COMAR 21.01.02.01B(39) set forth above defines "Equivalent item" as an item of supply (in this case juice bases) that is functionally equal or superior to an item specified in a solicitation. Herein the bidders specified by sample (assuming acceptance of the sample) the item to be provided. Once accepted, it was as if the characteristics of that sample were specified in the ITB. Appellant specified products manufactured by Nicholson and no other manufacturer. Thus, Appellant was required to provide Nicholson products or, pursuant to COMAR 21.01.02.01B(39) and COMAR 21.04.01.02B,[3] the functional equivalent thereof. We recognize that because samples were required prior to bid, the State was also allowing approved samples to constitute compliance with the specifications. However, the specifications were generic - a particular product was not specified. The approved sample became the description of the functional characteristics of the specifications. Had the State specified the product, the words "or equivalent" would have appeared in the ITB; that is if the State had specified XYZ juice product, the words "or equivalent" would have appeared after XYZ so that the specification would have read "XYZ or equivalent." *See* COMAR 21.04.01.02B. We, therefore, read into the specifications the words "or equivalent" as consistent with the ITB requirements to include provision of a sample prior to submission of bids. The approval of a sample was based on functional ingredient characteristics set forth in the ITB; not on the name of the product offered as a sample. The sample, whatever its manufacturer's name, had to possess certain ingredient characteristics as set forth in the ITB, and it was approval of those characteristics, along with any other ingredient characteristic that the sample possessed, that approval of a sample accomplished. Thus, if between approval of Appellant's sample, manufactured by Nicholson, on May 27, 2003 and submission of its bid on May 28, 2003, or at any time during the contract performance, Nicholson changed its name or merged into another entity, Appellant could still provide the product as manufactured under the new name or entity as long as the ingredient characteristics of the product remained functionally equal or superior to the approved sample.

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[2]We make no actual findings concerning whether Ms. Seiler should have rejected Appellant's previous bids because such bids are not before us.

[3]COMAR 21.04.01.02B provides:

> B. Brand Name or Equal. Brand name or equal means a specification that uses one or more manufacturer's names or catalog numbers to describe the standard of quality, performance, and other characteristics needed to meet the procurement agency's requirements. Salient characteristics of the brand name item shall be set forth in the specification.

In any event, based on the record herein, we find that Appellant's bid, premised on "Nicholson or equivalent," was responsive and was not ambiguous. This is a procurement for juice bases and soft drink bladder boxes for dispensing of juices and soft drinks after the addition of water in a prescribed ratio. What was approved through the pre-bid submission of samples were the juice base and soft drink bladder box characteristics, not the name of the manufacturer. We do not find that Appellant's use of the words "or equivalent" under these circumstances is ambiguous or renders the bid nonresponsive because Appellant is still promising to provide the functional characteristics of what the ITB seeks, i.e. its bid constitutes a definite and unqualified offer to meet the material terms of the ITB.

Accordingly, we sustain the appeal.

Wherefore, it is Ordered this 8th day of September that the appeal is sustained.

Dated: September 8, 2003

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
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:

(a) the date of the order or action of which review is sought;
(b) 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
(c) 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 2356, appeal of Juice Company, Inc. under DGS Solicitations No. 001IT814396.

Dated: September 8, 2003

_____
Michael L. Carnahan
Deputy Recorder

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 363

September Term, 2004

DEPARTMENT OF GENERAL

SERVICES

v.

JUICE COMPANY, INC.

Davis,
Eyler, James R.,
Meredith,

JJ.

Opinion by Davis, J.
Dissenting Opinion by Meredith, J.

Filed: February 1, 2005

24C03007338

Appellant, the Maryland Department of General Services, solicited bids from contractors to supply concentrated juice bases, to be served in Maryland prisons. The appellee, JuiceCo, Inc., submitted a sample of "Nicholson" brand juice bases in the first step of the bidding process. Appellee's sample, as well as those of other bidders, was accepted, and appellant then solicited price bids based on the accepted sample products. Appellee submitted a price bid for "Nicholson or equivalent" juice bases, which appellant rejected as nonresponsive to its invitation for bids (IFB).

Appellee pursued an administrative appeal to the Maryland State Board of Contract Appeals (SBCA), which reversed appellant's decision. Appellant sought judicial review in the Circuit Court for Baltimore City, which affirmed the SBCA's decision. From that judgment, appellant noted this appeal and presents the following question for our review:

> May a bidder for a State procurement contract evade a solicitation requirement, authorized by State procurement law, to submit pre-bid samples of goods offered by the bidder to fulfill contract requirements?

We hold that the SBCA erred in concluding that appellee's bid was responsive to the IFB, and, therefore, we shall reverse the judgment of the circuit court.

FACTUAL BACKGROUND

I. Procurement Framework

The procurement process employed here was multi-step sealed bidding. Before recounting the facts of this case, it will be helpful to summarize the statutory and regulatory provisions governing multi-step procurement. *See also, generally,* Scott A. Livingston & Lydia B. Hoover, *Principles of Md. Procurement Law,* 29 U. Balt. L. Rev. 1 (1999).

Under Maryland Code (2001 Repl. Vol., 2003 Supp.), State Fin. & Procurement (S.F.P.), § 13-102(a), the default procurement method to be used by State agencies is the competitive sealed bid process described in S.F.P. § 13-103. The first step in sealed bidding is the issuance of an IFB, defined by S.F.P. § 11-101(j) as "any document used for soliciting bids under § 13-103." Generally, an IFB must include "the specifications of the procurement contract," S.F.P. § 13-103(a)(2)(i), and "specification" has been defined as:

> a clear and accurate description of the functional characteristics or the nature of an item to be procured. It may include a statement of any of the procurement agency's requirements and may provide for submission of samples, inspection, or testing of the item before procurement.

COMAR 21.04.01.01.

Under S.F.P. § 13-103(b)(1), "[w]henever a procurement officer determines that an initial preparation of specifications for price bids is impracticable," the IFB may,

> (i) include a request for unpriced . . . samples; and

(ii) direct bidders to submit price bids:

> . . . after the unit evaluates the . . . samples and finds that they are acceptable under the criteria set forth in the invitation for bids."

This is known as "multi-step sealed bidding," and was the procurement process used in this case. *See also* COMAR 21.05.02.17. The procuring agency may only consider price bids from bidders whose samples were found to be acceptable. S.F.P. § 13-103(b)(2).

Finally, "responsive bid" is a concept defined in the Code as a bid that:

> (1) is submitted under [S.F.P. § 13-103]; and
>
> (2) conforms in all material respects to the invitation for bids.

S.F.P. § 11-101(s); *see also* COMAR 21.01.02.01B(78). The issue in this case turns on the application of the term "material" to appellant's IFB and appellee's price bid. In previous administrative adjudications, the SBCA has held that when multi-step bidders submit otherwise conforming price bids, but fail to submit samples conforming to the IFB, their bids are materially nonresponsive and must be rejected. *E.g., H.L. Frey Corp.*, 5 MSBCA ¶ 435 (1998); *Merjo Adver. & Sales Promotions Co.*, 5 MSBCA ¶ 393 (1996).

II. The Procurement In This Case

This procurement case began when appellant issued an IFB for the procurement of "bag-in-a-box juice bases," which, from our reading of the record, are juice concentrates diluted on-site with water to make juice drinks. In conformance with the IFB, appellee and six other bidders submitted samples. Appellee submitted a sample of Nicholson brand juice base. All seven of the submitted samples were accepted by appellant, and appellant invited price bids for the approved samples.

When the price bids were opened, appellee would have been the winning low bidder, but its bid was rejected as nonresponsive. Instead of submitting a price bid on the Nicholson brand juice base that appellant had approved, appellant submitted a price bid for "Nicholson or equivalent" juice base. Appellant informed appellee that its bid was rejected, and appellee appealed to the SBCA.

At the hearing before the Board, Catherine Seiler, the State procurement officer, after testifying that appellant required, in the solicitation, that the bidders submit samples of the product it proposed to furnish before the bids were due, that the meaning (of the word "equivalent") was "that when we solicit a contract, we can't specifically state that we want a certain product. We have to state or equal or equivalent to, after the approval of the Agency or the procurement officer, we'll accept it or equal or equivalent to." Seiler was asked, "Had you allowed Juiceco to cure the defect in its bid by the removal of the words or equal, would

that have affected either the price or the quality of the goods in that solicitation?" Her response was "I was not allowed by law to allow him to correct the solicitation."

The SBCA reversed appellant's decision. The relevant portions of the SBCA's rationale are quoted here:

> COMAR 21.01.02.01B(39) . . . defines "Equivalent item" as an item of supply (in this case juice bases) that is functionally equal or superior to an item specified in a solicitation. Herein the bidders specified by sample (assuming acceptance of the sample) the item to be provided. Once accepted, it was as if the characteristics of that sample were specified in the [IFB]. [JuiceCo] specified products manufactured by Nicholson and no other manufacturer. Thus, [JuiceCo] was required to provide Nicholson products or, pursuant to COMAR 21.01.02.01B(39) and COMAR 21.04.01.02B,[1] the functional equivalent thereof. We recognize that because samples were required prior to bid, the State was also allowing approved samples to constitute compliance with the specifications. However, the specifications were generic – a particular product was not specified. The approved sample became the description of the functional characteristics of the specifications.
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> * * *
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> We . . . read into the specifications the words "or equivalent" as consistent with the [IFB] requirements to include provision of a sample prior to submission of bids. The approval of a sample was based on functional ingredient characteristics set forth in the [IFB]; not on the name of the product offered as a sample.

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[1]An internal footnote quotes COMAR 21.04.01.02B:

> B. Brand Name or Equal. Brand name or equal means a specification that uses one or more manufacturer's names or catalog numbers to describe the standard of quality, performance, and other characteristics needed to meet the procurement agency's requirements. Salient characteristics of the brand name item shall be set forth in the specification.

* * *

> In any event, based on the record herein, we find that [JuiceCo's] bid, premised on "Nicholson or equivalent," was responsive and was not ambiguous. . . . What was approved through the pre-bid submission of samples were the juice base . . . characteristics, not the name of the manufacturer. We do not find that [JuiceCo's] use of the words "or equivalent" under these circumstances is ambiguous or renders the bid nonresponsive because [JuiceCo] is still promising to provide the functional characteristics of what the [IFB] seeks, i.e. its bid constitutes a definite and unqualified offer to meet the material terms of the [IFB].

Thus, the SBCA held that there was a disparity between JuiceCo's bid and the IFB, but it further held that the disparity was not a material disparity.

DISCUSSION

I. Standard of Review

The decision under review is that of the SBCA, not the circuit court. *See, e.g., Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 57 (2002). We may only reverse the SBCA's decision if it prejudiced appellant because it,

> (i) is unconstitutional;
>
> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
>
> (iii) results from an unlawful procedure;
>
> (iv) is affected by other error of law;
>
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
>
> (vi) is arbitrary or capricious.

Md. Code (1999 Repl. Vol.), State Gov't, § 10-222(h); S.F.P. § 15-223(a)(1); *see also Md. State Police v. Warwick Supply & Equip. Co.*, 330 Md. 474, 493-94 (1993); *Dept. of Pub. Safety & Corr. Servs. v. ARA Health Servs., Inc.*, 107 Md. App. 445, 454-55 (1995), *aff'd*, 344 Md. 85 (1996). Those six specific grounds for reversal can be grouped into three levels of judicial review, depending on the amount of discretion the MSBCA is afforded for the challenged action. *See Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 528-30 (2004).

Subsections (i) through (iv) govern the SBCA's purely legal conclusions. Although we generally respect an agency's expertise in its field and extend some degree of deference to an agency's interpretations of the laws it administers, we will not hesitate to overturn its erroneous legal conclusions. *See, e.g., Gigeous v. E. Corr. Inst.*, 363 Md. 481, 496 (2001).

The SBCA has more discretion in making factual determinations; our review, therefore, under subsection (v) is more deferential to the SBCA's findings of fact. On appellate review, we limit our inquiry to whether "substantial evidence" in the record supports the SBCA's conclusions. *Spencer*, 380 Md. at 529. More precisely stated, we decide whether "a reasoning mind could have reached the same factual conclusions reached by the agency on the record before it." *Id.* Such a review also applies to mixed questions of law and fact – *i.e.*, "an application of law to a specific set of facts." *See Charles County Dep't of Soc. Servs. v. Vann*, 382 Md. 286, 296

(2004); *Travers*, 115 Md. App. at 420; Arnold Rochvarg, *Md. Admin. Law* § 4.37 (2001).[2]

Finally, we apply arbitrary or capricious review under subsection (vi) when the SBCA is neither making findings of fact nor drawing conclusions of law, but is acting in a purely discretionary capacity. *See Spencer*, 380 Md. at 529-30. This standard of review is most deferential to the SBCA. "[A]s long as an administrative agency's exercise of discretion does not violate regulations, statutes, common law principles, due process and other

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[2]Additionally, in interpreting the statutes and regulations as they are to be applied to the facts, we employ the well-known rules of statutory interpretation summarized by the Court of Appeals in *Engineering Management Services, Inc. v. Maryland State Highway Administration*, 375 Md. 211, 224-25 (2003):

> [1] The cardinal rule of construction of a statute is to ascertain and carry out the real intention of the Legislature.
>
> [2] The primary source from which we glean this intention is the language of the statute itself.
>
> [3] In construing a statute, we accord the words their ordinary and natural signification.
>
> [4] If reasonably possible, a statute is to be read so that no word, phrase, clause, or sentence is rendered surplusage or meaningless.
>
> [5] Similarly, wherever possible an interpretation should be given to statutory language which will not lead to absurd consequences.
>
> [6] Moreover, if the statute is part of a general statutory scheme or system, the sections must be read together to ascertain the true intention of the Legislature.

(bracketed numerals in *Eng'g Mgmt. Servs., Inc.*).

constitutional requirements, it is ordinarily unreviewable by the courts." *Id.* at 531 (quoting *Md. State Police v. Zeigler*, 330 Md. 540 (1993)). But, if the SBCA exercises its discretion in an arbitrary and capricious manner, we will intervene and reverse those actions. *Id.*

The issue in this case is a mixed question of law and fact. The SBCA applied the statutory and regulatory provisions[3] defining "responsive bid" to the undisputed first-level facts of this case. The SBCA concluded that, on these facts, the disparity between appellee's bid and the IFB was not a material disparity under those legal provisions. Therefore, we will not disturb the SBCA's decision if we find it to be a reasonable application of the law to the facts of this case.

II. ANALYSIS

Appellant chose to engage in a multi-phase sealed-bid procurement because, under S.F.P. § 13-103(b)(1), it determined that "an initial preparation of specifications for price bids [was] impracticable." Appellee never challenged the propriety of that determination.

Under normal multi-phase bidding procurement, appellee, having had its Nicholson sample approved, would thereafter supply only Nicholson juices if its price bid were accepted. That, clearly, is

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[3]S.F.P. § 11-101(s) and COMAR 21.01.02.01(B)(78).

the ideal process envisioned in the multi-phase bidding process, although reality may admit of exceptions.

The SBCA held that appellee's price bid did not deviate materially from the IFB because appellee would only supply juice bases that are the equivalent in substance, if not in name, to Nicholson juices. As long as appellee does, in fact, continue to supply Nicholson-equivalent juice bases, the SBCA's conclusion would be reasonable in the sense that appellee's *performance* would not be a material deviation from the IFB. That scenario, however, conflicts with the statutory framework governing multi-phase bidding.

Under the SBCA's decision, appellant would be required to duplicate the first step, *i.e.*, sample-evaluation, of the bidding process whenever appellee chooses to substitute what it considers to be an equivalent to Nicholson juices. Additionally, the SBCA's decision imposes no conditions on when appellee may substitute an alternative juice base for Nicholson, and imposes no requirement that appellee even notify appellant of the change. Finally, the flexibility appellee would enjoy from its open-ended "or equivalent" price bid would give it an advantage over other bidders who conformed their price bids to the IFB, and had committed to supply only the samples appellant had approved.

The SBCA's decision cited no applicable authority to support its conclusion. Its opinion cited COMAR 21.01.02.01B(39), defining "equivalent items," but the phrase "equivalent items" is only used

in one other COMAR section, 21.06.02.02,[4] and that section clearly has no applicability here. The opinion also refers to the definition of "brand name or equal," under COMAR 21.04.01.02B (quoted *supra* at n.1), but the specification included in the IFB that appellant actually issued was not a "brand name or equal" specification.

Similar to the lack of authority cited in the SBCA's opinion, neither party has referred us to controlling authority factually on point with this case. Our own research confirms the dearth of authority bearing on the issues at hand. That being the case, we are especially mindful of the legislature's designation of the SBCA, in the first instance, to discern the meaning and applicability of the broad statutory terms at issue here.

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[4]COMAR 21.06.02.02C provides:

C. Rejection of All Bids or Proposals.

(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 agency, with the approval of the appropriate Department head or 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:

* * *

(f) Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited.

Nevertheless, given the conflict between the decision of the SBCA and the multi-phase bidding process created by S.F.P. § 13-103(b), we hold the SBCA's decision to have been an unreasonable application of the law to these facts.[5]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED.

COSTS TO BE PAID BY APPELLEE.

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[5]The wisdom of appellant in selecting the instant case for appellate review was called into question during oral argument before the panel of this Court. Here, the "item" which is the subject of procurement is juice requisitioned for use by inmates committed to the jurisdiction of a Maryland Department of Correctional Services. Substitution of an "equivalent item" to the product manufactured by Nicholson to comply with COMAR 21.01.02.01B (39) is far less a significant matter than would be the case in substituting an item involving component parts, particularly, products involving technology and complex operation. At oral argument before the panel of this Court, we were advised that the decision to appeal the case at hand was driven by practical considerations. Appellant, it seems, believes that it is in a better position to protect the integrity of the procurement process during the bidding, rather than be compelled to redress violations later in the enforcement stage of the proceeding. The evil it seeks to prevent is the chicanery of bidders who attempt to secure a contract by reserving unto themselves the ability to substitute a less costly or inferior product during the performance of the contract.

Interestingly, appellate counsel, for both parties, conceded, at oral argument, that, had appellee simply omitted the words "or equivalent," the bid based on the sample provided could not have been deemed "nonresponsive." Although the product involved in the instant case, does not present the most graphic example of the evils appellant seeks to avoid in the procurement process, *i.e.*, unfairness to other bidders and securing a bid under false pretenses, the Board's decision, overturning the agency's determination that the bid was nonresponsive, is unsupported by any authority cited in the Board's decision and, in the proper case, could, as appellant posits, undermine the integrity of the procurement process.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 363

September Term, 2004

DEPARTMENT OF GENERAL SERVICES

v.

JUICE COMPANY, INC.

Davis,
Eyler, James R.,
Meredith,

JJ.

Dissenting Opinion by Meredith, J.

Filed: February 1, 2005

24C03007338

Although I agree with the majority's discussion as to the applicable standard of review, I do not agree with the conclusion that the SBCA's decision was "an unreasonable application of the law to these facts." I would have deferred to the SBCA's finding that the Appellee's bid (a) was not ambiguous, and (b) did in fact conform in all material respects to the invitation for bids. As the SBCA pointed out:

> [T]he specifications were generic – a particular product was not specified. The approved sample became the description of the functional characteristics of the specifications. Had the State specified the product, the words "or equivalent" would have appeared in the ITB; that is[,] if the State had specified XYZ juice product, the words "or equivalent" would have appeared after XYZ so that the specification would have read "XYZ or equivalent." *See* COMAR 21.04.0.02B. We, therefore, read into the specifications the words "or equivalent" as consistent with the ITB requirements to include provision of a sample prior to submission of bids. The approval of a sample was based on functional ingredient characteristics set forth in the ITB, not on the name of the product offered as a sample. ...
>
> ... What was approved through the pre-bid submission of samples were the juice base and soft drink bladder box characteristics, not the name of the manufacturer. ***We do not find that [JuiceCo's] use of the words "or equivalent" under these circumstances is ambiguous or renders the bid nonresponsive because [JuiceCo] is still promising to provide the functional characteristics of what the ITB seeks***, i.e.[,] ***its bid constitutes a definite and unqualified offer to meet the material terms of the ITB***. [Emphasis added.]

Because there was substantial evidence in the record to support the SBCA's finding that JuiceCo's bid was responsive to the ITB in all material respects, I would affirm the SBCA's disposition of this matter.