

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1994-15

In re: )  
 )  
Protest of Blue Bird Corp.; ) **ORDER**  
Appeal by Blue Bird Corp. )  
\_\_\_\_\_ )

This case came before the South Carolina Procurement Review Panel (Panel) for hearing from November 14, 1994, through November 16, 1994, on the appeal of Blue Bird Corporation (Blue Bird) of a decision by the Chief Procurement Officer (CPO) denying Blue Bird's protest.

Present and participating in the hearing before the Panel were Blue Bird Corporation, represented by Palmer Freeman, Esquire and Robert Knowleton, Esquire; Thomas Built Bus, represented by Elizabeth Crum, Esquire and William Simpson, Esquire; and Office of General Services represented by Delbert Singleton, Esquire. The S. C. Department of Education, represented by Greg McCarthy, Esquire, was present but did not participate in the hearing, except to request the Panel issue a verbal decision after deliberations. The Panel granted the request and issued a verbal order denying Blue Bird's protest.

#### FINDINGS OF FACT

On June 28, 1994, in conjunction with the S. C. Department of Education, General Services issued an Invitation For Bids (IFB) for "Type D Rear Engine School Buses". The procurement is for 2000 buses, consisting of 1800 seventy-eight (78) passenger buses and 200 thirty-five (35) special need passenger buses. Testimony indicated that a single order of two thousand buses is the largest bus purchase ever made in North America, and only three manufacturers are able to provide Type D rear engine buses.

Included with the IFB are questionnaires, one for the 78 passenger bus and one for the 35 passenger bus. The questionnaires are about the parts and components intended to be supplied, and must be completed and returned with the bid. Neither Thomas Built nor Blue Bird listed exceptions to the IFB specifications in its bid.

A pre-bid conference was held on July 11, 1994. Prospective bidders were given the opportunity to submit written requests for substitutions, approved equals, and clarifications. Amendment No. One was issued on July 22, 1994 to provide clarifications, answers to questions, changes to the IFB specifications and approved equals. Amendment No. Two was issued to formally change the date through which prices are required to remain firm.

Three bids were submitted in response to the IFB. The bids were opened on August 1, 1994. The following are the bid prices:

<u>Thomas Built:</u>	<u>Unit Price</u>	<u>Extended Price</u>
200 (35 capacity) passenger bus	\$54,797.00	\$ 10,959,400.00
1800 (78 capacity) passenger bus	\$51,307.00	<u>\$ 92,352,600.00</u>
Total Price Bid		\$103,312,000.00
(Record p. 247)		

<u>Blue Bird:</u>	<u>Unit Price</u>	<u>Extended Price</u>
200 (35 capacity) passenger bus	\$55,372.00	\$ 11,074,400.00
1800 (78 capacity) passenger bus	\$51,477.00	<u>\$ 92,658,600.00</u>
Total Price Bid		\$103,733,000.00
(Record p. 481)		

<u>Wayne Wheeled Vehicles:</u>		
Total Price Bid		\$107,400,000.00
(Record p.639)		

Charles Webb, with Materials Management Office of the Office of General Services, and Marshall Casey, with S. C. Department of Education, reviewed the two lowest bids and evaluated them for responsiveness. The intent to award the contract to Thomas Built Bus (Thomas Built), the lowest responsive and

responsible bidder, was issued August 4, 1994, after the two low bids were determined to be responsive. Blue Bird Corporation (Blue Bird) filed its protest of the intent to award on August 18, 1994. The CPO held a hearing for Blue Bird's protest on August 30, 31 and September 6, 1994, and issued a Decision on September 23, 1994.

The IFB includes the following statements which are relevant to the issues. The IFB specifications, under General Information, state:

it is the intent of these specifications to provide for vehicles allowing the safest operating conditions available, the greatest ease of maintenance, and the lowest possible life cycle cost. In all cases the materials and or equipment used in the construction of these vehicles shall meet or exceed the requirements of these specifications.  
(Record p. 137).

The IFB also provides for inspection of a pilot model, "designed and built to meet these specifications, for each capacity bus that is to be provided under this contract... to insure compliance with the attached specifications." (Record p. 138). The IFB specifications, under exceptions, provides, in pertinent part:

bidder must state in his/her bid that the equipment he/she proposes to furnish complies with these specifications, or list any exceptions wherein his/her equipment fails to meet specifications. The listing of exceptions, if any, is mandatory, but will not be construed as waiving any requirements of specifications. Exceptions found in the review of the bid and not listed may be cause for rejection of bid.  
(Record p. 137)

The IFB Instructions To Bidders state "by submission of a bid, you are guaranteeing that all goods and services meet the requirements of the solicitation during the contract period." (Record p.109).

The IFB Special Provisions, under bidding instructions, state that "bid requirements on the equipment listed are not intended to be restrictive to potential bidders, but indicate the required features for satisfactory performance. The state will determine if minor deviations from these features are acceptable." (Record p.114). The IFB General Provisions, under order of precedence, provide that:

in the event of inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order (a) the bidding schedule, (b) general provisions and general conditions, (c) instruction to bidders, (d) special provisions or special conditions of the contract whether incorporated by reference or otherwise; and (e) the specifications. (Record p.110)

The IFB General Provisions provide that "the state reserves the right to waive any instruction to bidders, general or special provision, general or special condition, or specifications deviation in accordance with the authority provided in Regulation 19-445.2080."<sup>1</sup> (Record p. 110).

The Panel received evidence in the form of testimony at the Panel hearing from the following witnesses. Greg McCalmon, Southern Regional Salesman for Blue Bird, testified that it is his responsibility to prepare state bids, and he put together the information and coordinated the pricing in Blue Bird's bid for the buses. Mr. McCalmon also reviewed Thomas Built's bid after the intent to award was issued. Charles Webb is a procurement officer with the Materials Management Office of the Office of General Services, for whom he has worked seventeen years. Mr. Webb issued the IFB, after putting the documents together from specifications received from the S. C. Department of Education. Mr. Webb testified that he has general knowledge of school buses but not

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<sup>1</sup> Budget and Control Board Regulation 19-445.2080 is codified at S. C. Code Ann. Section 11-35-1520(13) (1993 Supp.).

specific knowledge. In reviewing the bids for responsiveness, Mr. Webb testified that he sometimes relied on Mr. Casey's more specific knowledge of school buses. Marshall Casey, who has nineteen years experience with maintenance on school buses at the S. C. Department of Education, was certified as an expert in school bus maintenance on South Carolina school buses. Mr. Casey testified that the IFB specifications required specific brands or models in order to utilize parts the S. C. Department of Education already has in stock, and to avoid adding new parts and part numbers to the current inventory, where possible. Paul Whatley, a distributor for Blue Bird, assisted in putting together Blue Bird's bid and also reviewed Thomas Built's bid after the intent to award was issued. Roger Dean Harris, M.E., P.E., a mechanical and professional engineer, whose credentials are detailed in his resume, was certified as a steel coatings expert. (Record p. 762-764). Mr. Harris testified that he did not have experience with "Galvalume", or aluminum zinc alloy. Jimmy Culbreath, Assistant State Purchasing Officer, with eighteen years in state procurement, supervised the procurement of the school buses. Ken Dodson, the managing engineer in body design for Thomas Built, although not a professional engineer, oversees the body designs, and assures the design meets local, state and federal requirements. Herbert E. Townsend, Ph.D., whose credentials are detailed in his Biography and list of Publications and Patents, was certified as an expert corrosion specialist as well as an expert in the development of corrosion resistant coated steel. (Appellee Exhibit # 3).

#### **CONCLUSIONS OF LAW**

The Panel finds that based on provisions of the IFB and testimony, the listing of certain specified equipment in the IFB either indicates what features the listed equipment must have in order to perform satisfactorily or indicates a minimum standard to be met. Components which exceed the minimum standard

or features listed, clearly are within the IFB requirements and the Sate has the authority to waive any deviations from the exact requirements of the IFB so long as the component part bid meets or exceeds the bid specifications.

Mr. Casey testified that Thomas Built took no exceptions to the bid and under the IFB it must meet or exceed the IFB requirements, which it agreed to do. Also, the pilot inspection will verify that all specifications are met. The Panel acknowledges that the IFB requires a bidder to agree that its product meets or exceeds the bid requirements as detailed in the IFB. However, the broad statement by a bidder that it will meet the specifications does not necessarily cover any specific deficiencies in its response to the IFB. Each response in question must be reviewed individually. The pilot inspection required by this IFB does supply an added step to assure compliance with the IFB requirements, which is the State's goal in evaluating a bid for nonresponsiveness.

#### Requests For Substitutions

Mr. Casey testified that Thomas Built submitted several Requests For Substitutions, Approved Equals, and Clarifications which were not approved nor denied, because several of the requests were for items that meet or exceed the IFB specifications and therefore do not need approval. For example, Thomas Built submitted a Request For Substitutions, Approved Equals, and Clarifications for headlamps, requesting the use of the 5054 model Halogen lamp, which is "used for heavy truck application" and "provides far greater visibility at night". (Record p. 434). The Request is not marked approved nor rejected. The Panel believes it is better practice that written requests for substitution, whether considered acceptable as meeting or exceeding the requirements and therefore not in need of approval, be accepted, rejected or any explanation be made in writing. The State's failure to respond to some of Thomas Built's Requests did

not prejudice Blue Bird or effect the outcome of the award. The Panel further finds that the acceptance or rejection of any of Thomas Built's Requests For Substitutions, Approved Equals, and Clarifications does not effect the issues of nonresponsiveness raised by Blue Bird.

Eighteen issues of nonresponsiveness are raised in Blue Bird's letter of protest. Each issue is discussed individually below, although several issues are clearly interrelated. Prior to the taking of testimony, the Panel heard motions from the parties.

#### Motion to Dismiss

Thomas Built filed a Motion to Dismiss all issues alleging ambiguity as untimely. Thomas Built argues that Blue Bird's allegations of ambiguity relate to the specifications and therefore must have been filed within fifteen days of the issuance of the IFB to be timely filed. The IFB was issued June 28, 1994, and Blue Bird filed its protest on August 18, 1994, clearly beyond fifteen days after the issuance of the IFB. S. C. Code Ann. Section 11-35-4210(1) (1993 Supp.) requires

any prospective bidder... who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) below within fifteen days of the date of issuance of the Invitation For Bids... or any amendment thereto, if the amendment is at issue.

The Panel finds that Blue Bird's allegations as to the ambiguity of the specifications are untimely filed under S. C. Code Ann. Section 11-35-4210(1) (1993 Supp.).

#### Issue One: Alternator

The IFB provides that "the electric power source shall be a heavy-duty bus type alternator, Leece-Neville 2800 JB with 130 ampere output minimum."

(Record p. 143). Amendment No. One to the IFB amends the specification to provide for a Leece Neville 2670J. (Record p. 99). In its questionnaire, Thomas Built indicates it will provide a Leece Neville 2700J with a rated capacity of 130 amps. Blue Bird argues that Thomas Built is nonresponsive for failure to provide the exact alternator specified in the bid documents. Thomas Built argues that the alternator it bid exceeds the requirement of the bid documents, and therefore meets the specification. Mr. Casey testified that the Leece Neville 2700J is a heavier, longer lasting version of the Leece Neville 2670J, and the parts are interchangeable. The Panel finds that the alternator bid by Thomas Built meets or exceeds the IFB specification, as amended, and Thomas Built is responsive.

Any failure by Thomas Built to conform exactly to the IFB specification is an immaterial variation from the exact requirements of the IFB under S. C. Code Section 11-35- 1520(13) (1993 Supp.), which provides:

a minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing.

Because Thomas Built's bid exceeds the requirements of the specification, there is no deficiency to cure, and the minor variation is clearly to the state's advantage. Neither does the use of the Leece-Neville 2700J alternator instead of the 2670J alternator effect the performance of the contract or prejudice other

bidders. Mr. Webb's notes acknowledge minor deviations which were waived or found to exceed the requirements of the specifications.

#### Issue Two: Floor Plate

Blue Bird contends the "floor type material [Thomas Built] proposed to use was not the zinc-coated steel required by the bid specifications." The IFB provides that the "floor shall be prime commercial quality, zinc coated steel of at least 14 gauge." (Record p. 159). Thomas Built responded in its questionnaire that it will provide 14 gauge "Galvalume" as the type material for the floor.<sup>2</sup> (Record p. 124). Blue Bird argues that Galvalume is not a zinc coated steel and does not meet the rust proofing requirements of the specifications. The specification for rust proofing requires "all sheet metal and body frame parts shall be made of mill applied zinc coated steel having a minimum of 3/4 ounce and 1 1/4 ounces of zinc per square foot respectively." (Record p. 177). Amendment No. One adds the words "(12 gauge or thinner)" after body frame parts. (Record p. 103). Both parties called expert witnesses to address the floor plate and rust proofing issues.

Blue Bird contends that the specification for floor plates requires a zinc coated steel, which does not include Galvalume, an aluminum-zinc alloy, but is only galvanized steel. Blue Bird also argues that since no weight is specified, a bidder must apply the weight requirements in the rust proofing specification. Roger Dean Harris, M.E., P.E., an expert in steel coating, testified that the use of "weight per square foot" is common, but the weights used in the IFB specifications are not common. Mr. Harris testified that zinc coated steel is steel sheet coated in almost 100% zinc by two methods: electroplated (which is not

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<sup>2</sup> Galvalume is a trade name for aluminum-zinc alloy, coated by the hot dip process, which was developed by Bethlehem Steel, who has sold its proprietary rights and is now only licenced to sell Galvalume.

typically mill applied) and hot dipped. The American Society for Testing Materials (ASTM) provides standards for the thickness of coating on steel. ASTM Designation: A 525-93, titled Standard Specification for General Requirements for Steel Sheet, Zinc-Coated (Galvanized) by the Hot-Dip Process indicates Coating Designations for zinc from G01 to G360. (Appellee Exhibit #7). The Coating Designations also have correlating numbers titled Previous Coating Class, such as 1.25 corresponding with G90. (Appellee Exhibit #1). Mr. Harris testified that G90 now equals point 90 (.90) ounces per square foot. The correlating weight for the IFB specifications of 3/4 and 1 1/4 ounces are not on the ASTM chart, but the 3/4 ounce requirement would correlate to a point 75 (.75) if it existed, and 1 1/4 ounce would correlate to 1.25, if it existed. To meet the minimum weight requirements of the IFB, a bidder would use standard G90 and G140 coating designations, which are higher than the IFB requirements. Mr. Harris also testified that Galvalume is not a zinc coated steel, but an aluminum-zinc alloy coated steel. Mr. Harris admits that pure 100% zinc coating does not exist, but steel zinc-coated (galvanized) by the hot dip process is obtained by dipping steel in a molten vat of 98% pure zinc. Mr. Harris also discussed the different properties of zinc coating and aluminum coating, both used for corrosion control.

Thomas Built argues that the floor plate and rust proofing specifications are separate and therefore the floor plate specification requires zinc coating, which includes Galvalume, with no specific weight requirement. Mr. Webb testified that Galvalume contains zinc and therefore meets the requirement of zinc coated steel in the floor plate specification. The specification does not specify a thickness of coating. Mr. Casey also testified that the floor plate had to be steel with some zinc coating, with no specific amount required. Mr. Casey believes that Galvalume, an aluminum zinc alloy, is a coating containing zinc

and therefore responsive to the floor plate specification. Herbert Townsend, Ph.D., an expert in development of corrosion resistant coated steel and a corrosion specialist, testified that zinc coated steel is steel that is coated with zinc, which includes Galvalume. Galvalume is an aluminum-zinc alloy, which consists of 55% aluminum, 43.4% zinc and 1.6% silicone. Dr. Townsend testified that the ASTM Designation A 792-93a titled Standard Specification for Steel Sheet, 55% Aluminum-Zinc Alloy-Coated by the Hot-Dip Process, is for Galvalume (AZ50), and, as far as he is aware, Galvalume is the only available aluminum-zinc alloy steel coating. (Appellee Exhibit # 8). Dr. Townsend testified that galvanized steel, steel coated with zinc and a small percent of aluminum or iron, would also be zinc coated steel. Dr. Townsend further testified that based on his experience, Galvalume has better corrosive abilities in, for instance an AZ50 (Galvalume) coating versus a G90 (galvanized) coating, which have equal thickness of coating. Dr. Townsend discussed the three mechanisms by which zinc coating protects steel, and stated that both galvanized and Galvalume coated steel protects by all three mechanisms. However, Dr. Townsend states Galvalume has a superior ability to protect because it is more durable, and tests comparing Galvalume to galvanized confirm that Galvalume will last at least twice as long. Therefore, at least twice the coating of G90, which would be G180, would be required to equal the protection supplied by AZ50 Galvalume. Galvalume meets or exceeds the rust proofing requirements of the IFB.

The Panel agrees with Thomas Built's contention. The Panel finds that the specification for zinc coated steel in the floor plate does not specify galvanized, and therefore Galvalume, which contains zinc and is a steel coating, is responsive to the IFB. Furthermore, the Panel finds that the rust proofing specification is general, while the floor plate requirement is more specific. The Panel finds that Thomas Built is responsive to the specific floor plate

requirements of zinc coating with no weight requirement, and Galvalume meets or exceeds the IFB specifications.

### Issue Three: Rust Proofing

The rust proofing specification requires "all sheet metal and body frame parts shall be made of mill applied zinc coated steel having a minimum of 3/4 ounce and 1 1/4 ounces of zinc per square foot respectively." (Record p. 177). Thomas Built responded in its questionnaire that it would provide "industry standard" ounces per square foot for rust proofing sheet metal and frame members. (Record p.127). Mr. McCalmon testified that zinc coated steel at ASTM level G-60 galvanized coating is most typically used by Blue Bird, which supplies 40% of the bus market. However, Mr. Dodson testified that there is no bus industry standard for use of zinc coated steel, although G60 and G90 are often used. A steel industry standard for the measure of zinc coating on steel has been established by ASTM. Dr. Townsend testified that ASTM standards are voluntary compliance standards. Testimony corroborates that the ASTM standards are widely accepted in the bus industry.

The bid specification is presented in terms of "ounces per square foot" which is how the standards were expressed prior to the "G" ratings established by the ASTM. The bid specifications were not protested. Mr. Whatley testified that he spoke with Mr. Casey about the "G" ratings of the ASTM now being the standard prior to bid opening on July 28, 1994. Mr. Casey informed Mr. Whatley the bid specification is the standard that has been required in the past, and would not be changed. Blue Bird chose not to take an exception in its bid or protest the specification on the rust proofing. The 3/4 ounce and 1 1/4 ounces does not relate directly to a "G" rating on the ASTM table. However, the bid specification is a minimum, therefore the G90 rating, although higher than the minimum weight required, is the steel industry ASTM standard that meets or

exceeds the 3/4 ounce requirement, while G140 meets or exceeds the 1 1/4 ounce requirement. G90 and G140 are standards in the steel industry. Thomas Built's response of "industry standard" is sufficient to indicate that Thomas Built proposes to use the steel industry standard for zinc coating which most closely meets the minimum specification requirements stated in terms of ounces per square foot. The Panel notes that it is always better practice for bidders to provide specific information to avoid possible determinations of nonresponsiveness. The Panel finds that Thomas Built's response for rust proofing is responsive.

#### Issue Four: Seat Spacing and Capacity

Blue Bird argues that "Thomas' bid was nonresponsive because the buses it proposed to supply do not meet the minimum seat spacing and capacity required by the bid specifications." (Record p. 10). The IFB provides that "capacity will be based on 27 inch forward facing seat centers (measured at seat level), overall width of at least 96 inches, center aisle width of 12 inches, and 39 inch seats." (Record p. 151). The questionnaire requires no response for the capacity specification. Mr. Casey testified that the reference to 27 inch seat centers referred to an old requirement which was mistakenly included in the IFB. If inclusion of a reference to 27 inch seat centers in the capacity specification caused confusion in determining the capacity or seat spacing, bidders had an opportunity to request clarification prior to bidding. The intent of the specification for capacity is to determine the overall size of the "box", and not to indicate specific spacing for the seats. Corroborating testimony referred to the capacity as determinative of the total size of the "box". The plain meaning of capacity from the American Heritage Dictionary (2nd ed. 1985), is "the ability to receive, hold, or absorb; a measure of this ability; volume". Capacity in reference to the IFB is a bus capable of holding 78 or 35 passengers.

The IFB specifically addresses passenger seat spacing where it provides, "seats shall be forward facing and shall be 39" wide and a minimum of 15" deep and shall be arranged in rows of two. Knee room shall be not less than 24" (measured from center of back rest to point of contact with front barrier)." (Record p. 177). The seat spacing specification requires very specific dimensions for the seats and spacing, although uniform spacing between seats is not required. Thomas Built's response to the questionnaire for passenger seat spacing states that it "varies". (Record p. 128). Testimony indicates that seat spacing may vary because it may be effected by requirements of the Federal Motor Vehicle Safety Standards (FMVSS) for School Bus Construction, which are required to be complied with under the IFB. (Record p.137). Thomas Built provided a diagram of the bus interior which shows the proposed seat spacing. (Record p. 302). Even though the diagram indicates "pilot program - seat spacing does not meet South Carolina Minimum Requirement", after review of the diagram, the knee room indicated, while varied, is not less than 24 inches, as required by the seat spacing specification. Mr. Dodson explained that the computer mistakenly generated the note on the diagram based on previous seating specifications, and the statement is incorrect, as the diagram itself shows. The State properly waived the incorrect statement as a minor informality. Blue Bird has failed to prove by a preponderance of the evidence that Thomas Built is nonresponsive to the capacity and seat spacing requirements. The Panel finds that Thomas Built's bid is responsive to the separate requirements for the capacity specification and the seat spacing specification.

#### Issue Five: Bid Bond

Blue Bird protests that Thomas Built is nonresponsive "because it did not submit an original bid bond with its bid, and because the form of the bond that was submitted is neither facially valid nor sufficient to meet the bid surety

requirement." (Record p. 10). The IFB states "each bidder must submit with his bid a bid surety in the form of a bid bond with good and sufficient surety or sureties company licensed in South Carolina, or a certified check." (Record p. 115). Thomas Built submit a bid bond with its bid. The bid bond submitted by Thomas Built states "provided, however, neither Principal nor Surety shall be bound hereunder unless Obligee shall, prior to the execution of the contract, furnish evidence satisfactory to the Surety of the Obligee's ability to make payment to the Principal in accordance with the terms of the contract." (Record p. 300). Blue Bird argues that the language in the bid bond places limitations, which makes Thomas Built nonresponsive. The alleged limitation of the language is a moot point as an act of the legislature provides evidence of the State's ability to make payment. The Panel finds that Blue Bird failed to prove that Thomas Built's bid bond is defective on its face.

Blue Bird contends submitting a copy, rather than the original, bid bond is nonresponsive. It is undisputed that Thomas Built did not submit its original bid bond. The bid specification does not address the issue of submitting an original bid bond or a copy. Thomas Built argues that the Division of General Services' policy is to accept copies of bid bonds, which is reflected in it's Manual For Planning and Execution of State Permanent Improvements. Although the purchase of buses may not normally be considered a permanent improvement, Act R620 provides for the issuance of capital improvement bonds to fund the "purchase of new school buses" by the Department of Education. (Appellee Exhibit #1). Thomas Built submits that S.C. Code Ann. Section 11-11-430(A) concerning state bonds provides that "such proceeds must be used only for capital improvements." Therefore, the state permanent improvements manual is relevant to the issue of bid security in this case. The Manual For Planning and Execution of State Permanent Improvements, under Bid Security, states "copies

or faxed bid bonds and Powers of Attorney are acceptable." (Appellee Exhibit #1). The Panel finds no persuasive argument for rejecting the copy of Thomas Built's bid bond. The Panel finds that the copy of Thomas Built's bid bond is responsive to the IFB requirements.

S. C. Code Ann. Section 11-35-1410(6) (1993 Supp.) defines a responsible bidder as a bidder "who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." Blue Bird's original protest also alleges that Thomas Built "should not be considered a responsible bidder", because of the alleged nonresponsiveness of the bid bond. (Record p. 10). Blue Bird's appeal letter does not raise the issue of responsibility, but the Panel addresses the issue. The Panel finds that no evidence has been presented to show Thomas Built is not a responsible bidder.

#### Issue Six: Heater and Defroster

Blue Bird argues that Thomas Built's proposed heater/defroster system does not comply with the bid specifications. The IFB specification for heater and defroster requires:

"a heavy duty, hot water type, heater/defroster system having a minimum rated capacity of 180,000 BTU's per hour and a minimum of two (2) separate heater cores shall be provided (1) located at the front of the bus in the driver's area and (1) located in the rear portion of the bus."  
(Record p. 161)

Thomas Built's response on the questionnaire under heater/defroster indicates "rated capacity 101,000 BTU". Thomas Built contends the questionnaire response is for the front heater/defroster unit. Thomas Built included additional information, as required by the specifications, on the rear heater, which has a BTU rating of 84,000. (Record p. 304). Together the front and rear units that

comprise the heater/defroster system, have a BTU rating of 185,000, which exceeds the specification requirement of 180,000 BTU. Mr. Casey testified that the questionnaire does not provide a space for information on the rear heater, as the heater/defroster designation is for the front unit. All information was provided by Thomas Built in its questionnaire response and the additional diagrams and specifications required by the IFB. (Record p. 85). Mr. Casey testified that it was clear to him that Thomas Built's questionnaire response was for the front heater/defroster unit only and the rear heater unit was detailed in the diagrams required by the heater and defroster specification. The Panel finds that Thomas Built's bid meets or exceeds the heater/defroster specification requirement and is responsive.

Thomas Built submitted a diagram of the heater/defroster system, as required by the IFB, which shows an optional third heater. (Record p. 308). Blue Bird argues that the diagram does not show the heater/defroster system that will be in the bus provided for South Carolina, and the addition of options makes Thomas Built's bid nonresponsive. Mr. Casey testified that the diagram is a typical drawing which shows the plumbing for the heating system. The specification requires a "minimum" of two heater cores, which Thomas Built's diagram shows. The inclusion of an optional third heater does not render Thomas Built nonresponsive to the specification. The Panel would caution vendors that optional information could cause confusion and be a grounds for rejection of a bid as nonresponsive, although that is not the case with this diagram. Thomas Built's diagram does not attempt to modify the bid requirements, but instead includes one heater at the front of the bus and one heater at the rear of the bus, as required. The Panel finds that Thomas Built is responsive to the heater/defroster specification.

### Issue Seven: Booster Pump

Blue Bird protests that "the booster pump [Thomas Built] proposed to use under the heater and defroster questionnaire was rated at below the minimum requirement under the bid specifications." (Record p. 10). The IFB requires "all heater systems shall be equipped with an auxiliary booster pump to insure adequate coolant flow to the heater/defroster system. Pump shall be rated for a minimum of ten (10) GPM at 3.0 PSI." (Record p. 162). Thomas Built responded on its questionnaire that it will provide a pump with a rating of 8 GPM. (Record p. 125). The questionnaire does not request information on the PSI, so responsiveness can not be determined from the response solicited by the questionnaire. Even if Thomas Built had not mistakenly put 8 GPM, its responsiveness cannot be determined from only the questionnaire response. Mr. Casey testified that the PSI was also needed to determine if the booster pump would perform at the required standards. Thomas Built submitted a diagram of the heater/defroster system, which included information on the components of the system. Mr. Casey testified that he recognized that the diagram submitted by Thomas Built has a part number for the booster pump proposed to be used, so he anonymously called the parts department at Thomas Built to cross reference the Thomas Built part number and get the specifications on the pump, which are 10 GPM at 3 PSI. Mr. Casey also testified that cross referencing parts and gaining information about parts from a manufacturer's parts department are common, every day activities. Mr. Casey clarified that the Thomas Built part number supplied on the diagram correlates to a manufacturer's booster pump with the required 10 GPM at 3 PSI.<sup>3</sup> The Panel

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<sup>3</sup> The Panel notes that S. C. Code Ann. Section 11-35-1530(8) (1993 Supp.) allows for clarification of proposals. This section only applies to competitive sealed proposals, and does not apply to a bid, as in this case. The Panel mentions this section to point out the legislative intent to afford more flexibility in the procurement process, which is clear from the changes made to the Consolidated Procurement Code in 1993.

finds that Mr. Casey's anonymous call for clarification properly verified that the part number for the booster pump is responsive to the booster pump specification. The Panel finds that the booster pump proposed to be used by Thomas Built meets the specifications of the IFB and Thomas Built is responsive to the IFB. The Panel recognizes that this procurement is unique in many aspects. The purchase of school buses in the amount proposed and the funding provided for the purchase are unusual. The vendors able to respond and comply with the RFP is limited, providing limited competition. Because of these distinguishing features, the Panel limits its findings to the facts of this case.

#### Issue Eight: General Warranty

Blue Bird contends Thomas Built did not provide a general warranty as required by the bid specification. The IFB states "bidders will be required to furnish with their bids a warranty covering all materials and workmanship used in the construction of these vehicles for a minimum of five (5) years, unlimited mileage." (Record p. 141). Thomas Built's questionnaire indicates "warranty from in-service date 60 months." The questionnaire does not include a space to indicate the unlimited mileage requirement. The specification does not state that anything beyond the questionnaire response is required to indicate compliance with the general warranty specification. The IFB does contain the general statement of compliance that "by submission of a bid, you are guaranteeing that all goods and services meet the requirements of the solicitation during the contract period." (Record p.109). However, the IFB does not require a specific form of warranty to indicate the warranty requirement is met, other than response to the questionnaire and submission of a bid. Thomas Built's response to the questionnaire meets the warranty specification as required by the State.

The Panel finds that Thomas Built is responsive to the general warranty specification.

#### Issue Nine: Brakes and Driveline Warranty

Blue Bird contends that some of Thomas Built's warranty certifications do not comply with the bid requirements. More specifically, Blue Bird states that Thomas Built "did not certify that it would fulfill the missing conditions of the warranties for the brakes, the driveline, and the batteries." (Record p. 6). Thomas Built's certification of warranty for the driveline indicates "a period of 24 months or 50,000 miles whichever comes first from the date the product is placed in service." (Record p. 222). Thomas Built attached a page indicating it will cover the remaining three years of the required 60 months. Blue Bird argues the warranty is defective because the entire first two years may not be covered if 50,000 miles is reached prior to the 24th month, and Thomas Built has not indicated it will cover that time period. A similar defect is alleged with Thomas Built's warranty certification for the brakes. (Record p. 219). Thomas Built's certification from the component's manufacturer for the batteries provides for 36 months "as per battery schedule", which Blue Bird claims is similarly defective. (Record p. 215).

The IFB requires "all components of the braking systems (service, emergency, and parking); except for linings shall be fully warranted for a minimum of 60 months. Certification required. See Warranty Section." (Record p. 146). The IFB also requires certification for the driveline and battery warranties.<sup>4</sup> (Record p. 153 & 145). The Warranty Section referred to is the general warranty which provides, in pertinent part, that "components carrying

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<sup>4</sup> Blue Bird did not include the battery warranty issue in its initial letter of protest, and therefore it is not properly before the Panel. However, the Panel addresses the issue to avoid possible duplicate hearings should this issue be appealed and remanded.

special warranties other than those supported by the bus manufacturer shall require certification with the bid." [Emphasis Added] (Record p. 141). The special warranties are in addition to the general warranty given by the bus manufacturer, which is the bidder. Where special warranties are required and the component manufacturer covers part of the warranty, in addition to the bus manufacturer's warranty, certification from the component manufacturer is required. Certification is required to provide evidence of the portion of the warranty covered by the component manufacturers. The IFB does not require certification by the bus manufacturer, as his obligation is established by the specification. Mr. Casey's testimony indicates that certification from the components manufacturer is required to expedite repairs by allowing direct contact with the components manufacturer in case repair or replacement is needed. The bidder remains obligated to cover any aspect of the warranties not provided by the component manufacturers. Thomas Built's questionnaire, under "Brakes" and "Driveline", indicates "Warranty Period 60 months". (Record p. 122-123). Thomas Built's questionnaire, under "Batteries", indicates "Warranty 36 Months", as required. (Record p. 122). To the extent that component manufacturers have not certified a warranty for a component for the period required or to the full extent required, Thomas Built provides the remaining warranty requirement. The Panel finds that Thomas Built meets the warranty requirements and therefore is responsive.

#### Issue Ten: Axles and Paint Warranty

Blue Bird presents similar arguments for Thomas Built's nonresponsiveness to the Axles and Paint Warranty. The IFB requires "the warranty for all rear axle and differential components will be a minimum of 60 months. Certification required. See Warranty Section." (Record p. 145). Thomas Built's questionnaire, under "Axles", indicates "Warranty 60 months". (Record p.

121). For certification, Thomas Built provides a letter from the manufacturer which states, "Eaton agrees to warrant its drive axle products against defects in material and workmanship for five (5) years/ Unlimited miles." (Record p. 217). The letter continues with limitations on the warranty, which Blue Bird contends are not allowed under the IFB, and therefore Thomas Built is nonresponsive. Mr. Casey testified that the manufacturer's certification did not have to be unlimited, because the bidder is responsible for any aspect of the components manufacturer's warranty that is not for the full five years, unlimited miles required. A bus manufacturer cannot force a components manufacturer to give a five year, unlimited mileage warranty, and therefore must accept the warranty given by the components manufacturer and cover any remaining warranty requirements of the specifications. The Panel finds that Thomas Built is responsive to the warranty requirements for Axles.

Paint specifications did not require certification. However, Thomas Built includes a standard brochure in its bid, as required, which indicates a warranty below the specification standards. Since the brochure was required for purposes other than the warranty on the paint, the information on paint warranty in the brochure may be disregarded. The brochure does not change Thomas Built's obligation under the General Warranty specification. The Panel finds that paint is warranted under the general warranty, to which Thomas Built is responsive.

#### Issue Eleven: Transmission Lines

Blue Bird contends that Thomas Built is nonresponsive because it did not specify that it is using the make and model required in the IFB specification for transmission lines. The IFB requires "the flexible transmission cooling lines shall be Aeroquip or Stratoflex." (Record p. 184). Amendment No. One adds the requirement "...cooling lines meeting SAE 100R5 standards shall be...". (Record

p. 104). Thomas Built's response on the questionnaire indicates "Transmission Cooling Line, Make And Model SAE 100R5". (Record p. 127). Mr. Casey testified that the SAE standard was added to assure the quality of the hose. Thomas Built's response indicates the quality of the hose, and only two manufacturers models are allowed under the specification. Thomas Built's failure to provide a manufacturer's name along with the response it supplied, does not change its obligation to provide one of the two named manufacturer's products. Thomas Built's failure to indicate which of the two manufacturers proposed is not a material deviation from the IFB specification, since Thomas Built indicated the performance standard would be met. The Panel finds that the transmission cooling lines bid by Thomas Built meet the IFB specification, as amended, and Thomas Built is responsive. Any failure by Thomas Built to conform exactly to the IFB specification is an immaterial variation from the exact requirements of the IFB under S. C. Code Ann. Section 11-35-1520(13) (1993 Supp.) and is properly waived by the State. Thomas Built's bid of the standard SAE 100R5 for transmission cooling lines without indicating which of the two required manufacturers it intended to use, does not effect the performance of the contract or prejudice other bidders.

#### Issue Twelve: Wheelchair Lift

The IFB requires electric-hydraulic lifts on all special needs buses which require that the "pump shall be wired through the ignition so that lift will not operate unless ignition switch is on." (Record p. 191). Thomas Built's questionnaire for the special needs buses indicates that "YES" the lift will operate electrically with ignition switch off. (Record p. 280). Thomas Built indicates the "YES" response to the questionnaire concerning the lift's operation in relation to the ignition switch is a clerical error. Under "wiring", Thomas Built indicates "NO" on it's questionnaire to the question "with key off, can any

electrical accessory, except emergency flashers, be operated." (Record p. 279). The lift is an electrical accessory. Since no electrical accessories but the emergency flasher can be operated unless the switch is on, the lift also cannot be operated unless the switch is on. Since Thomas Built took no exceptions to the bid specifications, and the "YES" response would be an exception, if correct, and the response under wiring indicated a correct response, it is reasonable to determine that the "YES" response is a clerical error. The State properly waived Thomas Built's clerical error as a minor irregularity which does not effect the performance of the contract or prejudice other bidders.

#### Issue Thirteen: Batteries

The IFB requires "all batteries shall be of the same manufacturer...(Delco, Fleetrite, or approved equal)". (Record p. 145). Thomas Built's questionnaire response for batteries manufacturer copies the specification by stating "Delco, Fleetright or approved equal". (Record p. 122). No equals were approved, so either of the two manufacturers named is acceptable. Thomas Built's response indicates it will supply batteries from one of the two specified manufacturers. The Panel finds that Thomas Built is responsive to the battery specification.

#### Issue Fourteen: Brake Drums

Blue Bird did not include this original protest item in its appeal letter and it is therefore not raised for the Panel's determination. However, the Panel addresses the issue to avoid possible duplicate hearings should the issue be appealed and remanded. The IFB specification states that "all brake drums shall be outboard mounted to facilitate brake maintenance without disturbing wheel bearings and seals. Approved brands for brake drums are Webb or Gunite." (Record p. 147). The questionnaire does not specifically list brake drums or supply a place in which to specify which brand proposed to be supplied. The

Panel finds that Blue Bird failed to prove by a preponderance of the evidence that Thomas Built is nonresponsive to the brake drum specification.

#### Issue Fifteen: Engine Compartment

Blue Bird did not include this original protest item in its appeal letter and it is therefore, not raised for the Panel's determination. However, the Panel addresses the issue to avoid possible duplicate hearings should this issue be appealed and remanded. Blue Bird's original protest indicates that Thomas Built is nonresponsive because its questionnaire response does not contain information on the circuit breaker amperage. The IFB specification requires a list of five specific items to be included on the control panel in the engine compartment. (Record p.158). Amendment No. One adds a minimum amperage to one of the items, the circuit breaker. (Record p. 101). The Thomas Built bid includes chassis specifications which indicate a "150 amp main body circuit breaker" in the standard panel of the engine compartment. (Record p. 295). The questionnaire, under engine compartment simply states "Control Panel, List Items". (Record p. 124). Thomas Built did not list word for word the items as listed in the specification, but summarized each of the items listed. Thomas Built listed the circuit breaker, but did not specify the circuit breaker amperage in the list. The questionnaire did not require the specific language of the specification be repeated, nor that the amperage be listed. Thomas Built is responsive to the Engine Compartment specifications of the IFB, as amended.

#### Issue Sixteen: Headlamps

The IFB requires "(2) Halogen sealed beam type headlights (Wagner # H-6054 or approved equal)". (Record p. 169). Model numbers, no matter the make, are standard in the headlight industry. The 6054 model is for automobiles, and the 5054 is for trucks. Thomas Built's questionnaire indicates "Hologen Wagner 5054" headlamps. Blue Bird argues that Thomas Built did not

bid what is specified and Wagner does not make a #5054, and therefore Thomas Built is nonresponsive. Mr. Casey testified that the 5054 number indicates a longer lasting lamp, which exceeds the IFB requirements, and the type of headlamps are interchangeable, so he found the response exceeds the specification requirements. Mr. Casey also testified that the specification for H6054 designates a basic type of headlamp, with the H indicating a Hologen lamp and the 6054 indicating a rectangular headlamp. The H5054, a heavy duty truck headlamp providing longer life and higher visibility, exceeds the requirements of the IFB required H6054.

Undisputed testimony establishes that Wagner does not make a model H6054. Mr. Casey testified that the purpose in including specific manufacturers or models for certain specifications is to allow the use of parts already in stock, and to avoid adding new part numbers to inventory. This reasoning would not apply to headlamps, which do not require parts for repair. Also, the IFB states that "bid requirements on the equipment listed are not intended to be restrictive to potential bidders, but indicate the required features for satisfactory performance. The state will determine if minor deviations from these features are acceptable." (Record p.114). The Wagner designation of manufacturer is not an essential requirement of the IFB. The type of headlamp bid, model #H5054 exceeds the requirements of the specifications, which is to the State's advantage. Any failure by Thomas Built to conform exactly to the IFB specification is an minor irregularity under S. C. Code Ann. Section 11-35-1520(13) (1993 Supp.). Because Thomas Built's bid exceeds the requirements of the specification, there is no deficiency to cure, and the minor variation is clearly to the state's advantage. Neither does the use of the Model H5054 headlamp instead of the H6054 headlamp, or the use of a different brand, effect the performance of the contract or prejudice other bidders.

Issue Seventeen: Lamp & Signal/Flasher

Thomas Built admits that it mistakenly failed to mark "YES" under "Flasher Mechanism, Operation meets Specifications" for the Lamps and Signals on the questionnaire for the 78 passenger bus. The 35 passenger bus questionnaire is identical and does indicate "YES" in the appropriate place. (Record p. 275). The flasher mechanism specifications are the same for both the 78 and 35 passenger buses. Thomas Built's failure to mark the appropriate box on the 78 passenger questionnaire is a minor informality which is properly waived.

Burden of Proof

The Panel has established that the burden of proof lies with the protestant. Blue Bird has the burden of proving its claim by the weight or preponderance of the evidence. The Panel finds that Blue Bird has not proven its allegations by a greater weight or preponderance of the evidence.

CONCLUSION

For the foregoing reasons, the Panel finds that Blue Bird's protest is denied, and the CPO decision is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

  
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Gus J. Roberts, Chairman

Columbia, S.C.

December 16, 1994.