

3. Swing staging consists of a heavy, rigid, rectangular platform that is suspended along the side of a building from its roof by cables attached to each end of the platform. The staging is moved up and down the cables under the control of the workmen on the platform. After the workmen wash the windows on one section of the building, they must move the swing staging apparatus to an adjacent parallel position to complete the next section of windows.

A sky-genie incorporates a rappelling device which can only descend, and, in contrast to swing staging, is a light, strap-like device in which a single workman sits suspended from the roof along the side of the building. The straps of the sky-genie hold the board on which the workman sits as he washes the windows. A safety belt encompasses the board and the workman. The board has clips to which the workman's tools and buckets may be attached. The sky-genie includes two working lines and a safety line. When the workman completes washing a series of windows starting at the top of the building and descending to the bottom, he releases himself from the sky-genie, ascends by stairs or elevator to the top of the building, pulls the sky-genie up from below, and repeats the descent and washing process on the remaining windows.

4. While the building at 201 W. Preston Street (Contract No. 87/128S) has windows in areas that are inaccessible to swing staging, the other two buildings do not.

5. By letter dated May 22, 1987, the DGS procurement officer denied Appellant's protest regarding the specifications for Contract No. 87/128S limiting the method of performance to the use of swing staging. His final decision provided in part as follows:

The State reserves the right to identify its requirements and issue specifications based on past performance, need, cost, safety, and quality control. . . . My reasons for requesting the swing scaffold are as follows:

- a. Provides a stable platform from which to work.
- b. Is less subject to crosswinds.
- c. Provides uniformity in cleaning of vertical surfaces.
- d. Worked successfully on three previous contractual agreements.

At this point, I do not feel that the specification as written prohibits nor singles out for prohibition, any particular contractor from bidding. As far as costs incurred by the State to issue this type of specification I submit to you that, for a job well done, I am willing to pay a little more.

Agency Report, Exh. 4.

6. On May 24, 1987, Appellant filed protests regarding Contract No. 87/130S and Contract No. 87/132S. These protests were based on the same ground as that asserted in its protest of Contract No. 87/128S.

7. On June 5, 1987, the DGS procurement officer formally denied Appellant's protests regarding the specifications for Contract No. 87/130S and Contract No. 87/132S for the same reasons that he denied Appellant's protest regarding Contract No. 87/128S.

8. On June 10, 1987, Appellant filed a timely notice of appeal with this Board of the procurement officer's final decisions regarding all three protests.¹

Decision

The primary issue is whether the specifications as written unreasonably restrict competition. Under Maryland procurement law, the procurement officer has broad discretion in drafting specifications to meet the State's minimum requirements when weighed against the State policy of fostering the maximum practicable competition. And "we will not substitute our judgment for that of the procuring agency in the absence of a clear showing that it acted unreasonably or otherwise abused its discretion . . . Where there is a difference of

¹This Board has considered together in this appeal all three contracts and the respective protests of their identical specifications regarding the use of swing staging.

expert technical opinion, we will accept the technical judgment of the procuring agency unless clearly erroneous." Adden Furniture, Inc., MSBCA 1219, January 2, 1985, 1 MICPEL ¶93 at 4. Compare 49 Comp. Gen. 196, 198 (1969); Solon Automated Services, Inc., MSBCA 1046, January 20, 1983, 1 MICPEL ¶10; Solon Automated Services, Inc. v. University of Maryland et al.; Miscellaneous Law Nos. 82-M-38 and 82-M-42 (Cir.Ct. Baltimore Co., October 13, 1982). We have also stated that "the drafting of specifications is primarily a function of the State's procurement agencies who are uniquely knowledgeable as to what will solve the State's minimum needs in a given instance. 52 Comp. Gen. 219, 221 (1972); COMAR 21.04.01.04. In reviewing an agency's specifications, therefore, this Board is limited to a determination as to whether the specifications unreasonably restrict competition and cannot substitute its judgment as to technical requirements for that of the procuring agency." Xerox Corporation, MSBCA 1111, April 25, 1983, 1 MICPEL ¶48 at 6. Compare: 53 Comp. Gen. 270 (1973); 52 Comp. Gen. 393 (1972); 52 Comp. Gen. 941 (1973); Sterile Food Products, Inc., Comp. Gen. B-179704, April 12, 1974, 74-1 CPD 191; Hanna v. Board of Education of Wicomico County, 200 Md. 49, 51, 87 A. 846, 847 (1952).

In this regard, however, we observe that new systems for performing work or changes in the method of accomplishing tasks that previously have been performed by a commonly understood and well recognized method frequently encounter opposition. Although such opposition may in some instances be well-founded, a new method of accomplishing work should not be rejected out-of-hand because it has never been done before and the personnel involved are more comfortable with the old method. Sufficient justification should exist to exclude a new system or method for performing a State contract where use of the new system or method has been found acceptable by other entities in similar circumstances, particularly where the new system or method may be less costly. See: Bowers Reporting Co., Comp. Gen. Dec. B-185712, August 10, 1976, 76-2 CPD ¶144.

Having said that, however, the standard we apply is as set forth above and is whether the specifications under review here unreasonably restrict competition contrary to Maryland procurement law. See: Globe Air, Inc., Comp. Gen. Dec. B-180969, June 4, 1974, 74-1 CPD ¶301. DGS maintains that the specifications have a reasonable basis in that the procurement officer's opinion is that swing staging provides greater stability than a sky-genie thus providing more safety to the workmen and ensuring greater uniformity in cleaning as the workmen operating with swing staging are able to apply more pressure to the windows than a workman using a sky-genie. DGS believes also that it is possible for Appellant to rent swing staging equipment in order to perform the work using the specified method, thus enabling it to bid on these contracts. DGS recognizes that this might render its bid more expensive than those of the companies that own their own swing staging equipment.

On the other hand, Appellant offered evidence to refute DGS's contention that swing staging is safer and more effective than the use of a sky-genie. Appellant's witnesses, Messrs. Sheldon Kruger and Michael Mulhern, testified that the sky-genie, when used with solvents now available, is both safe and more effective than swing staging. They stated that the sky-genie is safer than swing staging because it is less subject to the actions of the wind since it is smaller and lighter. It is also safer according to Appellant because there is only one occupant who is always aware of his own actions. The normal operation of swing staging requires two workmen who must act as a team. This is said to introduce a safety consideration since both must act in concert in maneuvering the swing staging to avoid accidents. Appellant's witnesses also stated that with the new solvents currently available pressure is not required to properly clean the windows. Thus, it is unnecessary to scrub windows, so there is less of a tendency for a workman using a sky-genie to push himself away from the side of the building. In addition, Appellant's evidence asserts that use of a sky-genie may be less time-consuming and less expensive than use of swing staging.

While the evidence presented by Appellant is convincing, there is no clear showing that DGS acted unreasonably in the exercise of its judgment to require the use of swing staging except where the use of a sky-genie is permitted in areas inaccessible to swing staging. The procurement officer and Mr. Donald Schaefer, Director of Facilities Management for the Baltimore and Annapolis State Office complexes, have had a number of years of experience in building maintenance and supervision. They determined that the use of swing staging provides cleaner windows by a safe method and that the prescription of swing staging in the specifications was necessary to meet DGS' minimum needs. This may not be an entirely correct assumption, and we might conclude differently were it our responsibility to make this technical judgment in the first instance. It is not within our province to make such

technical determinations, however, although this Board concludes that the specifications as written obviously limit competition to some extent since prescribing a specific method for performing the contract work necessarily excludes other methods.

Appellant, however, has failed to show, contrary to the rationale of the DGS procurement officials, that specifying the method of performance in these procurements unreasonably restricted competition, which is the applicable standard. Stated another way, we conclude from the evidence before us that the procurement officer's judgment that only swing staging provides the necessary safety as well as the method that assures that the windows are properly cleaned was appropriate and reasonable.

For the preceding reasons, therefore, the appeal is denied.