

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of BECKMAN INSTRUMENTS,
INC.)

Under Univ. of Md. Bid Request
No. 67323-L)

) Docket No. MSBCA 1412
)
)

February 10, 1989

Responsiveness - Compliance With Specifications - Where compliance with specifications is an issue, Appellant bears the burden of demonstrating that the expressed technical judgment of the procuring agency is clearly erroneous. The factual determination as to whether any product conforms to design specifications primarily is a matter within the jurisdiction of the procuring agency and the Board will not substitute its judgment for that of the agency in the absence of a clear showing that the agency acted unreasonably or otherwise abused its discretion. Where there is a difference of expert technical opinion, the Board will accept the technical judgment of the procuring agency unless clearly erroneous.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Lawrence White
Assistant Attorney General
Baltimore, MD

OPINION BY MR. LEVY

This is an appeal from a University of Maryland College Park (University) procurement officer's final determination denying Appellant's protest. Appellant alleges that LKB's lower priced bid did not meet the technical requirements of the specifications and thus was nonresponsive.¹

Findings of Fact

1. On March 22, 1988, the University issued Invitation For Bids (IFB) No. 67323-L requesting bids on a liquid scintillation counting system.²
2. The type of liquid scintillation counting system generally referenced in

¹ The opinion is based on the written record since neither party requested a hearing pursuant to COMAR 21.10.07.06.

² A liquid scintillation counter is an integrated system of laboratory machinery that measures the amount of radioactive decay in specially prepared samples.

the bid request was a Beckman Model 5801 with versa-rack sample changer and data capture software for an existing IBM personal computer. Additional specifications outlined certain operational characteristics of the system, including counting capabilities (Specification D), calibration capabilities (Specification E), spectrum search capabilities (Specification J), sample identification and user program capabilities (Specifications L and H), and quench correction capabilities (Specifications C and H).

3. Bids were received from three firms on April 15. The low bidder was T.M. Analytic, in the amount of \$19,484. The second low bid was from LKB, at \$22,485. Appellant's bid of \$25,245 was the highest received.

4. A review of the proposals resulted in the rejection of T.M. Analytic's low bid as nonresponsive. A field demonstration was conducted on May 13, 1988 and the LKB equipment was determined to meet the specifications. On May 17, 1988, a purchase order was issued to LKB as the lowest responsive bidder.

5. Appellant protested the award to LKB by letter dated May 19, 1988. In its protest, Appellant claimed that the LKB liquid scintillation counting system did not meet six of the specifications.

6. The procurement officer denied Appellant's protest by letter dated August 17, 1988.

7. Appellant files its notice of appeal with the Board on September 1, 1988. In its notice of appeal, Appellant repeated its claim from its original protest that the LKB system did not meet six of the specifications. In particular, Appellant claimed:

1. The LKB unit cannot add the 2 sigma error of background in background subtract to the 2 sigma error of the sample count rate and develop the actual error for the sample count. (Specification D).
2. The LKB unit does not provide printout or verification that calibration is operating correctly or has been made. (Specification E).
3. The LKB unit cannot determine the unquenched end-point of an unknown isotope. (Specification J).
4. The LKB is incapable of giving you both user programs and positive sample identification at the same time. (Specifications L and H).
5. The LKB unit does not provide background quench curves. (Revised Specification C).

6. The LKB unit cannot accomplish triple label DPM with varying quench without the use of a computer. (Revised Specifications C and H).

Decision

Appellant contends that the LKB liquid scintillation counting system did not conform to the IFB specifications in six different areas, therefore, its bid was not responsive. Where such allegations are made we have held:

The factual determination as to whether any product conforms to design specifications and thus is responsive to a solicitation primarily is a matter within the jurisdiction of the procuring activity....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 in determining that a product did not comply with specifications....Where there is a difference of expert technical opinion, we will accept the technical judgment of the procuring agency unless clearly erroneous...(citations omitted)

Adden Furniture, Inc., MSBCA 1219, 1 MSBCA ¶93 (1985). "Where compliance with specifications is an issue, Appellant bears the burden of demonstrating that the expressed technical judgment of the procuring agency is clearly erroneous."
Packard Instrument Company, MSBCA 1272, 2 MSBCA ¶125 (1986).

The notice of appeal filed by Appellant with this Board consisted of no more than repeating its claim from its original protest that the LKB system did not meet six specific IFB specifications. While the procurement officer in his August 17, 1988 final decision responded to each of Appellant's allegations, Appellant did not point out in its appeal how or why it disagreed with the procurement officer. It was only in response to Assistant Attorney General Lawrence White's lengthy and informative agency report that Appellant through its District Sales Manager, Charles Kennedy, attempted to explain its allegations. We note with interest the following statement in Mr. Kennedy's

November 17, 1988 letter:

If you [Asst. A.G. White] had a grasp of the subject matter, a statement such as "Beckman short unilluminating notice of appeal" would not be a problem, you would understand what I said in the short paragraphs. They are concise, to the point and anyone with reasonable knowledge of the field would understand exactly what they mean.

This illustrates a problem faced by many protestors/appellants who may have something substantive to say which requires specific technical knowledge to understand. It cannot be taken for granted that the procurement officer or the members of this Board share the same specific technical knowledge that the Appellant possesses. The Appellant has the burden of conveying its message and convincing the procurement officer and this Board of its position.

In the appeal before us the Appellant did not request a hearing and only submitted brief comments on the Agency report. Based on the written record before the Board, as we explain below, we find that the Appellant has not met its burden of proof to establish that the technical judgement of the procuring agency was erroneous.

Specification D of the IFB required a system capable of "background subtract with two-sigma error calculated."³ Appellant contends that the LKB system cannot develop the actual error for the sample count and the LKB system does not employ "good standard statistical practice." We first note that Specification D does not require the calculation of actual error for the sample count. Therefore, consideration of the system's ability to calculate actual error is outside of the scope of the specification and is impermissible under the State procurement regulations which prohibit bid evaluations based on "any

³ The term "background subtract" refers to the ability to compensate for the background error inherent in any liquid scintillation counting system. The term "two-sigma error" is a statistical standard which defines the acceptable margin of error for the background subtract capability.

requirement or criterion that is not disclosed in the invitation for bids." COMAR 21.05.02.13A. Secondly, Specification D does not require the use of any particular statistical methodology or system design. The procurement officer determined the LKB system met the specification and was statistically sound. The LKB manual indicates that it can perform the calculations. A field demonstration conducted on May 13, 1988 confirmed to the procurement officer that the LKB system met the specification. Since compliance with this specification is a matter that falls within the procurement officer's technical expertise and his decision was not shown to be clearly erroneous, we accept his technical judgment. See Adden Furniture, supra.

Appellant next contends that the LKB system does not comply with Specification E's requirement that "[it] should print-out on hard copy verification that calibration is complete and the instrument is performing properly." The LKB system accomplishes calibration verification through an internal start-up test and continuous spectrum calibration system, which displays, with optional hardcopy printout, specific error codes when the instrument is not calibrated or operating properly. The absence of an error signal verifies that the system is operating properly and a light located on the unit visually indicates that the initial calibration is complete. If the system cannot calibrate at any time before, during or after a sample count, it will print out a hard copy message. The procurement officer made a determination that this system met the functional requirements of Specification E and there was no material deviation from the specification. The procurement officer relied on supplemental condition III (p. 3 of Specifications) which provides "[m]inor deviations in size and operational characteristics from those set forth

in this bid will be considered when such deviations do not alter nor deter the users from accomplishing its intended usage or function." The procurement officer's determination was within his discretion and it was not shown to be erroneous.

Specification J requires a "spectrum search which will provide the unquenched endpoint of an unknown isotope." Appellant contends that to its knowledge the LKB system cannot accomplish this. The procurement officer determined that while the spectrum plot program utilized by LKB may differ from Appellant's process, the information is nevertheless available. The record shows that utilizing the LKB system's printout arithmetics feature, the user can determine the unquenched endpoint of an unknown isotope. Where there is a difference of opinion, as here, we will accept the technical judgement of the procuring agency unless clearly erroneous. See Adden Furniture, supra. Appellant has presented insufficient evidence to support its contention that the procurement officer's determination was erroneous.

Specifications L and H require positive sample identification and a system with approximately ten user programs. Appellant contends that LKB does not meet the specification because LKB is incapable of providing the user programs and the positive sample identification at the same time. Even though LKB contends its unit is capable of meeting the simultaneous function, as the procurement officer stated, such simultaneous function was not specified in the solicitation. Since simultaneous function was not made a part of the IFB, LKB's bid cannot be found nonresponsive on this basis. See COMAR 21.05.02.13A.

Revised Specification C requires that the system "have background quench curves for background correction". Appellant contends that the LKB system does

not provide the background quench curves. The procurement officer determined that with the LKB system, multiple quench correction curves, including a curve for background alone, can be generated, if needed. LKB asserts its system, utilizing its "3 over 2" quench determination system has the capability of storing background quench curves. Again the Appellant has failed to present sufficient supporting evidence for its position and has not met its burden of proof to show that the procurement officer's technical determination which we accept was clearly erroneous.

Appellant's final allegation is that the LKB system "cannot accomplish triple label [DPM] except by the use of a computer which requires obtaining the data, rerunning it on the computer with no AQC type function." Appellant asserts that unspecified specifications (which appear to be revised Specifications C and H) indicate the instrument was to accomplish dual and triple label DPM with varying quench and the varying quench was to be compensated for by an automatic quench compensation (AQC) system. The procurement officer determined that in single and double label counting LKB corrects for quench with an internal mathematical "3 over 2" quench determination system. In triple label an external on-line computer program is utilized. Both methods were determined to be acceptable for accomplishing quench compensation and neither method requires the collection of data from additional standard samples which is prohibited by revised Specification H. The record indicates that LKB and Appellant use different technologies for dual and triple label counting but Appellant has not met its burden of proof to show that the procurement officer's determination that LKB's system was acceptable was erroneous.

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

