

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeals of Custom Management Corporation)
and Ogden Food Service Corporation)
Under DGS Job No. BPB & G 82/17) Docket Nos. MSBCA 1086/1090

October 22, 1982

Competitive Bidding - Responsibility - Definitive Responsibility Criteria — Where an invitation for bids specifies definitive responsibility criteria, elementary fairness dictates that such objective criteria be literally applied. The test urged by the State, and apparently followed by the Comptroller General of the United States, that would permit a determination of compliance with objective criteria based on a demonstration of equivalent achievement is rejected as overly broad.

Competitive Bidding - Responsibility - Definitive Responsibility Criteria — Where a State agency elects to include definitive responsibility criteria in its solicitation, and prospective bidders do not protest such criteria as being overly restrictive, no party should be heard to complain of the literal application thereof.

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OPINION BY MR. KETCHEN

The appeals¹ of Custom Management Corporation (Custom) and Ogden Food

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

Service Corporation (Ogden) are taken from separate final decisions issued by Department of General Services (DGS) procurement officers regarding the captioned procurement for operation of the Main State Office Building Cafeteria (State Cafeteria), located in Baltimore, Maryland. Both final decisions determined that the highest responsive bidder², A'Dell Food Services, Inc. (A'Dell), was also a responsible bidder and entitled to a contract award. Both Appellants contend that the proposed award to A'Dell should not be made since that firm does not meet the specific experience requirements contained in the solicitation. DGS maintains that its procurement officer's affirmative determinations of bidder responsibility should not be disturbed absent a showing of fraud.

FINDINGS OF FACT

1. On March 31, 1982, DGS issued an invitation to submit a proposal (IFB) for Job No. BPB & G 82/17 for operation of the State Cafeteria for a one year period from July 1, 1982 to June 30, 1983. The contract, when issued, was to be subject to renewal for one year periods up to a maximum of four additional years.

2. Award of the contract was to be made to the lowest responsive and responsible bidder offering the highest percentage operating fee excluding sales tax.

3. Paragraph 8 of the IFB provided as follows:

"Qualification of Bidders: Bids will only be considered from responsible organizations or individuals who are now or who have been recently engaged for five (5) years in the operation of management of cafeteria, restaurants, or industrial catering services, comparable in size and kind to those described herein, which have furnished good food under sanitary conditions at reasonable prices. Each bidder must furnish with each copy of his bid, a narrative statement listing five (5) accounts of comparable size which he has operated or managed, also a general history of his operating organization and experience. Before a bid is considered for award, the bidder may be required by the State to provide a financial statement certified to by a C.P.A. Demonstrated financial ability, competency in operating or managing similar establishments, the net worth of the bidder, and the financial terms of the bids submitted will all be considered in selecting the bid to be accepted." (Underscoring added.)

4. Bids were received and opened on May 3, 1982 with the following results:

<u>Bidder</u>	<u>Base Bid</u> (Percentage of Monthly Gross Operating Fee)
A'Dell	5.2%
Custom	5.13%
Ogden	5.0%
Servomation	3.5%

²In this instance where the contract results in revenue to the State, award is to be made to the "highest" bidder, i.e., that bidder who promises the greatest return of revenue to the State.

5. By letter dated May 4, 1982, Custom questioned award of the contract to A'Dell as the apparent high bidder. Custom contended that A'Dell did not meet the experience requirements of IFB Paragraph 8.

6. In a letter dated May 12, 1982, the DGS Assistant Superintendent for Baltimore Public Buildings & Grounds requested A'Dell to provide information in addition to that submitted with its bid to show that it had at least five (5) years experience operating five (5) food service accounts comparable in size and kind to the State Cafeteria.

7. Information provided with A'Dell's bid and later provided by letter of May 19, 1982 shows the following concerning its current and past food service operations:

- a. Operation of seven (7) retail food stands in Lexington Market, grossing in excess of 1,000,000.00 per year from 1971 through 1979;
- b. Operation of catering and concession work aboard the MV Port Welcome under State contract with a gross of approximately \$180,000.00 per year in 1979-80 and approximately \$120,000.00 per year in 1981-82;
- c. Operation of a Coffee and Sandwich Shop in the World Trade Center, grossing approximately \$3,500.00 per week (1978 to present);
- d. Operation of the Motor Vehicle Administration cafeteria in Glen Burnie, Maryland grossing approximately \$70,000.00 per year (1981-82); and
- e. Operation of the Seal Harbor Cafe in the National Aquarium in Baltimore, expected to gross \$600,000.00 per year (1981-82)

Information submitted by A'Dell in its May 19, 1982 letter further showed that it had engaged in catering and concession operations in Baltimore and the surrounding metropolitan area from 1951 to the present time. Examples of A'Dell's larger catering jobs were listed as:

Hod Carriers Union	(5,000 persons)
Chrysler Corporation	(2,000 persons)
Operation Sail, Inc.	(6,000 persons)

In addition, A'Dell did all catering work in the Baltimore Civic Center from 1964-1967 and was the sole concessionaire for the Baltimore Arts Festival (1978) and Operation Sail, Inc. (1977, 1978, 1979 and 1980). Quantitative aspects of these latter operations were not further described. A'Dell also represented that it had operated food concession booths in the Baltimore Inner Harbor for the various ethnic festivals held there each summer which grossed from \$5,000 to \$10,000 per day.

8. The food service operation at the State Cafeteria as compared to A'Dell's food service operations appear as follows:

	State Cafeteria	A'Dell Operations				
		Glen Burnie	World Trade Center	Seal Harbor	Port Welcome	Lexington Market
Business Type	B & I*	B & I	Coffee Shop	Tourist	Tourist	Deli
Menu Type	Full	Full	Sandwich	Seafood	Snack	Deli
Approx. Bldg. Pop.	5,000	1,200	1,129	-0-	-0-	-0-
Potential Customers	5,000	1,200	1,129	2,000	350	1,000
Observed Staff	22	10	4	7	4	5
Cash Stations	6	2	1	2	1	2
# of Seats	1,000	220	24	130	0	0
Approx. Sq. Feet	21,500	6,400	700	2,800	256	500
Menu Selections	354	139	30	39	15	40
Kitchen Type	Full	Full	Pantry	Exposed	Exposed	None
Months of Operation	12	12	12	12	5	12
Approx. Daily Sales	\$2,500	690	700	1,650**	920**	1,000***

* B & I means "Business and Industrial" facility in the technical jargon of the food service industry.

** Includes liquor sales.

*** Includes bulk food sales.

9. On May 28, 1982, DGS notified A'Dell that its bid would be accepted subject to approval of the Board of Public Works. A contract has not been awarded, however, pending the disposition of this appeal.

10. Custom and Ogden, by letters dated June 7, 1982 and June 10, 1982 respectively, protested the proposed contract award on the ground that A'Dell did not meet the experience criteria set forth in Paragraph 8 of the IFB. Ogden expressly stated that Paragraph 8 limited those who could participate in the procurement to national and regional companies experienced in the management of large volume food service accounts.

11. By letters dated June 10, 1982 and June 18, 1982 respectively, two DGS procurement officers denied the separate bid protests submitted by Custom and Ogden on the ground that A'Dell was a qualified bidder within the meaning of IFB Paragraph 8. These final decisions were based on the information submitted by A'Dell concerning its financial status, business history, and statement of food service accounts. Although the procurement officer who issued the Custom final decision stated that the facilities operated by A'Dell individually were not comparable to the State Cafeteria, he concluded that when considered in total the skills acquired in operating all of the A'Dell facilities qualified that firm to operate the State Cafeteria. (Tr. 83, 85-87.)

12. Custom and Ogden submitted timely appeals to this board on June 22, 1982 and July 2, 1982 respectively.

DECISION

The central issue raised by the instant appeals is whether the DGS procurement officers properly determined that A'Dell was a responsible bidder. Under Maryland law, a procurement officer has broad discretion in determining whether a bidder is responsible³ and such a determination will not be disturbed unless clearly unreasonable, arbitrary, an abuse of discretion, or contrary to law or regulations. Compare Solon Automated Services, Inc. v. University of Maryland, et al.; Miscellaneous Law No. 82-M-38 and 82-M-42 (Cir. Ct. Baltimore Co., October 13, 1982) (and cases there cited). Consistent with this principle, affirmative determinations of bidder responsibility normally will not be disturbed since such decisions involve business judgment based on a host of subjective factors going to the capability to perform the work. Compare Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD ¶ 64; Keco Industries v. United States, 428 F.2d 1233, 1240, 192 Ct. Cl. 773 (1970). However, where the IFB contains specific, objective, or definitive responsibility criteria, an affirmative determination of bidder responsibility must have a reasonable basis founded on an application of those specified criteria. Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD ¶ 365, reconsidered at 54 Comp. Gen. 715 (1975), 75-1 CPD ¶ 138; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD ¶ 376; Haughton Elevator Division, Reliance Electric Corporation, 55 Comp. Gen. 1051 (1976); 76-1 CPD ¶ 294; International Computaprint Corporation, 55 Comp. Gen. 1043 (1976), 76-

³COMAR 21.01.02.59 provides:

"Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which shall assure good faith performance"

See MD Ann. Code Art. 21, §3-101(h) (1981 Repl. Vol., 1982 Supp.).

1 CPD ¶ 289. See: Patterson Pump Company, Comp. Gen. Dec. B-204694, March 24, 1982, 82-1 CPD ¶ 279; see also, Vector Engineering, Inc., Comp. Gen. Dec. B-200536, July 7, 1981, 81-2 CPD ¶ 9. This is essential to assure the fair and equitable treatment of all persons who deal with the State procurement system.⁴ MD Ann. Code, Art. 21, ¶1-201 (1981 Repl. Vol., 1982 Supp.); compare International Computaprint Corporation, supra; Haughton Elevator Division, Reliance Electric Corporation, supra.

In the instant procurement, definitive responsibility criteria were established in the IFB in an attempt to preclude marginal firms from bidding and to insure that the prospective contractor would have the special expertise necessary to manage the State Cafeteria. Bidders expressly were appraised in the IFB that their bids only would be considered for award if they could demonstrate five years experience "...in the operation or management of cafeteria [sic], restaurants, or industrial catering services, comparable in size and kind to those described herein...." Further, bidders were required to list five separate accounts of comparable size to the State Cafeteria as well as a general history of their operating organization and experience. A'Dell was unable to establish, and the DGS procurement officers did not find, that A'Dell had ever operated a single facility comparable in size and kind to the State Cafeteria.

Notwithstanding the foregoing, DGS contends that literal compliance with definitive responsibility criteria should not be required if a level of achievement equivalent to that specified in the solicitation can be demonstrated. Compare Pike's Peak Community College, Comp. Gen. Dec. B-199102 (October 17, 1980), 80-2 CPD ¶ 293. Indetermining whether equivalency has been demonstrated, DGS further states that the procurement officer has considerable discretion.

The Board recognizes that definitive responsibility criteria may be established in such a way as to afford a degree of discretion to the procurement officer in determining compliance. For example, in the instant appeal, it certainly was within the DGS procurement officers' discretion to decide whether any of A'Dell's accounts individually was comparable in size and kind to the State Cafeteria. In making such a determination, business judgment and a host of subjective considerations were necessary. However, once this discretionary determination was made, no special agency expertise was required to determine compliance with the remaining definitive responsibility criteria, i.e., proof of having operated or managed that comparable institution for five years prior to bid.

The test urged by DGS makes objective standards amorphous. Compliance with definitive responsibility standards would depend upon the mind's eye of a particular procurement officer. This, of course, is contrary to any reasonable definition of the terms "objective" and "definite". For this reason, the Board concludes that the test urged by DGS and apparently followed by the Comptroller General is overly broad.

⁴A failure to apply specific responsibility criteria is prejudicial both to other bidders and to prospective bidders. Bidders may be prejudiced in that had they realized that the competition would include firms with less experience and thus perhaps lower overhead, etc., they may have refrained from bidding or bid lower in an attempt to secure the award. Prospective bidders may have failed to bid because of the experience requirement and their doubts as to their ability to comply with the definitive standards established in the IFB.

In refusing to follow the DGS test for determining compliance with definitive responsibility criteria, the Board notes that the use of such criteria is not mandated in State procurements. Without definitive criteria, a bidder is required to establish his responsibility to the reasonable satisfaction of the State procurement officer under general standards of competence. Further, where definitive responsibility criteria are written into the solicitation, a bidder always has the right to protest, prior to bid, the overly restrictive nature of such requirements which unfairly may preclude him from being considered for award. Once definitive performance criteria are selected by a State agency without protest from prospective bidders, however, no one should be heard to complain about the literal application of such criteria.

In the absence of objective responsibility criteria in the IFB, A'Dell's considerable experience in the food service industry may have been appropriate to demonstrate that firm's capability to manage the State Cafeteria. However, where definitive responsibility criteria are specified, as here, elementary fairness dictates that they be followed in determining whether the bidder is also responsible. Since the DGS procurement officers did not apply the definitive responsibility criteria and because it is clear that A'Dell did not meet those definitive criteria, it was inappropriate to find that A'Dell was a responsible bidder under the terms of IFB Paragraph 8.

For the foregoing reasons, therefore, the appeals of Custom and Ogden are sustained. Award, therefore, should be made to the next highest responsive and responsible bidder.

