

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DATA PERSONNEL)
& MARKETING, INC.)
Under MDE RFP 1/20/88) Docket No. MSBCA 1380

June 21, 1988

Responsiveness--Where compliance with specifications is an issue, the Appellant bears the burden of proving that the express technical judgement of the procuring agency is clearly erroneous.

APPEARANCE FOR APPELLANT: None

APPEARANCES FOR RESPONDENT: Jeffrey E. Howard
Assistant Attorney General
Baltimore, MD

Lydia B. Duff
Staff Attorney
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant appeals the determination of the Maryland Department of the Environments (MDE) procurement officer that its bid was not responsive and that its protest on such grounds was untimely. For reasons that follow we conclude that the Appellant's bid was not responsive and therefore deny the appeal.

Findings of Fact

1. On January 20, 1988 MDE issued a request for separate bids on two computer systems, the Compaq Deskpro 386-16 and 386-20. Bids were due to be filed by January 29, 1988. Appellant submitted its bid based on provision of an Intel model computer rather than the Compaq computer required by the specifications.

2. Sometime between February 3, 1988 and March 16, 1988 Appellant

was advised that MDE did not consider its bid to be responsive.

3. By letter dated March 16, 1988, Appellant protested the determination by MDE that its bid was nonresponsive because it proposed to provide an Intel model computer.

4. While it is not completely clear, the essence of the protest appears to be Appellant's assertion that the Intel model computer was the functional equivalent of the specified Compaq 386 computer.

5. Based on technical justification provided by MDE that the Compaq 386 computer possessed operating characteristics involving a dual bussing system and expansion capabilities that were unique to it, the procurement officer determined that the Intel computer was not comparable. The technical justification also included specific rationale for why the specific operating characteristics of the Compaq 386 were required for future expansion needs and operating speed achievable through the dual bussing system.

Based on this technical justification, the procurement officer denied Appellant's protest finding that its bid was not responsive because of the proposed use of the Intel computer. The procurement officer also found that Appellant's protest was not timely filed under COMAR 21.10.02.03A which requires that protests based upon alleged improprieties in bids or proposals which are apparent before the date for receipt of bids or proposals to be filed prior to bid opening or the closing date for receipt of proposals.

6. In its comment on the Agency Report Appellant questioned certain of the factual determinations contained in the MDE technical justification for use of the Compaq computer. However, Appellant did not

specifically address the expansion capabilities of the Compaq computer compared to the Intel computer, nor address the effect of the absence of a dual bussing system for the Intel computer in terms of actual operation speed.

7. MDE succinctly set forth why the Appellant's proposed Intel computer was not functionally equivalent to the Compaq computer in its response to Appellant's comment of the Agency Report as follows:

The protestor's point A.1. states "Emulation of a DEC UT240 CRT does not require "Flex Architecture." The MDE does not disagree that the 386 computer when used with a DEC system does not require a dual bussing system (Flex Architecture). When used as standalone PC, however, the 386 computer needs a dual bussing system to operate efficiently. As protestor notes, the MDE plans to use the equipment both as a standalone PC and with the DEC. Therefore, the requirement for a Compaq 386 was reasonable since this machine, unlike protestor's 386 computer, has the dual bussing system.... Protestor is correct in saying that the specifications required an 80387 math coprocessor and not the more powerful Weitek Coprocessor. The MDE chooses at this time to purchase the less powerful math coprocessor but does not wish to bind itself to that level of coprocessor by its selection of a computer. The Compaq, unlike Intel, will allow the Department to expand to the more powerful Weitek Coprocessor if and when the need arises.... The MDE also notes that while Intel's clock speed is 24 MHz, the lack of a dual bussing system means that the operation speed may be considerably slower.

Decision

The essence of the Appellant's protest appears to be that the Intel computer is the functional equivalent of the Compaq computer required by the specifications.¹ MDE disputes that the Intel computer is functionally

¹The specific ground of Appellant's protest was that "Data Personnel and Marketing, Inc. is appealing your department's request for bid of one Compaq 386 Computer system. We have submitted a compatible computer at a competitive price and would like justification in the form of a debriefing on the criteria used in disqualifying our bid." It is not completely clear to the Board from this language whether Appellant is claiming that the Intel computer is the functional equivalent of the Compaq computer and thus its bid is responsive or whether Appellant is claiming that the specifications should have been revised to permit offering of either. We believe that Appellant claims functional equivalency. However, if Appellant's protest was in fact intended to challenge the requirement

equivalent to the Compaq computer because of the absence of both a dual bussing system and expansion capabilities in the Intel computer. Thus MDE rejected as nonresponsive Appellant's bid to supply the Intel computer rather than the Compaq computer required by the specifications. MDE made its decision to reject Appellant's bid based on clear and rational technical information. We have held that where compliance with specifications is an issue, Appellant bears the burden of proving that the express technical judgment of the procuring agency is clearly erroneous. Adden Furniture, Inc., MSBCA 1219, 1 MSBCA ¶93 (1985); M/A-COM, Inc., *supra*; Packard Instrument Company, *supra*. Here Appellant has not met its burden of proof, because it has not presented any matter specifically rebutting the technical judgment of MDE that the Intel computer did not comply with the specifications in all material respects involving expansion capabilities and absence of a dual bussing system.

Accordingly, the appeal is denied.

for submission of bids based solely upon the Compaq computer it is untimely pursuant to COMAR 21.10.02.03A since such a challenge to specifications is required to be filed prior to bid opening. See M/A COM, Inc., MSBCA 1258, 2 MSBCA ¶112 (1985) and cases cited therein at p.4; Packard Instrument Company, MSBCA 1272, 2 MSBCA ¶25 (1986).