

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of ENVIRONMENTAL  
GROWTH CHAMBERS

Under DGS Solicitation No.  
001IT801018

)  
)  
)  
)  
)  
)

Docket No. MSBCA 1952

July 22, 1996

**Interpretation of Contracts - Invitation for Bid** - The rule that provisions of a contract shall, if reasonably possible, be construed as a whole to give effect to all of such provisions applies as well to the provisions of an Invitation for Bid.

**APPEARANCE FOR APPELLANT:**

Robert M. Wright, Esq.  
Whiteford, Taylor &  
Preston L.L.P.  
Baltimore, Maryland

**APPEARANCE FOR RESPONDENT:**

John H. Thornton  
Assistant Attorney General  
Baltimore, Maryland

**APPEARANCE FOR INTERESTED PARTY:**  
(Normco Cascade, Inc.)

Michael Evan Jaffe, Esq.  
Arent, Fox, Kintner,  
Plotkin & Kahn  
Washington, D.C.

**OPINION BY CHAIRMAN HARRISON**

Appellant timely appeals the denial of its bid protest that Respondent should not have applied a resident bidder preference and that the Interested Party was not a manufacturer as required by the Invitation for Bid (IFB).

**Findings of Fact**

1. On December 21, 1995, the Department of General Services (DGS) issued an IFB for the purchase of nine walk-in and twenty-three reach-in plant growth chambers and a central control system for the new Plant Science Building at the University of Maryland College Park.

2. By the deadline for receipt of bids, two bids were received, one from Normco Cascade, Inc. (Normco) and the other from Appellant, Environmental Growth Chambers (EGC).

3. Appellant bid \$748,800 while Normco bid \$778,693.

4. Normco is incorporated in Maryland with its principal office or place of business in Beltsville, Maryland.

5. Appellant's bid offered equipment some of which is of United States origin. Normco's bid offered equipment manufactured by Controlled Environments, Inc. (Conviron). Conviron is a South Dakota company. Most of the Conviron equipment components are of United States origin.

6. The State of Ohio has a regulation which gives a 5% preference to Ohio bidders against out-of-state bidders in the purchase of similar equipment. Ohio Administrative Code Section 123:5-1-06. Maryland has a reciprocal preference statute, St. Fin & Proc. §14-401, Annotated Code of Maryland, and a regulation, COMAR 21.11.07.02, which allows a procurement agency to apply in favor of a Maryland resident bidder and against an out-of-state resident bidder a procurement preference given by the other state in favor of its resident bidder against a Maryland bidder.

7. Appellant is an unincorporated division of Integrated Equipment and Manufacturing Co. (IEM) which is an Ohio corporation with its principal office or place of business in Ohio. At the time of bid opening IEM did not have its principal office or place of business in Maryland.<sup>1</sup> Under the authority of St. Fin & Proc. §14-401 COMAR 21.11.07.02, the DGS Procurement Officer considered giving a 5% preference in favor of Normco, a Maryland bidder, and against Appellant, an Ohio bidder. Because Normco's bid was not more than 5% greater than Appellant's, application of this preference would have entitled Normco to award of the contract.

8. On March 27, 1996, the DGS Procurement Officer received from Appellant a letter dated March 26, 1996 arguing against the possible application of Maryland's reciprocal preference statute in Normco's favor. On March 29, 1996, Appellant sent the DGS Procurement Officer another letter which said that Appellant's March 26 letter was intended to be a protest. Appellant also protested that the IFB required the successful bidder to be the manufacturer of the equipment and that Normco was a manufacturer's representative for (Conviron).

---

<sup>1</sup> On April 22, 1996, Appellant incorporated in Maryland. Its principal place of business or office apparently remains in Ohio. The Board finds that Appellant was not a Maryland resident bidder at the time of bid opening and at the time the preference was applied by the DGS Procurement Officer.

9. By letter dated May 10, 1996, the DGS Procurement Officer denied Appellant's protest and informed Appellant that Ohio's 5% preference would be applied against Appellant entitling Normco to the award. The decision reflects that the Procurement Officer and the University of Maryland determined that the equipment being procured is not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. From that decision Appellant appealed to this Board. On May 30, 1996, the Board of Public Works approved an award to Normco in the face of Appellant's protest and DGS then awarded the contract to Normco. No party requested a hearing before this Board and the appeal is thus decided on the written record.

### Decision

Section 14-401 of the St. Fin. & Proc. Article of the Annotated Code of Maryland and COMAR 21.11.07.02 allow a Procurement Officer to apply against an out-of-state bidder and in favor of a Maryland bidder any preference which the law of the state of the other bidder would apply against a Maryland bidder bidding in that state.<sup>2</sup> Under St. Fin & Proc. §14-401(a)(3), Normco is a resident bidder and Appellant is not.

Ohio grants bidders resident in Ohio (such as Appellant) a 5% preference over Maryland bidders. Ohio Administrative Code, Section 123:5-1-06. Therefore, under St. Fin & Proc. §14-401 COMAR 21.11.07.02 DGS had the authority to award the contract to Normco rather than Appellant

---

<sup>2</sup> Section 14-401 provides in relevant part:

§ 14-401. Reciprocal preference for resident bidders.

(a) Definitions -(1) In this section the following words have the meanings indicated.

(2) "Preference" includes"

- (i) a percentage preference;
- (ii) an employee residency requirement; or
- (iii) any other provision that favors a resident over a nonresident.

(3) "Resident bidder" means a bidder whose principal office is located in the State.

(b) Conditions for preference.- When a unit uses competitive sealed bidding to award a procurement contract, the unit may give a preference to the resident bidder who submits the lowest responsive bid from a resident bidder if:

- (1) the resident bidder is a responsible bidder;
- (2) a responsible bidder whose principal office is in another state submits the lowest responsive bid;
- (3) the other state gives a preference to its residents; and
- (4) a preference does not conflict with a federal law or grant affecting the procurement contract.

because Normco's bid did not exceed Appellant's bid by more than 5% (Normco's bid of \$778,693 is less than Appellant's bid of \$748,800 plus 5%, or \$786,240).

Appellant, however argues that Maryland cannot apply a 5% reciprocal preference in favor of Normco and against Appellant because if the procurement were being conducted in Ohio and the parties' roles were reversed, Normco, which allegedly offered a "Canadian" product, would have its bid rejected by Ohio before Ohio's in-state preference could be applied in Appellant's favor. This argument is based on the multistep procedure established by Ohio law for applying Ohio's resident bidder preference. The first step under Ohio law is to review all bids to see whether or not a bidder is offering a "domestic source end product" (American product) as defined under federal law. Bids offering non-U.S. products are rejected. Then the 5% preference for Ohio bidders can be applied against the remaining non-Ohio bidders whose bids were not rejected. Ohio Adm. Code, Section 123:5-1-06(c)(1).

Appellant argues that because Normco bid a "Canadian" product rather than an American product, if Normco were bidding in Ohio Normco's bid would be rejected before Appellant would take advantage of Ohio's 5% resident bidder preference. Under this argument Ohio then could not apply a preference against Normco, a Maryland bidder; therefore, in this procurement Maryland could not apply its reciprocal preference against Appellant and in favor of Normco.

However, Ohio could find that Normco's product is an American product. Ohio Adm. Code §123:5-1-06(c)(2).

Ohio could also decline to reject a bid even if the bidder offered a non-U.S. product if Ohio found that the product is "not mined, produced or manufactured in the U.S. in sufficient and reasonably available commercial quantities and of a satisfactory quality." Ohio Adm. Code Section 123:5-1-06(c)(1). Ohio then could accept the bid for a non-American product from a non-Ohio firm and then apply a 5% price preference in favor of the Ohio bidder and against the non-Ohio bidder. Ohio Adm. Code §123:5-1-06(c)(2).

The DGS Procurement Officer and the University found that the plant growth chambers being procured by Maryland are "not mined, produced or manufactured in the U.S. in sufficient and reasonably available commercial quantities and of a satisfactory quality." The Procurement Officer accordingly determined that Ohio could have made a similar finding and have accepted a non U.S. product. The record does not reflect that this determination by the Procurement Officer was

unreasonable. The Board will not disturb a discretionary act of a Procurement Officer unless such act is taken in bad faith or is arbitrary. Appellant has not shown the application of the preference herein to have been in bad faith or arbitrary. It was thus appropriate for the Procurement Officer, - pursuant to St. Fin & Proc. §14-401 and COMAR 21.11.07.02., to apply a 5% reciprocal preference against Appellant, an Ohio bidder, and in favor of Normco, a Maryland bidder.

Appellant also protested that the IFB required that the bidder be the manufacturer of the equipment and that Maryland cannot accept Normco's bid because Normco is not the manufacturer of the equipment offered by it. The record reflects that Conviron is the manufacturer of the equipment and that Normco is a manufacturer's representative for Conviron. The Board finds, however, that the IFB does not require the bidder to be the manufacturer.

The IFB distinguishes between requirements imposed on bidders and requirements imposed on manufacturers and others:

**1.01 GENERAL REQUIREMENTS:**

\* \* \*

- B. Bidders attention is drawn that the Plant Sciences Building is under construction.... If ... the building construction is still not completed, then the successful Vendor/Contractor must coordinate with the current Plant Science Building General/ Subcontractors on-site to facilitate proper completion of the total project. [emphasis added.]

\* \* \*

**1.02 DELIVERY REQUIREMENTS:**

\* \* \*

- B. Delivery shall be made .... Vendor shall coordinate actual delivery schedule with owners' representatives. [emphasis added.]
- C. The Vendors shall plan on using the loading dock and the service elevator.... [emphasis added.]

\* \* \*

- D. The Vendor shall coordinate directly with the current General Contractor.... [emphasis added.]

**1.03 BID PRICE:**

Bidders' prices quoted shall include.... [emphasis added.]

\*\*\*

1.05 PERFORMANCE BOND:

- A. performance...will be required from the successful bidder. [emphasis added.]

1.06 LIABILITY:

The successful bidder shall maintain such insurance as will protect him from claims under Workmen's Compensation Acts for damages which may arise from operations under this contract. [emphasis added.]

Manufacturer and installer must ...meet all insurance requirement outlined.... [emphasis added.]

1.07 REQUIRED BID DOCUMENTS:

\*\*\*

- B. The bid package shall include...clients where similar equipment has been provided. If a subcontractor would be used, identify the subcontractor, and submit at least 2 (two) references for the sub. [emphasis added.]

\*\*\*

- C. Minor deviations.... [T]he bidder must clearly indicate in writing where the products deviate from the specifications. The bidder must also explain how their products accomplishes the desired function. [emphasis added.]

1.08 PRE-QUALIFICATION REQUIREMENTS:

- A. Manufacturer's (bidder) eligibility to respond...is based on bidder's ability to meet qualification requirements... The University of Maryland, in its sole discretion, reserves the right to determine whether any bidder meets the minimum eligibility standards....[emphasis added.]

\*\*\*

- B. Bidder or any Subcontractor must have all necessary qualifications and licenses to legally conduct business in the State of Maryland. This may include Maryland contractors [sic] license applicable for the installation of the equipment specified. [emphasis added.]
- C. Manufacturer must maintain a permanent place of business adequate for and devoted to the manufacture of the equipment specified. [emphasis added.]

\* \* \*

- D. Manufacturer must be engaged in the manufacture of similar equipment as specified in this RFQ for an uninterrupted period of not less than (5) years. Bidder shall have satisfactorily completed installations that are similar to the operating conditions specified. [emphasis added.]
- E. Manufacturer must have demonstrated knowledge of plant growth chambers systems, including their application and capabilities along with the technical expertise to design and manufacture the requested systems. [emphasis added.]
- F. Bidder must have the financial stability to provide the funding necessary to start-up and the follow through on this project through completion.
- G. Bidder and any subcontractor to be used in the performance of any contract resulting from this RFQ must have a satisfactory record of performance.... [emphasis added.]
- H. Bidder and any subcontractor used by bidder... must have a sufficient number of qualified personnel available to administer and perform the manufacturing, installation and service work required within this RFQ. They should have demonstrated experience in projects of similar type and scope that have been successfully completed and can be certified in writing by the manufacturer. [emphasis added.]

## PART II: QUALITY ASSURANCE

### 2.01 ACCEPTANCE:

- A. Specifications performance: All performance specifications must be demonstrated on the installed equipment at the time of commissioning and acceptance. If the equipment cannot meet the specifications, the University reserves the right to return the equipment to the Vendor for full refund of all monies, including such other costs incurred by the University for replacement. [emphasis added.]
- C. Performance Test: The University reserves the right to observe and witness the testing of one unit of each size at the manufacturer's facilities prior to dispatch. [emphasis added.]

### 2.02 WARRANTY:

- B. If factory repairs are to be performed during the warranty period, all costs associated with removal, transportation, re-installing and commissioning will be paid by the manufacturer or their agents. [emphasis added.]

Provisions in an IFB are required to be read and construed as a whole pursuant to the general rule in Maryland State Procurements that a contract shall, if reasonably possible, be construed as a whole to give effect to all its provisions. See Granite Construction Company, MDOT 1101, 1 MSBCA ¶8 (1981) at p. 12. Reading these provisions as a whole, we find that a reasonable bidder would conclude that the bidder did not have to be the manufacturer or the installer. The provisions of the IFB set forth above make distinctions between the bidder (or vendor) and subcontractors, installers and the manufacturer. Only in one place, Section 1.08A, where the IFB uses the words "Manufacturer's (bidder)," is there the juxtaposition of manufacturer and bidder. This single instance, Section 1.08A, should not be read, in light of the bid document as a whole, to impose a requirement that the bidder must be the manufacturer.

For the foregoing reasons the appeal is denied. Wherefore, it is Ordered this 22nd day of July, 1996 that the appeal is denied.

Dated: July 22, 1996

---

Robert B. Harrison III  
Chairman

I concur:

---

Candida S. Steel  
Board Member

---

Randolph B. Rosencrantz  
Board Member



Certification

**COMAR 21.10.01.02 Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

**Annotated Code of MD Rule 7-203 Time for Filing Action.**

**(a) Generally.** - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

**(b) Petition by Other Party.** - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

\* \* \*

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1952, appeal of Environmental Growth Chambers under DGS Solicitation No. 001 IT801018.

Dated: July 22, 1996

\_\_\_\_\_  
Mary F. Priscilla  
Recorder

THESE ARE THE TERMS AND CONDITIONS OF THE CONTRACT

1. The Contractor shall be bound by the terms and conditions of the contract as set out in the schedule of conditions.

2. The Contractor shall be bound by the terms and conditions of the contract as set out in the schedule of conditions.

3. The Contractor shall be bound by the terms and conditions of the contract as set out in the schedule of conditions.

4. The Contractor shall be bound by the terms and conditions of the contract as set out in the schedule of conditions.

5. The Contractor shall be bound by the terms and conditions of the contract as set out in the schedule of conditions.

6. The Contractor shall be bound by the terms and conditions of the contract as set out in the schedule of conditions.