

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of LANWORKS, INC. )  
Under Department of Budget ) Docket No. MSBCA 1473  
and Fiscal Planning )  
IFB DBFP 90-6 )

October 25, 1989

Definitive Responsibility Criteria - Burden of Proof - Once an agency establishes prima facie support for its position that a challenged definitive responsibility criteria is reasonably related to its minimum needs, the Appellant must then show that the requirement is clearly unreasonable.

APPEARANCE FOR APPELLANT: None  
APPEARANCE FOR RESPONDENT: Gail R. Cohn  
Assistant Attorney General  
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant appeals the final determination by the Department of Budget and Fiscal Planning (DBFP) that a definitive responsibility criterion that a bidder have been in the business of selling computers in Maryland for a period of at least five years was not unreasonable.

Findings of Fact

1. After publication in the Maryland Register DBFP issued the instant invitation for bids (IFB) on August 25, 1989 to approximately ninety-one firms including Appellant who were either known to the Department or who had expressed interest in receiving the solicitation. The closing date for submission of bids was October 10, 1989.
2. The IFB contemplated an expansion of the existing DBFP microcomputer network to establish an integrated area network interconnecting the components at its primary site, the Louis L. Goldstein Treasury Building in Annapolis, with its four field offices located in Baltimore and Annapolis. The IFB generally described the services sought as follows:

[This] expansion will provide intra-agency networking of administrative, word processing, spreadsheet, database, and other office automation functions and terminal emulation/access of microcomputers to an IBM 308 1K mainframe. The selected vendor will provide comprehensive services including

cable installation, hardware installation, software installation, user training and manuals, and maintenance support. The chosen vendor will supply and install the microcomputers, set-up the network, and provide custom menus.

3. The protest and appeal stem from the following definitive responsibility criterion as set forth in Section F of the IFB.

1. Bids will be accepted only from business entities who, as such, have in excess of five year's business experience as merchants of data processing hardware/software while trading in the State of Maryland.

4. By letter dated August 28, 1989, Appellant protested that the requirement that a company as such have in excess of five years business experience was "unnecessary, and serves only to restrict free and open competition for business."

5. By letter dated September 7, 1989, the DBFP procurement officer denied Appellant's protest advising that the five year requirement was "intended as a measure of a company's ability to be able to service the intended contract."

6. Appellant appealed to this Board on September 15, 1989.

7. The Agency Report filed with the Board on October 10, 1989, contains the following justification for the five year requirement:

In the instant procurement, the Department is not merely seeking a vendor to sell and to install information processing equipment. Rather, it intends to contract with a vendor who has not only superior technical skill, but also proven reliability and stability. The system to be acquired, local area networks, or LANs, wire together computers and office equipment so they can "talk" to each other. Under a LAN, two or more users in the same office can exchange information, access the same files, share a printer or send electronic messages to each other; functions can be added or expanded as needs dictate. Several LANs within a company can be strung together with those in field offices, creating a wide area network.

Although LANS assuredly save time and resources over the long term and increase productivity, it is recognized that installing a LAN can be complicated, and the cost of installation is expensive; unlike a simple stand-alone station, which may require little more than plugging it in, a LAN must be carefully planned, installed, and monitored. LANs also can produce

maintenance problems not present in simple stand-alone equipment. Problems that might be easy to detect in a stand-alone can quickly become a systemwide problem in a LAN. For example, a simple pinched connection caused by the movement of an office desk may show up as a network "glitch" that may not be easy to trace. Similarly, computer viruses that may be easy to detect and treat in a stand-alone unit can become complicated and evasive in a LAN.

The Department, like other purchasers of LANs, is cognizant of the potential problems these networks can present, but believes that the benefits on many levels they offer far outweigh any drawbacks. However, given its awareness of the complexity of the system and the concomitant potential for problems, and the need for constant monitoring, the Department further believes it incumbent upon it, and as critical to the success of this endeavor as technical skill and experience, to contract with a vendor of proven reliability. The Department seeks a vendor who will stand behind its services and products, one upon whom it can depend, or, stated in simplest terms, a vendor who has proven that it is going to be around in the event a problem does develop.

8. Appellant did not comment on the Agency Report. Neither party requested a hearing.

#### Decision

Appellant challenges the requirement of the IFB that a company be in business for at least five years in order to be considered a responsible bidder. Dealing with a somewhat similar definitive responsibility criterion that a bidder have contracts dating back five years this Board previously opined that:

The Board finds that requiring a bidder to have contracts that date back five years as an element of demonstrating its elevator service, inspection, and maintenance capability is not per se invalid. Nothing that this Board has stated in its past decisions would negate the validity of such responsibility criteria if shown to be reasonably required to meet DET's minimum needs. In this regard, if a specification is challenged, we are limited to a determination as to whether the specification unreasonably restricts competition, and we cannot substitute our judgment as to such requirements for that of the procuring agency. Initially, the burden is on the procuring agency to establish prima facie support for its position that [the] challenged definitive responsibility criteria is reasonably related to its minimum needs. If the agency

meets this burden, the protester on appeal must then show that the requirement is clearly unreasonable. In short, we necessarily must affirm the use of definitive responsibility criteria in a solicitation to measure a bidder's capability to perform if rationally based. (Citations omitted). (Emphasis added).

The National Elevator Company, MSBCA 1276, 2 MSBCA ¶131 (1986) at p. 4.<sup>1</sup>

In the instant appeal DBF&P has articulated in the Agency Report that its judgment that the criterion requiring vendors to have been in business for five years is reasonably related to its minimum needs, i.e., that the selected vendor be a contractor of proven reliability to ensure its ability to respond in the event of a problem developing with the LAN. Appellant has not commented on nor otherwise challenged this articulation in the Agency Report. We therefore find that DBF&P has established prima facie support for its position that the challenged definitive responsibility criterion is reasonably related to its minimum needs. We must also find in the absence of any challenge by Appellant on this appeal that the requirement that a bidder have been in business for at least five years is not unreasonable. We therefore deny the appeal.

CONCURRING OPINION BY MR. KETCHEN

Five years of business experience as a merchant of data processing hardware/software may give some indication of a vendor's capabilities that DBFP alleges is necessary to meet its minimum procurement need for a responsible vendor of "not only superior technical skill, but also proven reliability and stability." DBFP also believes it critical to the success of its endeavor to contract with a vendor of proven reliability. I do not disagree that the listed responsibility criteria in DBFP's judgment may be necessary to assist it in obtaining a responsible contractor to perform the work under this procurement. However, although not raised as an issue by Appellant in this procurement, a specification requirement that a vendor must obtain the described experience while trading in Maryland is troublesome. An agency would have to establish support for the materiality of this latter requirement as being reasonably necessary to measure a bidder's capability in the face of a proper challenge to it as an improper restriction of competition. See Md. Ann. Code State Finance and Procurement Article ¶13-205. (A unit shall draft specifications to encourage maximum practical competition without modifying the requirements of the State.)

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<sup>1</sup> The Board sustained National Elevator's appeal because the State Agency concerned conceded that the language setting forth the five year requirement in that particular procurement was ambiguous.