

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of LOTTERY ENTERPRISES,)
INC.)
) Docket No. MSBCA 1680
Under Maryland State Lottery)
IFB for Instant Ticket Vending)
Machines Contract No. 93-02)

October 19, 1992

Specifications - Unduly Restrictive - The Board in reviewing whether specifications unreasonably restrict competition must necessarily look at the facts underlying the agency determination. Specifications are to be written to permit maximum practicable competition without modifying the State's requirements. The specifications here did not unreasonably restrict competition.

APPEARANCE FOR APPELLANT: M. Kent Krabbe, Esq.
8 West Madison Street
Baltimore, MD

APPEARANCES FOR RESPONDENT: Romaine N. Williams
Dale E. Cantone
Assistant Attorneys General
Maryland Lottery Agency
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: Michael V. Johansen, Esq.
Interlott, Inc. Rifkin, Evans, Silver &
Rozner
Baltimore, MD

OPINION BY MR. MALONE

The Appellant timely appeals the denial of its bid protest that the bid specification excluding the tear type ticket dispenser unduly restricted competition under State Finance and Procurement Article § 13-205 Annotated Code of Maryland¹ and thereby favored a single prospective bidder.

¹State Finance and Procurement Article § 13-205 Annotated Code of Maryland states;

§ 13-205. Drafting Specifications
A unit:
(1) shall draft specification to encourage maximum practicable competition without modifying the requirements of the State; and
(2) may not draft specifications to favor a single prospective bidder or offeror. (SF § 11-109; 1988, ch. 48, § 2.)

Findings of Fact

1. New technology in the gaming machine industry has led to the development of the Instant Ticket Vending Machine (ITVM). This device allows for the sale of lottery ticket games to the public without the need for sales personnel. The machine accepts coin or currency and the public, after selection of the type of lottery game a player desires, is delivered an instant ticket. These tickets, if winners, are then cashed at the location where the ticket is purchased. These machines allow for the capture of the incremental lottery market since the cost of operators is eliminated to a great degree and the machines can be placed where it may not ordinarily be economically feasible. (ie. supermarkets, lobbies of buildings, etc.)
2. In 1991 Respondent became interested in the feasibility of developing ITVM's for the incremental lottery ticket market. The Respondent began investigation of this technology by reviewing trade magazines, visiting trade shows in New Orleans and Richmond, by discussing the machines with lottery officials in other states and by running a test in the Maryland market.
3. In 1991 Respondent ran a 90 day study in Maryland to test the performance of the machines, the public's acceptance of the instant ticket vending machine concept, to provide insight into the value of player - activated machines in high traffic locations and to determine what level of sales that could be generated. Unfortunately this study only included the Appellant's machine which provided a tear dispenser. Respondent proffered only Appellant's machine was tested since it was the only one with the capacity for eight different types of game tickets available at the time of the test.

Respondent's personnel reviewed Public Gaming Magazine, March of 1992 issue, which gives general information concerning the various models and methods of ticket dispensing.

4. Respondent leased 10 ITVM's from Appellant for placement in various retail stores for the 90 day test period. These machines dispensed tickets which had to be pulled and torn off the machine. Respondent had numerous instances where when the tickets were pulled by the consumer tickets would be damaged³, jam in the machine or more tickets than actually purchased would be dispensed. These problems caused repeated repairs of the machines, intervention of sales personnel and concern from consumers that the jammed or damaged ticket could have been a winner.

5. In early 1992 Respondent discovered lottery officials in Virginia had similar problems with Appellant's tear type dispenser and that lottery officials in Ohio preferred the cut/or burst dispenser over the tear type dispenser.⁴

6. The record reflects that if a cut or burst type dispenser was used the machine may cut or burst the ticket at the incorrect location damaging the ticket. This could be caused by misalignment of the tickets or an incorrect setting on the ticket length indicator.

³ Tickets that are damaged are void. This warning and condition of sale is recited on the back side of the ticket which states;

"All winners, tickets and transactions subject to Maryland State Lottery Agency Regulations and State Law. Tickets void if stolen, unissued, unreadable, mutilated, altered, counterfeit in whole or in part, miscut, misregistered, multiple printed, defective, printed or produced in error, or partially blank, if display printing is irregular, if apparent or asserted lottery symbols are not confirmed by any of lottery's other validation test. Liability for void or nonconforming ticket, if any, limited to replacement of ticket with unplayed ticket. Not responsible for lost or stolen."

⁴ There are currently three types of dispensers; cut, burst and tear. The cut type cuts the ticket which falls freely into a bin for the consumer. The burst type cuts across the ticket which falls freely into a bin for the consumer. The tear type perforates the ticket which is pulled and torn from the machine by the consumer.

7. The record reflects that the tear type dispenser could tear and damage the ticket or allow the ticket to become jammed in the machine or if pulled too hard allow more than the correct number of actually purchased tickets to be pulled from the machine. These problems could be caused by the size of the ticket and the number and depth of the perforations made on the ticket.⁵ Several witnesses testified that adjusting the machines to the type of ticket stock provided was necessary for efficient operation since not all ticket stock is the same. The size, thickness of the ticket paper along with the number and depth of the perforations require adjustment.

8. The Virginia Lottery developed its own ticket stock specifications from a process of trial and error and laboratory testing since the technology is so new the manufacturers have no standard ticket stock specifications. The machines in use in Virginia are made with internal adjustment mechanisms to accept various ticket stock.

9. Appellant has been making ITVM's since 1985⁶. They developed and made ITVM's with cut, burst and tear dispensers and have the capability to make any one of the three types. Appellant, in fact, sold its burst type machine dispenser to Interlott, Inc. an interested party in this case.

10. Appellant has acquired approximately 5/8's of the existing United States ITVM market⁷ and is presently filling a contract to provide up to 10,000 ITVM's to the State of California. Appellant believes its ITVM, with tear dispenser, to be the best product and is currently manufacturing ITVM's with only tear

⁵ The fewer and shallower the perforations on the ticket the more difficult it becomes to tear the ticket from the machine.

⁶ Originally the principals of Appellant did business as a partnership when they developed their first ITVM.

⁷ There are only (8) states with ITVM's.

dispensers. While Appellant could make ITVM's with cut/burst dispensers it has internally decided not to make them.

11. The Respondent's decision to require machines with cut or burst tickets is in part based upon the agency's history of "hands on" problems with tear dispensers during its test study. Use of tear dispensers would require more labor and maintenance than it desired. Respondent also concluded the problems with tear type dispensers resulting in ticket damage and jamming would frustrate players and lottery agents and lead to reduced sales. Respondent was also concerned about the possible requirement of adjusting ticket stock currently in use by existing lottery agents using non-ITVM's in the much larger, successful ongoing manual operation. Respondent reasoned if it adjusted ticket strength for easy tear off by ITVM's the tickets used with hand operated dispensers (ie. non-ITVM's) could be lost or damaged.

12. Respondent sent bid packages to twelve (12) companies and received two bids; one from Interlott, Inc. and one from International Products of America, Inc.

13. The IFB included the following mandatory requirements:

2(d) "(i)t is mandatory that tickets are either automatically cut or burst by the machine after being dispensed."

2(g) "it is mandatory to have tickets burst or cut in a manner that does not distort any ticket such that the appearance or playability of any ticket is compromised."

2(k) "(i)t is mandatory that the machines do not require coins or require the consumers to tear instant tickets from the dispensers."

This language clearly excludes tear type dispensers.

14. Respondent alleges that at least five companies produce cut or burst type dispensers for their ITVM's. Appellant alleges that only one or two companies presently produce such machines. However, both agree the cut or burst type dispenser could be produced by any number of companies since the technology is non-proprietary. The parties also agree and the Board finds that

this technology is emerging and in a very brief period new machines will be available which could replace the present systems. Appellant and Interlott, Inc. representing the tear vs. cut/burst camps "have done battle" in many states while competing for lottery machine contracts over who has the best machines.

15. The record reflects that whether an ITVM has a cut, burst or tear dispenser, all are subject to break downs and problems to some degree and that the selection of which type of machine is best involves a judgment as to how effectively a specific public market will react to purchasing lottery tickets from a machine. Several witnesses testified that if you place two machines, one of each type, side-by-side they would both sell tickets to the public. There is no controlled study of the actual sales effectiveness of either machine.

16. Respondent, after purchasing the machines must then place them in locations to capture the incremental market. Respondent hoped to acquire a relationship with Giant Foods in Maryland who may be willing to place up to 100 machines in its stores. In order to further this goal Respondent arranged for the 1991 test to be partially located at Giant Food Store locations. During the test with the tear type dispenser Giant Food Store personnel had to spend time resolving damaged and jammed ticket problems. Respondent believes that the history of problems during the test period could jeopardize its relationship with Giant Foods if it procured the tear type machine used in the test.

17. Appellant contends that with minor adjustments the problems encountered during the test could be eliminated. Appellant further states that its machines have been substantially upgraded both in terms of hardware and software since 1991 and that these new upgraded machines would be delivered if it wins the contract.

Decision

The limited issue⁹ before us is whether the mandatory language of the IFB excluding tear type dispensers violates State Finance and Procurement Article § 13-205 Annotated Code of Maryland by being unduly restrictive. See also COMAR 21.04.01.²

Respondent has the primary function of drafting specifications which most accurately reflect the minimum needs of the State since it is in a unique position to determine those needs. The Trane Co., MSBCA 1264, 2 MICPEL ¶118 (1985). The Board will not disturb the determination of State Procurement Officers absent clear evidence that they were made in an arbitrary or unreasonable fashion. Admiral Service Inc., MSBCA 1342, 2 MICPEL ¶159 (1987). However, those determinations must be based upon some reasonable fact. Siems Rental & Sales Co., Inc., MSBCA 1609, 3 MICPEL ¶228 (1991). The Board in reviewing whether specifications unreasonably restrict competition must necessarily look at the facts underlying the agency determination of minimum needs to determine reasonableness. Helmut Guenschel Inc., MSBCA 1434, 3 MICPEL ¶211 (1989). However, the

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Respondent also raised the issue that Appellant was not represented by counsel which was withdrawn at the hearing.

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COMAR 21.04.01 provides in relevant part:

.01 A specification as used in this title means a clear and accurate description of the functional characteristics or the nature of an item to be procured. It may include a statement of any of the procurement agency's requirements and may provide for submission of samples, inspection, or testing of the item before procurement.

.02 General Purposes.

A. A specification is the basis for procuring an item in a cost effective manner. It is the policy of the State that specifications be written so as to permit maximum practicable competition without modifying the State requirements. Specifications may not be drawn in such a manner as to favor a single vendor over other vendors....

procurement officer has broad discretion in determination of State needs. "We (the Board) 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." Adder Furniture, Inc., MSBCA 1219, 1 MICPEL ¶93 (1982) at 4. Solon Automated Services, Inc., MSBCA 1046, 1 MICPEL ¶10 (1983).

Respondent made reasonable efforts to evaluate the State's requirements. The agency read some available literature on the ITVM market and visited trade shows to see demonstrations of the various machines. The agency procured units from Appellant for a study in 1991 for hands on exposure to see the interaction of the public with ITVM's. While the fact only tear type dispensers were used during the study is troubling the agency had a reason for the selection.¹⁰ The primary reason for the study was to evaluate the possible success in using ITVM's to capture the incremental lottery market. Respondent researched the history of ITVM's to the extent information existed in other states. The record is clear that in Virginia and Ohio problems with damaged and jammed tickets were reported for machines¹¹ with tear type dispensers. The agency reasonably concluded that based upon its own experience during the 1991 test and other sources tear type dispensers could result in consumer frustration and consequently weak sales. The further possibility of difficulty with a change in ticket stock to accommodate the tear type dispenser on existing lottery agents with manual dispensers was another reason in excluding tear type machines. These were the facts available at the time of drafting the specifications.

¹⁰ This was the only machine available with eight game selections and the agency wanted to test as many games as possible.

¹¹ The record makes no attempt to define the exact machines discussed or used. The machines were simply separated by the type of dispenser they generally possessed.

The fact that, after these minimum needs were determined, new technology and improvements occurred is not surprising. However, hindsight can not be the standard of review. The reasonableness of the specification is judged by the facts available when the determination was made. The review, testing and evaluation phases of procurement comes to an end when the IFB is issued. The facts known or reasonably ascertainable at the time when the needs are defined is what is relevant. The needs of the agency were reasonably determined based on the facts available.

The lottery agency specifications are not unduly restrictive even in light of new post IFB technology and improvements. The technology is available to any manufacturer. Appellant itself could have provided these machines. Many companies build ITVM's. Several companies are presently manufacturing machines with tear type dispensers and several with cut or burst type dispensers. While the market is split, the technology is non-proprietary and available for any bidder. The fact Appellant is presently manufacturing a large number of tear type machines for another contract and is eager to provide Maryland with its machines is not determinative. The specifications do not favor a single bidder or offeror. The specification encourages maximum competition while meeting the minimum needs of the State Lottery Agency. Therefore the appeal is denied.

Dated: 10/19/92




Neal E. Malone
Board Member

I concur:



Robert B. Harrison III
Chairman



Sheldon H. Press
Board Member

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1680 appeal of Lottery Enterprises, Inc. under Maryland State Lottery IFB for Instant Ticket Vending Machines Contract No. 93-02.

Dated:

Mary F. Priscilla / L.H.

Mary F. Priscilla
Recorder