

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of SIEMS RENTAL & SALES )  
CO., INC. ) Docket No.  
 ) MSBCA 1609  
Under DGS RFQ 65098 )

December 11, 1991

Decision Summary

Bid Protest - Specifications - While the Board may not substitute its judgment for that of the agency as to the agency's minimum needs, the needs of the agency must be supported by some reasonable fact where a protest is made of unreasonable restriction of competition.

APPEARANCE FOR APPELLANT:

Michael P. Kenney  
Assistant Attorney  
General  
Baltimore, MD

APPEARANCE FOR RESPONDENT:

Robert L. Siems, Esq.  
Baltimore, MD

OPINION BY MR. MALONE

This timely appeal is taken from a Department of General Services (DGS) procurement officer's final decision denying Appellant's pre-opening bid protest that the RFQ specifications unreasonably restrict competition. DGS, however, maintains that the procurement officer had a reasonable basis for preparing the specifications as written in order to meet its minimum needs.

Findings of Fact

1. DGS issued Request For Quotation 65098 to provide self-propelled lift platforms, complete with batteries, in accordance with attached specifications.
2. There were numerous protests to various specifications for the platforms, however, the only specification which concerns this appeal is the one which stated that the overall width of the

chassis was to be 32" +/- 1". The State contends that at least two lift platforms on the market will comply with the specifications; the SkyJack SJ3220 and the Economy 2032. Appellant contends that only the SkyJack SJ3220 meets all the bid specifications.

3. Appellant filed letters dated July 2, 1991, and August 2, 1991 protesting several of the RFQ's specifications.

4. Appellant complained that the RFQ chassis width specification of 32" +/- 1" limited the competition to one lift platform and thus unreasonably restricted the competition. If the specification were enlarged to a 33" +/- 1" width range, a large variety of platforms are available including Appellant's.

5. DGS issued this RFQ to procure platforms to be used in the Mass Transit Administration bus repair facility at 1515 Washington Blvd. Building #6. This building is used for the repair and maintenance of buses. DGS personnel obtained the specifications for the size of the self-propelled lift platforms from Mr. Richard Wilt, the supervisor of the repair shop. Mr. Wilt did not testify before the Board. Appellant's sales representative, Mr. Michael Whaley, testified that he questioned Richard Wilt as to the reason for the 32" +/- 1" chassis width and was told he simply wrote the specifications based on a sales flyer for the SkyJack SJ3220, provided to him by another vendor.

6. The self-propelled lift platforms would be used beside and around buses parked in the building. The buses are parked in pairs, side by side, over top of work pits in the building floor. These work pits have safety flanges on either side of the pit, parallel

to the buses' wheels to prevent the buses from slipping into the pit. This restricts how the buses can be parked. The platforms are also used inside of the paint room in the building and in other areas by means of access through interior doors which are approximately 36" in width. No actual measurement of door size or space between parked buses was offered at the hearing.

7. Before the hearing, Appellant had requested access to MTA Building #6 to measure the site. DGS denied Appellant access to measure the space between buses, paint room, and doorways.

8. DGS offered no factual data as to the measurement of space between parked buses, the doorways, or any other dimensions in the MTA bus repair building.

9. At the conclusion of the hearing, the parties jointly requested the Board to keep the record open until December 6, 1991 on which date the parties asked the Board to rule on the record. The record closed on December 6, 1991.

#### Decision

The issue is whether the specifications as written unreasonably restrict competition. Under Maryland procurement law, the procurement officer has broad discretion in drafting specifications to meet the State's minimum requirements when weighed against the State policy of fostering the maximum practical competition. "We 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. Where there is a difference of expert technical opinion, we will accept the

technical judgment of the procuring agency unless clearly erroneous." Adden Furniture, Inc., MSBCA 1219, 1 MICPEL ¶93 (1982) at p.4. Solomon Automated Services, Inc., MSBCA 1046, 1 MICPEL ¶10 (1983). The drafting of specifications is primarily a function of the State's procurement agencies who are uniquely knowledgeable as to what will solve the State's minimum needs in a given instance. COMAR 21.04.01.04. "In reviewing an agency's specifications, therefore, this Board is limited to a determination as to whether the specifications unreasonably restrict competition and cannot substitute its judgment as to technical requirements for that of the procurement agency." Xerox Corporation, MSBCA 1111, 1 MICPEL ¶48 (1983) at p. 6.

The standard we apply is whether the specifications under review here unreasonably restrict competition contrary to Maryland procurement law. Admiral Services, Inc., MSBCA 1341, 2 MICPEL ¶159 (1987). DGS maintains that the procurement officer had a reasonable basis for drafting the specifications in question. However, in the face of a protest, some reasonable facts upon which the opinion that the specifications meet the State's the minimum needs must be shown. The mere assertion that a specification, which dramatically restricts competition, can be sustained without any showing of facts underlying the restriction in the specification will not be upheld by the Board. In this case, some measurements of the space between parked buses, doorways, and the paint room should have been supplied to the Board in order for it to determine the agency's minimum needs. However, the record reflects no such measurements

were made. The agency assertion that 1" +/- is crucial to its minimum needs is not factually supported in the record.

This Board is limited to a determination as to whether the specifications unreasonably restrict competition. A review of the specification necessarily included some understanding of the facts upon which the specification is based to determine its reasonableness. See Admiral Services, Inc., MSBCA 1341, 2 MICPEL ¶159 (1987).

This Board in reviewing whether specifications unreasonably restrict competition, must necessarily look at the facts underlying the minimum needs to determine reasonableness. Helmut Guenschel Inc., MSBCA 1434, 3 MICPEL ¶211 (1989). (Evaluation of factual basis for requiring a prototype). Admiral Services, Inc., MSBCA 1341, 2 MICPEL ¶159 (1987). (Evaluation of actual basis for requiring swing staging for window cleaning services.

In the absence of such facts, the appeal is sustained.

