

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE NATIONAL ELEVATOR)
COMPANY)
Under University of Baltimore) Docket No. MSBCA 1266
Project No. S-2604)

March 7, 1986

Specifications - Responsibility - IFB requirements regarding prior work experience applied to a newly formed corporation to determine bidder responsibility do not unreasonably restrict competition contrary to Maryland procurement law.

Responsibility - In applying the five year experience requirement set forth in the IFB, the procurement officer properly should take into consideration the experience of the principals of a new corporation in reaching a determination as to its responsibility.

Responsibility Criteria - Restricted Competition - Responsibility criteria requiring evaluation of a company as an entity as well as evaluation of the qualifications and experience of its employees do not unreasonably restrict competition contrary to Maryland procurement law.

Specifications - Restricted Competition - The IFB requirement that elevator maintenance and repair services be provided by the successful contractor using only personnel from a list of qualified and experienced personnel furnished at the time of award unreasonably restricts competition contrary to Maryland procurement law. The University failed to establish a prima facie case that the requirement is reasonably related to its minimum needs.

Specifications - Bidding on an Equal Basis - The IFB restriction limiting performance only to those experienced and qualified employees listed by the successful contractor at the time of bidding was not a mere formality. Treating this requirement as a mere formality subject to waiver as a practical matter during performance would be contrary to the principle that bidders are entitled to rely on a solicitation's requirements regarding the scope of competition for award in order that they may bid on an equal basis.

APPEARANCE FOR APPELLANT:

Barbara Solomon Brown, Esq.
Alvin Solomon, P.A.
Baltimore, Maryland

APPEARANCE FOR RESPONDENT:

Christine Steiner
Assistant Attorney General
Baltimore, Maryland

OPINION BY MR. KETCHEN

This timely appeal is taken from a University of Baltimore (University) procurement officer's final decision denying Appellant's bid protest which challenged the Qualifications of Bidders section of the captioned project's specifications as being discriminatory and anti-competitive.

Findings of Fact

1. On September 3, 1985, the University issued an Invitation for Bids (IFB) for Project No. S-2604 which provides for maintenance and repair of the University's five elevators. Bids were due on September 23, 1985.

2. Section IV of the IFB, "Detailed Specifications," requires bidders to have certain qualifications and provides, in pertinent part, as follows:

2. QUALIFICATIONS OF BIDDERS:

a. The company shall have had a minimum of five (5) years successful experience in fully maintaining and repairing elevators of the type described herein. Upon request of the State, bidders shall be able to show evidence of his reliability, ability and experience, by furnishing:

(1) a list of personnel who will perform maintenance and repairs covered under this contract, showing the length and type of experience of such personnel, and what licenses (if any) they possess.

(2) The names and addresses of other concerns and/or similar situations [sic] of comparable size and function for which prior comparable services were rendered by the bidder or for which similar services are presently being provided.

b. Ability to meet the foregoing requirements and the adequacy of the information submitted will be considered by the Department of General Services in determining the responsibility of the bidder.

c. Services must be provided by the successful bidder using only personnel from the above requested list.

d. The Contractor shall have their service personnel at the University within one (1) hour after receiving an emergency call back and repair service request. Such emergency and call back services shall be on a twenty four (24) hour basis.

e. All bidders must submit with their bids the above referenced lists showing their reliability, ability, and experience. Ability to meet the foregoing qualifications covering personnel and experience requirements and the adequacy of the information submitted by the bidder will be considered by the University in determining the recommendation of the award of the Contract. The University reserves the right to reject any bid from companies who, in its opinion, do not meet the foregoing requirements.

3. On September 20, 1985, three calendar days (one working day) prior to opening of bids, the University received a timely protest from Appellant requesting that the bid notice be withdrawn and that the instructions and specifications be re-issued consistent with its protest. Appellant's protest alleged that the Qualifications of Bidders clause was arbitrary, capricious and improper because it prevents new companies, in existence for less than five years, from realistically competing for the contract.

4. Appellant submitted its bid on the scheduled bid opening date after the procurement officer determined not to delay the opening. Since the protest was filed three calendar days (one working day) before bids were due, the procurement officer decided that insufficient time remained for her to notify other vendors of the challenge to the specifications.¹

5. The bid opening proceeded as scheduled, but no contract award has been made.

6. On October 9, 1985, the University procurement officer rendered a final decision denying the protest. She determined that the Qualifications of Bidders section of the specification was appropriate and necessary.

7. Appellant filed a timely notice of appeal with this Board on October 23, 1985.

Decision

Appellant initially contends that the following subsections of Section IV Paragraph 2 of the specifications are arbitrary, capricious, and discriminate against newly formed companies:

a. The company shall have had a minimum of five (5) years successful experience in fully maintaining and repairing elevators of the type described herein. Upon request of the State, bidders shall be able to show evidence of his reliability, ability and experience, by furnishing:

(1) a list of personnel who will perform maintenance and repairs covered under this contract, showing the length and type of experience of such personnel, and what licenses (if any) they possess.

(2) The names and addresses of other concerns and/or similar situations [sic] of comparable size and function for which prior comparable services were rendered by the bidder or for which similar services are presently being provided.

* * *

¹We have held previously that a procurement officer has a duty to resolve a bid protest regarding an IFB's specifications received prior to bid opening, even if delay in the bid opening results. William F. Wilke, Inc., MSBCA 1162 (October 3, 1983).

c. Services must be provided by the successful bidder using only personnel from the above requested list.

* * *

e. All bidders must submit with their bids the above referenced lists showing their reliability, ability, and experience. Ability to meet the foregoing qualifications covering personnel and experience requirements and the adequacy of the information submitted by the bidder will be considered by the University in determining the recommendation of the award of the Contract. The University reserves the right to reject any bid from companies who, in its opinion, do not meet the foregoing requirements. (Underscoring added).

Appellant's contention necessarily raises the issue of whether these provisions restrict competition contrary to Maryland procurement law. Appellant particularly objects to the use of the word "company" in Section IV. 2.a and "bidder" in Section IV. 2.a(2) and insists that they be replaced by "principals" and "individuals."² It also challenges the necessity of using only personnel from a list compiled at the time of bid preparation.

The procurement officer's final decision states that the required five years experience and references of comparable services must be of the firm itself, not of the principals and individuals. This position in part is contrary to the one taken by this Board in Aquatel Industries, Inc., MSBCA 1192 (August 30, 1984). In that decision we specifically held that "the experience of corporate officials gained prior to the formation of a new corporation can be included when evaluating a corporation's overall experience level." Aquatel, at 4.³ In light of that decision, this Board finds that it would be improper for the University's procurement officer not to consider the prior work experience and references of the principals of a new corporation when evaluating the responsibility⁴ of a "company" or "bidder". However, it is not necessary to instruct the University to rewrite this portion of the specification regarding substitution of "principals" for either "company" or "bidders" in Section IV.2.a, or for bidder in Section IV.2.a(2) as Aquatel has already set forth a test for measuring the experience of a business that coincides with the result that Appellant desires. In addition, the University's attorney freely admitted during the hearing that under Aquatel the procurement officer is obligated to take into consideration the prior work experience of the principals in evaluating matters of responsibility. (Tr. 12, 30). Accordingly, we find that the specifications objected to in this regard, in fact, comport with Maryland procurement law.

²Appellant does not challenge directly the five year firm experience requirement as restricting competition but only the method permitted by the wording of the specifications to establish that a bidder meets the requirements.

³See also: Haughton Elevator, Comp. Gen. Dec. B-184865, May 3, 1976, 76-1 CPD ¶294, at 9; Baldwin Ambulance Service, Inc., Comp. Gen. Dec. B-184384, December 15, 1975, 75-2 CPD ¶393, at 3; Hydromatics International Corporation, Comp. Gen. Dec. B-180669, July 29, 1974, 74-2 CPD ¶66, at 3.

⁴COMAR 21.01.02.59 provides that a "[r]esponsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which shall assure good faith performance."

We next consider Appellant's demand that the University also substitute "individuals" (employees or personnel) for either "company" in Section IV.2.a. or for "bidders" in Section IV.2.a.(2). It is clear that the IFB requires consideration of the qualifications and experience of a bidder's employees as a factor in determining a bidder's overall ability to perform as a company. Section IV.e.⁵ In addition, consideration of a bidder's employees who will do the work raises related but somewhat different concerns under the specifications set forth here. In this regard, the specifications expressly state that "upon request of the State, bidders shall be able to show evidence of his reliability, ability and experience by furnishing: (1) a list of personnel who will perform maintenance and repairs covered under this contract, showing the length and type of experience of such personnel. . . ." (Underscoring added). In addition to providing information about a bidder's overall capability to meet the specified minimum standard of experience or expertise, this aspect of the IFB's responsibility criteria also provides that the University will determine whether a bidder presently has a work force of sufficient size and experience capable of performing this contract given the size and complexity of the work involved. National Elevator, MSBCA 1251 (October 17, 1985) at 7. The present capability of a bidder's employees, each considered on an individual basis, obviously reaches aspects of a bidder's ability to perform that differ from a bidder's managerial ability to sufficiently organize and run a business, which is to be demonstrated in this procurement by five years successful experience performing elevator maintenance services for comparable institutions.⁶ Thus, a bidder's experience and that of its individual employees are both related to the ultimate responsibility determination. However, the underlying analyses necessary to reach a final determination of responsibility requires the procurement officer to evaluate these different facets of a bidder's ability — i.e., (1) its capability as a firm, considered as a whole, which includes consideration of its employees, and (2) the capabilities of its employees. This distinction between a bidder and its employees would be lost if we required the University to substitute individuals (employees), in addition to "principals," for either "company" or "bidders" in Section IV.2.a. or for "bidder" in Section IV.2.a(2).

Based on the above, we find that Appellant has not demonstrated that the phrasing of Section IV.2 requiring consideration of a company's or bidder's ability separately but in conjunction with the experience and ability of the company's or firm's employees who will perform the work restricts competition and, therefore, is unreasonable. The IFB's responsibility criteria need not be rewritten as Appellant requests since they comport with Maryland procurement law.

⁵Cf.: Haughton Elevator, *supra*, at 3, 9 ("corporate officials" included listed servicemen not otherwise identified as corporate principals).

⁶Of course, it is within the procurement officer's reasonable discretion to determine whether a bidder has met the minimum level of definitive responsibility criteria set forth in the IFB. Compare Pike's Peak Community College, Comp. Gen. Dec. B-199102, October 17, 1980, 80-2 CPD ¶293 with Haughton Elevator, *supra* and Louise T. Keelty, MSBCA 1195 (September 26, 1984) at 7 and with Custom Management Corp. & Ogden Food Service, MSBCA 1086/1090 (October 22, 1982) at 9, *rev'd A'dell Food Service, Inc.*, Case No. 109503 (Cir. Ct. *alto*. City, March 10, 1983).

Appellant next contends, as noted above, that the requirement of Section IV. 2.c. that "services must be provided by the successful bidder using only personnel from the above requested list" (Section IV.2.c.) restricts competition. While Appellant apparently has no objection to listing personnel who will perform the maintenance and repairs under the contract as required by Section IV. 2.a(1), it argues that Section IV. 2.c. is discriminatory to small, new companies because it prevents them from obtaining new employees during the contract period to perform the contract work. Thus, a bidder that does not have a surplus of qualified and experienced employees to place on the list at the time of bid preparation cannot responsibly submit a bid knowing that if it loses those employees listed through natural attrition, it will be unable to replace them with new, albeit qualified and experienced, employees. According to Appellant, Section IV.2.c. would severely deter small companies from bidding because larger ones would have a surplus of experienced and qualified employees to place on the list.

In Xerox Corporation, MSBCA 1111 (April 25, 1983), at 7, we stated:

The drafting of specifications is primarily a function of the State's procurement agencies who are uniquely knowledgeable as to what will serve the State's minimum needs in a given instance. 52 Comp. Gen. 219, 221 (1972); 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 procuring agency. Compare 53 Comp. Gen. 270 (1973); 52 Comp. Gen. 393 (1972); 52 Comp. Gen. 941 (1973); Sterile Food Products, Inc., Comp. Gen. B-179704, April 12, 1974, 74-1 CPD ¶191; Hanna v. Board of Education of Wicomico County, 200 Md. 49, 51, 87 A.2d 846, 847 (1952).

In Amray, Inc., Comp. Gen. Dec. B-208308, January 17, 1983, 83-1 CPD ¶43 the Comptroller General held:

Generally, when a specification has been challenged as unduly restrictive of competition, it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. Walter Kidde, Division of Kidde, Inc., B-204734, June 17, 1982, 82-1 CPD ¶539; S.A.F.E. Export Corporation, B-207655, November 16, 1982, 82-2 CPD ¶445.

The Appellant's challenge of Section IV. 2.c as unduly restrictive of competition places the burden on the University to establish a prima facie position that the language of Section IV. 2.c is reasonably related to the University's minimum need for elevator maintenance, inspection, and repair services to assure safe operation of its elevators. The University argues that Section IV.2.c. assures that a bidder initially is of sufficient size to perform

the contract satisfactorily and that there will always be enough qualified and experienced persons available during contract performance to provide the contract services for the University's elevators.⁷

Appellant does not complain directly about Section IV.2.c. relative to the scope of the procurement officer's discretion to evaluate the size of a company or its work force as factors in determining whether a bidder has the ability initially to comply with the contract provisions and thus is responsible. See: Haughton Elevator, supra, at 8. Appellant's argument assumes that the low responsive bidder at the time of contract award will have a work force of sufficient size, experience and qualifications and thus be capable of performing the work. It complains, however, that assuming a company is of sufficient size to perform at the time of award, restricting contract work performance only to those employees listed will cause problems to a small company due to normal employee turnover. This will deter such companies from bidding and, therefore, unreasonably restricts competition. It is in this context that we address the University's position.

The rationale given by the University for Section IV.2.c. is that the procurement officer has the obligation to consider the size of a company, which includes the number of qualified and experienced employees who will perform the work, in determining a bidder's ability to perform. This is said to be especially true in a contract for elevator maintenance, inspection, and repair services, including emergency services, where safety considerations are involved. See: Post-hearing Brief of Appellee (University), January 13, 1986, at 2. The University argues that a large inventory of qualified and experienced employees listed by the contractor at the time of award will assure that there will always be enough employees available to maintain the University's elevators during contract performance. However, the University has provided neither probative evidence nor rational argument showing how size (to mean a certain, although unspecified, number of listed employees available to perform) and safety are directly linked to the restriction limiting contract performance to only those employees listed by the successful bidder at the time responsibility is determined initially at contract award and, therefore, that the restriction is required to meet its minimum needs. The implication of the University's unsupported argument that a large company provides a greater degree of safety than a smaller one in and of itself does not establish that Section IV.2.c., in its present form, is reasonably necessary to meet the University's minimum needs for elevator maintenance, inspection, and repair services, including emergency services.

As further support for Section IV.2.c., the procurement officer in her decision also stated that

"when a contract of this type is awarded, the University's Plant Operations Department requires some of its employees to acquaint the contractor's representative with the specific University policies and

⁷The detailed specifications require the contractor to be available for emergency services on a twenty-four hour basis with a response time of one hour from receipt of an emergency call. Section IV. 2.d; Section IV. 16.b. Elevators may not be out of service for more than one day for electrical troubles, burned out control coils, open circuits, electrical or mechanical adjustment nor more than a maximum of three days for other types of shutdowns. Section IV. 9.

procedures which he/she must follow. This procedure may take a few weeks to accomplish, and the University does not wish, nor does it have the time, to repeat such a task." (Underscoring added).

It was this reason, as well, that the University used to help establish its prima facie position that Section IV. 2.c. reasonably related to its minimum needs. (Tr. 30-32). However, this rationalization does not state that the University explains its procedures to each contractor employee listed but only to the contractor's representative. There is no reason why the same contractor representative who receives the instructions initially cannot acquaint and train new, experienced and qualified employees with University policies and procedures, as he obviously will have to do with those employees listed at the time of contract award.

The University appears also to be under the impression that Appellant's complaint about the listing requirement is based on Appellant's desire to use persons to perform the work who have not been approved by the University. See: Post-hearing Brief of Appellee (University), January 13, 1986, at 3. This is not the case. Appellant has made it clear that it merely seeks the ability to add qualified and experienced employees who will perform the work during contract performance, subject, of course, to University approval. (Tr. 22).

Based on the above, we find that the University has not established a prima facie showing that the Section IV.2.c. requirement limiting contract performance only to qualified and experienced employees listed at the time of award is reasonably related to its minimum needs and, therefore, does not unreasonably restrict competition. Nor would it be permissible to recognize, as suggested by the University at the hearing, that Section IV.2.c. is merely a formality that as a practical matter could be subject to exception if circumstances arose during performance that required the use of new, qualified and experienced employees after review of their qualifications by the University. (Tr. 35-40). This would be contrary to the requirement that bidders are entitled to bid on an equal basis; they have a right to rely on the solicitation's wording regarding the scope of competition for award. See: Instrument Marketing Corp., Comp. Gen. Dec. B-182347, January 28, 1975, 75-1 CPD ¶60.

Having sustained the appeal regarding Section IV.2.c., a suggestion is in order. If Section IV.2.c. is important to the University, it should reconsider how to phrase it consistent with the policy set forth in Maryland procurement law that competition is to be encouraged⁸ and its concern that only experienced and qualified persons approved by the University are permitted to perform the work. While we believe the University in this contract has a right to approve those contractor employees performing the work, Haughton Elevator, supra, at 5, 10, we note that as presently drafted the specifications do not specify any minimum level of experience or qualifications for individual, contractor employees. The definitive responsibility criteria of five years of successful experience of a company in performing elevator maintenance and repair services for comparable institutions is a different criteria to be applied and involves the procurement officer's exercise of her reasonable discretion as to whether this broad, overall standard of responsibility is met

⁸State Finance & Procurement Article, Md. Ann. Code, Section 14-101, "Encouragement of competition; favoritism."

by a company. We thus go one step further in suggesting that in order to avoid possible disputes the University may want to consider establishing minimum experience and qualifications criteria for evaluating employees that the successful contractor may propose to add to the approved employee list during contract performance.

For the foregoing reasons, therefore, Appellant's appeal is denied in part (as to Section IV. 2.a.) and sustained in part (as to Section IV. 2.c.)

