

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE NATIONAL ELEVATOR)
COMPANY)
) Docket No. MSBCA 1276
Under DET Contract No.)
DET/OA12-85-062)

June 18, 1986

Definitive Responsibility Criteria - Ambiguous - Where the IFB's definitive responsibility criteria were ambiguous, the IFB was materially defective such that competition was unreasonably restricted.

Ambiguous Responsibility Criteria - Invalid Award - Where the IFB's definitive responsibility criteria are ambiguous and thereby do not reflect the agency's minimum needs, award would not substantially comply with Maryland procurement law requiring the fair treatment of all bidders. Award under these circumstances would result in an invalid contract.

APPEARANCE FOR APPELLANT: Barbara Solomon Brown, Esq.
Alvin Solomon, P.A.
Baltimore, MD

APPEARANCE FOR RESPONDENT: Alexander Wright, Jr.
Assistant Attorney General
Baltimore, MD

OPINION BY MR. KETCHEN

This timely appeal is taken from a Maryland Department of Education and Training (DET) procurement officer's decision denying Appellant's bid protest of the bidder qualifications clause contained in the Invitation For Bids (IFB) of the captioned contract as being arbitrary, anti-competitive, and improper.

Findings of Fact

1. In January 1986, DET issued an IFB for Contract No. DET/OA 12-85-062 for the performance of maintenance and repair services on four elevators located within the agency building. Bids were due to be opened on February 14, 1986.

2. Appellant filed a protest with the procurement officer on February 4, 1986 which asserted that the language used in the bidder qualification clause is arbitrary, capricious, and discriminatory because it prevents new companies, in existence for less than five years, from obtaining this contract.

3. The language objected to by Appellant is in Section III, Supplementary General Conditions, which states, in pertinent part, as follows:

4. QUALIFICATIONS OF BIDDERS

a. The Contractor shall be a competent and experienced contractor in elevator and dumbwaiter service, repair and maintenance. He shall have adequate technically qualified personnel employed within his organization to perform all phases of the contract requirements. He shall have an established good reputation within the community in which work is to be performed. The contractor shall be presently retained by other facilities with similar (or more complex) equipment for a minimum period of five (5) years. He shall furnish a list of these facilities and shall furnish the names and telephone numbers of persons to contact in those organizations. This requirement is for the purpose of checking past performance and references. (Underscoring added).

*

*

*

4. Even though Appellant's protest of the specifications dated February 4, 1986 was received by DET on February 5, 1986, nine days before the scheduled bid opening, the procurement officer opened the bids on February 14¹ with the following results:

National Elevator Company	\$12,800 per 16 months
General Elevator Company	\$15,697 per 16 months
Consolidated Standard Elevator	\$16,608 per 16 months ²

5. On February 26, 1986, Mr. J.E. McGarry, Jr., the DET employee assigned to evaluate the bids, wrote a memo to the procurement officer containing his evaluation of the bids. His conclusion was that although Appellant was the low bidder, "its failure to supply information requested as part of the bid request would seem to exclude consideration of their proposal."³ In his opinion, the contract should have been awarded to General Elevator Company.⁴

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). If bids are opened only to have the solicitation cancelled and re-advertised, the potential is for the new solicitation to create an unsatisfactory auction atmosphere, where new bids are responses to the prior exposed bids rather than to the requirements of the new solicitation. See: 52 Comp. Gen. 285, 289 (1972).

²Consolidated Standard Elevator also included a one-time pre-maintenance condition which brings its total contract price to \$19,726.

³National Elevator failed to submit a list of present businesses being served by it, to submit a list of employees and their experience, or to identify a maintenance shop available to it.

⁴General Elevator had written a letter to the procurement officer protesting award of the contract to Appellant. General Elevator maintained that as Appellant had been in business for only one year, it could not have compiled a list of at least five similar facilities. General Elevator erroneously stated

6. The DET procurement officer denied Appellant's protest of the bidder qualifications clause requirement that a bidder "shall be presently retained by other facilities with similar (or more complex) equipment for a minimum period of five (5) years" in a final decision issued on February 27, 1986. That decision provided, in pertinent part, as follows:

[Counsel] informed this office that your protest was similar to other issues that had previously been brought to the Maryland State Board of Contract Appeals. The former appeals on this issue provided that experience of corporate officials gained prior to the formation of a new corporation can be included when evaluating a corporation's overall experience level. Additionally, we were advised by our counsel that responsiveness to the experience requirements and the adequacy of this information cannot be considered in evaluating the responsibility of a bidder.

Our Counsel advises that your protest is premature and the RFP was read and construed in the light of recent Maryland Board of Contract Appeals decisions and considered the experience of corporate officials.

7. Appellant filed a timely notice of appeal with this Board on March 4, 1986 requesting rejection of all bids, cancellation of this procurement, and re-advertisement for the services sought.

8. On March 10, 1986, DET wrote again to Appellant requesting that additional information relating to its qualifications be furnished to permit DET to finalize its recommendations for award of the contract. The point that DET would consider the prior experience of corporate officials in determining whether a company met the IFB's five year experience requirement was further elaborated in a letter sent from DET to Appellant's attorney on March 24, 1986.

Decision

In its protest dated February 4, 1986, Appellant maintained that the disputed requirement that a bidder be presently retained by other facilities with similar or more complex equipment for a minimum period of five (5) years "is arbitrary and capricious as a qualification [and] should not require five (5) years experience of a company, but rather the experience should be regarding the principals and individuals comprising and working for the company." We recently denied an appeal (in part) by this Appellant in another procurement objecting to a solicitation requirement involving an issue regarding experience criteria similar to that set forth here. We held there that the specifications did not need to be revised to substitute "principals" or "employees" for "bidder" or "company" in an IFB that required five years of company or bidder experience in providing elevator maintenance, repair, and inspection services. However, we held that relevant experience of corporate officials may be included in evaluating whether a corporation ("company" or

the bidder qualifications requirement. The bidder qualification criteria does not require experience servicing five facilities but only that a contractor "shall be presently retained by other facilities . . . for a minimum period of five (5) years."

"bidder") meets a solicitation's definitive responsibility criteria stated in terms of a company's or bidder's minimum experience level. National Elevator Co., MSBCA 1266 (March 7, 1986) at 4; Aquatel Industries, Inc., MSBCA 1192 (August 30, 1984) at 4. We reiterate that agencies, such as DET here, may specify bidder qualification requirements literally in terms of a bidder's (company's) experience. Whether a bidder meets particular criteria set forth is left to the procurement officer's reasonable judgment, although a company may attempt to show that it meets the specified criteria through the experience of its corporate officials.

We next address Appellant's contention that the requirement for five years experience is unclear or ambiguous. (Tr. 3-4). We agree that it is. (Tr. 10-14, 18, 27). While our prior decisions should dispel any worries that Appellant may harbor based on the fact that it is a new company, it is arguably possible to construe the "presently retained for 5 years" requirement in several ways. It would seem to require a bidder to have (or have had) contracts with similar entities with similar or more complex equipment running for five years. It thus is not clear whether this means that the contractor must be "presently retained" under a contract that is presently in existence and will run five years, or that it must be a party to at least one contract that has lasted a minimum of five years. One interpretation would be that DET was looking for companies with five years previous experience maintaining elevator equipment similar to or more complex than that to be serviced under the instant solicitation. However, no evidence to assist in clarifying the interpretation of the "presently retained for 5 years" language is contained in the written record nor was any introduced at the hearing held on May 9, 1986.

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. See: National Elevator, supra. 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. Xerox Corporation, MSBCA 1111, (April 25, 1983) at 7. Initially, the burden is on the procuring agency to establish prima facie support for its position that challenged definitive responsibility criteria is reasonably related to its minimum needs. National Elevator Co., supra, at 8. If the agency meets this burden, the protester on appeal must then show that the requirement is clearly unreasonable. Id. 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.

However, as we noted above, DET conceded that the particular responsibility requirement that Appellant objects to is inappropriately framed contrary to Maryland procurement law, and either will not be used as written in judging bidder qualifications, or will be modified in some fashion. (Tr. 10-12, 14, 18). Since the definitive responsibility requirement as presently set forth in the IFB was by DET's own admission ambiguous, we find that the IFB in this appeal was obviously and materially defective such that competition was unreasonably restricted. See: The Fechheimer Bros Co. and Harrington Industries, MSBCA 1181 & 1182, at 8. Under these circumstances,

award in the face of the IFB's ambiguous responsibility criteria that do not reflect DET's minimum needs would not substantially comply with Maryland procurement law requiring the fair and equal treatment of all bidders and thus would result in an invalid contract. State Finance and Procurement Article, Md. Ann. Code, §§11-201,⁵ 12-201.⁶ See: National Elevator Co., supra at 11; Delmarva Drilling Co., MSBCA 1096 (January 26, 1983); Haughton Elevator Division, Reliance Electric Co., 55 Comp. Gen. 1051, 1058 (1976); Ingersoll-Rand Co., Comp. Gen. Dec. B-192279, October 6, 1978, 78-2 CPD ¶258; Meds Marketing, Inc., Comp. Gen. Dec. B-213352, March 16, 1984, 84-1 CPD ¶318. See generally: Custom Management Corp. and Ogden Food Service Corp., MSBCA 1086/1090 (October 22, 1982) rev'd, A'Dell Food Services, Inc. v. Maryland State Board of Contract Appeals, Case No. 109503, Docket: 25-P, Page: 299 (March 10, 1983).

For the foregoing reasons, therefore, Appellant's appeal is sustained.

⁵Section 11-201(b) provides, in pertinent part, that the "underlying purposes and policies of this Division II of this article [State Finance and Procurement Article] are, among others to:

* * *

(2) Insure the fair and equitable treatment of all persons who deal with the procurement system of this State."

⁶Section 12-201(b) provides, in pertinent part, that "Except as otherwise provided in this Division II of this article a contract which is entered into in violation of this Division II of this article or the regulations promulgated under it are void, unless it is determined in a proceeding under this Division II of this article or subsequent judicial review that good faith has been shown by all parties, and there has been substantial compliance with the provisions of this Division II of this article and regulations."

