

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of The Trane Company)
) Docket No. MSBCA 1264
Under MTA Contract No.)
MTA-90-7-10)

December 9, 1985

Bid Protest - Specifications - In reviewing a protest concerning an agency's technical specifications, the Board may not substitute its judgment for that of the agency as to what the agency's minimum needs should be. The Board may consider, however, whether the technical specifications unreasonably restrict competition in contravention of Maryland law.

Bid Protest - Specifications - A technical specification requiring an item of equipment produced by only one manufacturer does not unreasonably restrict competition if there is a reasonable basis for requiring the item to meet the agency's minimum needs in a given instance.

Evidence - Once the agency establishes a prima facie case that the technical requirements are necessary to meet its minimum needs, the complaining bidder must show by the greater weight of evidence that the technical specifications complained of do not have a reasonable basis and, therefore, are unnecessarily restrictive.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: William B. Tittsworth, Jr.
 Assistant Attorney General
 Baltimore, MD

OPINION BY MR. KETCHEN

This is an appeal from a Mass Transit Administration (MTA) procurement officer's final decision denying Appellant's protest concerning the specifications utilized in Invitation for Bids (IFB) No. MTA-90-7-10. Appellant contends that the technical specification requiring a horizontal condenser coil in the air conditioning condenser conversion kit unnecessarily restricts competition and violates COMAR 21.04.01.02 which provides that specifications shall be written to permit maximum practical competition without modifying the State's requirements. MTA, however, contends that the specification as modified permits competition on an equal basis and that it is primarily MTA's responsibility to design specifications to meet its minimum needs.

Findings of Fact

1. On July 5, 1985, MTA issued an IFB for RTS transit coach upgrade contract MTA-90-7-10 for installation of air conditioning condenser conversion kits and air starter systems on 1978 and 1980 General Motors RTS II, Series 03 transit coaches. The conversion involves replacing the original condenser which is mounted next to the radiator on the transit coach with a self-contained condenser unit installed at the rear of the coach above the engine compartment. Bids were due on October 8, 1985.¹

2. Paragraph 2 of the IFB Technical Specifications provides, in pertinent part, as follows:

Condenser Coil

The condenser coil shall be constructed of thick walled (.0195) 3/8 copper tubing mechanically expanded into .010 thick aluminum fins supported by three aluminum header plates. The entire coil assembly shall be dipped in an acrylic base, vinyl coating material for corrosion protection. The condenser coil shall be mounted in an approximate horizontal plane for minimum collection of dirt and to provide ease of washing and drainage. The condenser shall have a minimum of eleven (11) square feet of face area.

3. Paragraph 18 of the Special Provisions provides, in pertinent part, as follows:

Required Submissions

The bidder shall include with his bid a description of the proposed system modification together with engineering drawings and schematics, separately for both the Air Conditioning and Air Starter conversions.

* * *

Bidders shall submit with their bids, evidence, that the conversion kit/package proposed for use under this Contract has been successfully installed and in operation on RTS-II Series 03 transit coaches on other transit properties for a minimum of one (1) year. The units described above shall be identical with equipment for which the bidder proposes to bid and install herein.

4. Paragraph 3b of the Special Provisions provides as follows:

A bidder may submit to the MTA request for approved equals and for clarifications of the contract and any addendum. Any such request must be received by the Mass Transit Administration, Director of Contract Administration, 300 West Lexington Street, Baltimore, Maryland 21201-3415 not less than 15 calendar days

¹Addendum No. 2 issued on August 1, 1985 extended the bid opening date of August 7, 1985 to September 18, 1985. Addendum No. 3 issued on September 3, 1985 extended the bid opening date to October 8, 1985.

before the date scheduled for bid opening. Any request for an approved equal must be fully supported with the technical data, test results or other pertinent information as evidence that the substitute offered is equal to or better than that required by the specification. Oral explanations, instructions or determinations given by MTA personnel will not be binding.

5. Article 2f of the General Provisions of the IFB provides, in pertinent part, as follows:

In the event a Bidder believes that the MTA's specifications are unfairly restrictive, the matter shall be promptly brought to the attention of the Director of Contract Administration. Such matters will be submitted to the address in Article 3 in writing with specific details in order that the matter may be fully considered and appropriate action taken by the MTA prior to the closing time set for bids.

6. Appellant submitted a written request to MTA on July 3, 1985 seeking approved equal status for its equipment. It delineated the areas where its equipment differed from the description of the equipment set forth in the technical specifications. Among the variances noted, the condenser coil on Appellant's air conditioning condenser conversion kit is mounted vertically. The MTA technical specification requires that the condenser coil be mounted in an approximate horizontal plane.

7. By letter dated July 22, 1985, MTA approved as equals certain of the items of equipment listed by Appellant as part of its air conditioning condenser conversion kit. However, it denied Appellant's request for approved equal status on a number of other items including its request for approval of a vertical condenser coil. The request for waiver of the requirement for coating the entire condenser coil assembly in an acrylic base, vinyl coating material was also denied.

8. On July 29, 1985, Appellant filed a written protest asserting that the MTA technical specification restricted competition with regard to certain of those items for which its request for approved equal status had been denied. Appellant maintained that there are only three manufacturers of air conditioning condenser conversion kits, i.e., "Suetrak," "Thermo-King," and "Trane," and that the specification was restrictive because it was based on air conditioning condenser conversion equipment manufactured by Thermo-King, the only manufacturer using a horizontal condenser coil design. Appellant noted, however, that it would comply with MTA's determinations on other items of equipment where its request for approved equal status had been denied, if MTA would not enforce the minimum one year successful operation requirement.

9. Appellant's July 29, 1985 protest letter submitted the technical basis for its position that its vertical condenser coil design is technically equivalent to the MTA specification and the limitation to a horizontal condenser coil design unreasonably restricts competition. Appellant also pointed out that the specifications were unnecessarily restrictive regarding (a) the thickness of the condenser coil wall tubes and coil fins, (b) the requirement for acrylic, vinyl coating of the coil, and (c) the requirement for a specific size condenser coil face.

10. Addendum No. 3 to the IFB, issued September 3, 1985 in response to Appellant's protest, modified Paragraph 18 of the Special Provisions to permit a demonstration test for bidders who could not certify that equipment approved as equal had been successfully operated for at least one year. The condenser coil technical specification was modified to permit condensers to have the thinner wall thicknesses and thinner fin thicknesses consistent with Appellant's July 29, 1985 position. The condenser coil technical specification which specified a minimum size face area of eleven (11) square feet was changed to a performance specification. However, the condenser coil specification was not otherwise modified as Appellant requested, and still requires that the condenser coil assembly be dipped in an acrylic base, vinyl coating material for corrosion protection and mounted in an approximate horizontal plane.

11. The technical specification requiring a horizontal condenser coil was developed based on an analysis of daily operating maintenance records and was designed to procure an air conditioning system that performs efficiently and reliably under MTA's operating conditions. These technical requirements reflect the MTA's cumulative knowledge of operations, maintenance and reliability requirements.

12. A horizontal condenser coil configuration requires less maintenance than the vertical condenser coil configuration proposed by Appellant. It is a self-cleaning unit since rainwater and bus washing tend to keep the coils clean. This is important because it reduces the possibility of dirt and oil accumulation which could result in high head pressure, reduced system coil capacity, and eventually shorten the life of the air conditioning compressor. Compressor overhaul due to premature failure resulting from constant high head pressure requires twelve (12) man-hours of labor, and, including parts, costs approximately \$600.

13. Another pertinent factor is that the horizontal coil configuration allows for easy access to the condenser motors and motor brushes for preventative maintenance activities and inspection. In accessing the condenser motors from the outside rear of the coach the mechanic does not have to work on the roof of the coach. This eliminates unsafe working conditions.

14. A vertical condenser, on the other hand, accumulates excessive oil and dirt due to drafting conditions which results in additional maintenance. Also, oil and dirt accumulation subjects the vertical coil system to higher operating temperatures which in turn reduce the cooling capacity of the system and cause the compressor to operate at higher temperatures. This reduces the overall life of the compressor.

15. The MTA procurement officer denied Appellant's prebid protest by letter dated September 16, 1985.

16. Appellant filed a timely appeal with this Board on October 4, 1985.

17. Bids were opened on October 8, 1985 with the following results:

Suetrak USA Transport Refrigeration and Air Conditioning Co., Inc.	\$692,505
Chesapeake Thermo King	\$734,774
Appellant	\$740,520
Body Rite Repair Co.	\$920,319

18. Neither party requested a hearing, therefore, this decision is based on the written record.

Decision

We initially must determine the grounds for protest that are properly before this Board for resolution. Appellant maintains on appeal that the MTA procurement officer's final decision and Addendum No. 3 to the IFB could (1) result in the MTA's purchase of untested equipment which is an unjustified risk, (2) lead to a violation of COMAR 21.04.01.02 prohibiting specifications which favor a single bidder, and (3) create a conflict between the Special Provisions, which require compliance with GM specifications and suggestions for conversion of RTS II, Series 03 transit coaches and the specifications as modified by IFB Addendum No. 3. We shall address first the procedural issues raised by MTA's objection that the first and third issues of Appellant's notice of appeal are not properly before the Board for consideration.

The first issue is essentially an objection to MTA's modification of the specification to permit bids based on a prototype test of proposed equivalent equipment that is unable to meet the one year performance requirement specified by Paragraph 18 of the Special Provisions. The minimum one year performance requirement was modified, essentially based on Appellant's protest, to permit approved equal equipment that had not been successfully operated for the minimum one year period. However, this issue is not timely. This matter was not raised initially with the MTA procurement officer as required by COMAR 21.10.02.02 & 03A and COMAR 21.10.02.09.² By waiting until the notice of appeal to allege deficiencies in the IFB, Appellant waived its right to protest and have the Board consider its appeal on this ground. Compare National Elevator Co., MSBCA 1252 (October 15, 1985); The CTC Machine & Supply Corp., MSBCA 1049 (April 20, 1982); Mitek Systems, Inc., Comp. Gen. Dec. B-208786.3, May 10, 1983, 83-1 CPD ¶494. Similarly, Appellant's third issue regarding a possible conflict between GM specifications for conversion of RTS II, Series 03 transit coaches referred to in Paragraph 1 of the IFB's Special Provisions, and IFB Addendum No. 3 was not timely raised by protest to the procurement officer and thus is waived as an issue for our consideration on appeal. Compare National Elevator Co., supra.

²COMAR 21.10.02.02 and COMAR 21.10.02.09A require a protester to raise its concerns initially with the procurement officer representing the agency. See: Md. Ann. Code, State Finance and Procurement Article, §17-201.

We now consider whether the technical specifications objected to unreasonably restrict competition.³ Appellant maintains that specifying a horizontal condenser coil, which is only used in the air conditioning condenser conversion equipment manufactured by Thermo-King, unreasonably restricts competition.⁴ The only other two manufacturers of air conditioning condenser conversion equipment for General Motors RTS II, Series 03 transit coaches use condenser coils that are mounted vertically. In this regard, COMAR 21.04.01.02 provides:

"A. A specification is the basis of obtaining a suitable supply, service or construction 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's requirements. Specifications may not be drawn in such a manner as to favor a single vendor over other vendors. . . ." (Underscoring added).

We have stated previously the following with respect to the drafting of specifications:

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).

When a bidder protests the nature and sufficiency of a technical specification, the procuring agency is required to establish a prima facie case that the limitations imposed are necessary for its minimum needs. ALCO Power, Inc., Comp. Gen. B-207252.2, November 10, 1982, 82-2 CPD ¶ 433. Once a procuring agency has met this burden of going forward, however, the disappointed bidder is required to show by a preponderance of the evidence that the requirements complained of have no reasonable basis and, therefore, are unnecessarily restrictive. Bernstein v. Real Estate Comm'n, 221 Md. 221, 156 A.2d 657 (1959), appeal dismissed, 363 U.S. 419 (1960); ALCO Power, Inc., supra."

³MTA maintains that Appellant's second issue, i.e., that the specifications violate COMAR 21.04.01.02, is untimely. However, we regard Appellant's statement of this issue in its notice of appeal as being simply a restatement of the issue raised with the procurement officer that the specifications unreasonably restrict competition by being drawn in such a manner as to favor the equipment of a single manufacturer.

⁴Appellant on appeal pursues only the issue that the specifications unreasonably restrict competition because of the restriction to a horizontal condenser coil design. It no longer contests the requirement for coating the condenser coil with an acrylic base, vinyl coating material.

Xerox Corp., MSBCA 1111 (April 25, 1983) at 7-8. Compare Neoplan USA Corp., MSBCA 1186 and 1202 (September 18, 1984) at 9-10. A technical specification is not restrictive where it specifies a feature produced by only one manufacturer if required to meet the State's minimum needs. The test is whether the specification complained of has any reasonable basis. The Trane Co., Comp. Gen. Dec. B-216449, March 13, 1985, 85-1 CPD ¶306; Gerber Scientific Instrument Co., Comp. Gen. Dec. B-197265, April 8, 1980, 80-1 CPD ¶263.

We are satisfied that the MTA has established a prima facie case that the requirement for a horizontal condenser coil is necessary to meet its minimum needs (Findings of Fact Nos. 11 - 13) although there is only one manufacturer of air conditioning condenser conversion kits using the horizontal condenser coil design. Here, MTA presented evidence that its requirement for an air conditioning condenser conversion kit with a horizontal condenser coil design is essential to its minimum needs from a maintenance and cost standpoint. In this regard, MTA modified the requirement that the air conditioning condenser conversion equipment proposed must have been operated successfully for at least one year, and, in lieu of that requirement, permitted a demonstration test for equipment that had to be modified to provide a horizontal condenser coil. This clearly permitted bidders whose air conditioning conversion kits use a vertical condenser coil design to bid based on modified equipment providing horizontal condenser coils to meet what MTA deemed to be a critical need.

While Appellant presented its view that the vertical condenser coil design is equivalent or superior to the horizontal condenser coil design, and articulated what it believes are drawbacks to use of horizontal condenser coils, there is no evidence that its opinion is based on any objective analysis. Appellant otherwise did not submit any evidence that MTA's requirement for horizontal condenser coils does not have a reasonable basis. Under these circumstances, we find that Appellant has not demonstrated by the greater weight of evidence that the technical specification limitations complained of are unnecessarily restrictive. Appellant also has not produced any credible evidence that it, or any other bidder, was precluded from competing equally for the air conditioning condenser conversion contract on the basis provided for under the IFB specifications.

For these reasons, therefore, Appellant's appeal must be denied.

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