

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of XEROX CORPORATION)
Under DGS Request for Quotation) Docket No. MSBCA 1111
No. 7999)

April 25, 1983

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

Evidence — Once the agency establishes a prima facie case that the solicitation's technical requirements meet its minimum needs, the complaining bidder must show by a preponderance of evidence that the specifications precluded it from competing equally with the other bidders.

APPEARANCE FOR APPELLANT:

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APPEARANCES FOR RESPONDENT:

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OPINION BY MR. KETCHEN

The appeal is taken from a Department of General Services (DGS) procurement officer's final decision denying Appellant's protest concerning the specifications utilized in a request for quotations (RFQ) for plain paper photocopiers. Appellant contends that obtaining photocopiers under the advertised specifications was not in the State's best interest. DGS, however, states that the specifications permitted competition on an equal basis and that it was solely within its discretion to design specifications to meet the State's minimum photocopier needs.

FINDINGS OF FACT

1. On July 9, 1982 DGS issued RFQ 7999 for the rental and/or purchase of plain paper photocopiers. The RFQ was to result in a contract for the photocopier needs of all State agencies during the period from November 1, 1982 to September 30, 1983. Bids were due on August 17, 1982.

2. The solicitation provided that bids were to be submitted for twelve separate photocopier classes and six separate paper copy volumes as follows:

Band I - Class 1	1,000-7,000 copies
Band I - Class 2	1,000-7,000 copies
Band II - Class 3	7,001-20,000 copies
Band II - Class 4	7,001-20,000 copies
Band III - Class 5	20,001-35,000 copies
Band III - Class 6	20,001-35,000 copies
Band IV - Class 7	35,001-50,000 copies
Band IV - Class 8	35,001-50,000 copies
Band V - Class 9	50,001-70,000 copies
Band V - Class 10	50,001-70,000 copies
Band VI - Class 11	70,001-100,000 copies
Band VI - Class 12	70,001-100,000 copies

3. For each volume band and class, the RFQ described specific minimum photocopier specifications. Band I - Class 1, for example, was described as a photocopier which was capable of handling 8 1/2 x 11 inch paper, 8 1/2 x 14 inch paper and able to reproduce at a speed of 15 copies per minute when using 8 1/2 x 11 inch paper. Band VI, Class 12, on the other hand, was described as a photocopier capable of handling 8 1/2 x 11 inch paper, 8 1/2 x 14 inch paper, bound volumes, 2 sided copying, automatic reduction, having a single-sheet document feed, no less than a 20 bin sorter and able to reproduce at a speed of 60 copies per minute when using 8 1/2 x 11 inch paper.

4. The RFQ provided for submission of bids by volume band and photocopier cell within 5 geographical regions and for the State as a whole. Bids also were to be based on the following three acquisition methods:

- a. Outright Purchase, excluding maintenance, supplies, and paper. Awards within each region and the state-wide region were to be based on the lowest bids submitted for each photocopier volume band and class.
- b. Lease With Purchase Option, including maintenance and supplies (except paper until an option is exercised. Awards for each region and the state-wide region were to be based on the lowest evaluated bids per photocopier volume band and class determined by the evaluation formula set forth in the R.F.Q.¹

¹The Lease With Purchase Option evaluation formula provided;

$$\text{Price} = B + (\text{CPC})(Q) + \frac{I + R}{*} + \frac{\text{SBO}}{*}$$

(* Figure to be used was 11, 23, 35 months based on the particular number of months quoted.) The evaluation formula was based upon a monthly base charge ("B"), including maintenance and supplies (except paper); the cost per copy ("CPC") above the base quantity ("Q"); the installation and removal charges ("I + R"); and the sum of all monthly buy out amounts ("SBO") quoted for the lease period, i.e., 11 months, 23 months, or 35 months.

Vendors could quote prices for 11 months, 23 months and 35 months for each of the 12 classes of photocopiers specified.

- c. Monthly Rental, including maintenance and supplies (except paper). Awards within each region and the state-wide region were to be based on the lowest evaluated bids per equipment class and volume band determined by the evaluation formula set forth in the RFQ.²

5. On August 12, 1982 Appellant filed a written protest asserting that the procurement was not in the State's best interest. The following summarizes Appellant's complaints:

A. Supplies.

- 1. If the State, in actual practice, does not buy supplies from an equipment vendor, then the vendor should not be required to include these items as part of its bid price.

B. Remanufactured Photocopiers.³

The State loses the advantage of lower priced remanufactured photocopiers by limiting bids to new photocopiers for the outright purchase and lease with purchase option acquisition methods.

C. Photocopier Quantities - Discount Pricing.

Allowing agencies to acquire photocopiers as needed on a machine by machine basis is fiscally disadvantageous since this method of acquisition necessarily limits bidders to single unit pricing

D. Volume Bands and Photocopier Specifications.

- 1. The photocopier volume bands and classes were arbitrarily and randomly specified.
- 2. The pricing alternatives available from vendors over the volume bands specified could possibly result in the State's payment of higher prices for photocopier services in the lower volume ranges of the volume bands.

²The evaluation formula for photocopier rentals provided:

$$\text{Price} = B + (\text{CPC})(Q) + \frac{I + R}{11 \text{ [months]}}$$

³The IFB provided that, "unless otherwise specified, all materials, supplies (except paper) or equipment offered by a bidder shall be newly manufactured and be suitable for their intended purpose." (RFQ,p. 12)

E. Delivery Requirements.

The more technically sophisticated photocopiers could not be delivered fully serviced and ready for operation as required by the specifications.⁴

F. Loss of Equipment.

The contractor should not be responsible for misplaced photocopiers acquired by Outright Purchase.⁵

6. Bids were opened on August 17, 1982. Appellant was the apparent low bidder for certain copy volumes and classes in Region D,⁶ although it had submitted bids for other geographical regions, including the state-wide region.

7. The DGS procurement officer denied Appellant's bid protest by letter of September 9, 1982. The following summarizes the DGS position concerning each of Appellant's complaints:

A. Supplies.

Appellant would not be penalized by having to quote a price for supplies since it would have to furnish supplies for use in its photocopiers acquired by lease or rental, if it were a successful bidder. Requiring the vendor to furnish maintenance and supplies for

⁴The RFQ delivery requirements specified:

"Delivery: Deliveries shall be made in such time and in such quantities as ordered in strict accordance with the instructions given by the using agencies, but not more than 30 days after receipt of the order." (RFQ, p. 3).

"All equipment shall be assembled and fully serviced ready for operation when delivered including start up supplies." (RFQ, p. 12).

"All copy machines shall be fully serviced and ready for operation when delivered." (RFQ, p. 13).

⁵The RFQ provision Appellant was concerned about reads as follows:

"DAMAGE". The risk of loss and damage to all items of equipment will remain the responsibility of the contractor during Rental, Lease With Purchase options, or Warranty period. Damage of [sic] the equipment resulting from neglect or abuse by the State shall not hold the contractor liable to damages incurred." (RFQ, p. 10).

⁶Region D was identified as the Upper Chesapeake and Lower Eastern Shore consisting of Harford, Cecil, Kent, Queen Annes, Caroline, Talbot, Dorchester, Wicomico, Somerset, and Worcester counties.

leased or rented equipment avoids any controversy that may arise over responsibility for equipment malfunction. Requiring vendors to furnish supplies allows them to select supplies best suited to their machines and may lead to better performance. Administrative expense associated with obtaining supplies by separate solicitations is reduced.

B. Remanufactured Photocopiers.

In the DGS procurement officer's opinion, the State's best interest required newly manufactured photocopiers for acquisition by lease with purchase option and for direct purchase, since the State would have an ownership interest in photocopiers acquired by these methods.

C. Photocopier Quantities - Discount Pricing.

Vendors had the same equal and fair opportunity to submit their best pricing based on the same information available to all bidders.

D. Volume Bands and Specifications.

Volume band sizes and corresponding photocopier specifications were determined based on experience, historical data, agency and vendor surveys, and exceptions taken to recent DGS contract specifications. The DGS procurement officer pointed out that experience within the State indicates that a photocopier will produce the maximum number of copies established for the volume band of that particular photocopier. If the evaluation of bids was based upon anything other than the maximum copies within any particular band the vendors pricing for copies above the established evaluation volume would not be reflected in the determination of successful bidders. Vendors therefore could artificially inflate their pricing for copies above the established evaluation volume. The procurement officer also pointed out that the State could maximize its budget dollars by appropriate selection of photocopiers by the using agencies to meet their particular requirements on an as needed basis.

E. Delivery Requirements.

The DGS procurement officer explained that the specifications permitted delivery to include any necessary set up time so long as the photocopier was fully serviced and ready for operation within 30 days after receipt of the order from the using agency.

F. Loss of Equipment.

Appellant interpreted the meaning of loss of equipment during the warranty period for purchased photocopiers that are misplaced. The procurement officer clarified the meaning of the clause, stating that "misplaced" equipment would be the State's responsibility, although "loss of use" due to photocopier malfunction not caused by DGS use would be covered by the warranty provisions.

8. Appellant filed a timely appeal with the Board on September 23, 1982.

9. DGS advised the Board by letter of November 17, 1982 that contracts for the photocopiers were being awarded based on the RFQ evaluation criteria.

DECISION

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.

We are satisfied that the DGS procurement officer has established a prima facie case as to the necessity of the specification requirements. See Finding of Fact No. 7. Appellant, however, has failed to prove, by any credible evidence, that the limitations complained of were unnecessarily restrictive. The crux of Appellant's argument simply was that the State was not purchasing and leasing its photocopiers in the most cost effective way. No evidence was adduced, however, that Appellant was precluded from competing equally for the photocopier contracts on the basis provided for under the RFQ specifications. For this reason, therefore, its appeal must be denied.