

THE CITY OF NEW YORK
OFFICE OF ADMINISTRATIVE TRIALS
AND HEARINGS

- - - - - X

In the Matter of :

PENN-TROY MACHINE COMPANY, INC., :

Petitioner, : Index No.

- against - : 478/93

DEPARTMENT OF GENERAL SERVICES, :

Respondent. : MEMORANDUM

DECISION

- - - - - X

P R E S E N T: CHARLES R. FRASER
Administrative Law Judge

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The petitioner, Penn-Troy Machine Company, Inc., appeals pursuant to section 324(2) of the New York City Charter and 9 RCNY section 7-06(c) from denial of its application for inclusion on a prequalified vendor list compiled by the respondent, the Department of General Services. Penn-Troy maintains that DGS's use of the prequalification mechanism was arbitrary and capricious, either as to the entire procurement in question or at least as to part of that procurement. In the alternative, Penn-Troy argues that even if DGS acted rationally in deciding to use prequalification, DGS's choice of criteria for inclusion on the prequalified vendors list was arbitrary and capricious. DGS contends that the decision to use the prequalification mechanism is not subject to review here, and was in any event rational; and that DGS's prequalification criteria were also rationally based.

Upon the following analysis, I find that the denial of Penn-Troy's prequalification was not arbitrary or capricious, although it raises some rather troubling questions. Therefore, Penn-Troy's appeal is denied.

ANALYSIS

The Department of Environmental Protection uses Metropolitan Gate Valves in construction and repair of the city's water mains and sewer lines. These valves were developed "over the years" specifically for use in the city's water system (Answer, ¶ 4). DEP maintains an inventory of the valves which it uses as needed. The

valves are apparently fairly complex mechanisms, and require precision tooling (see Answer ¶ 4).

In August 1989, the city solicited bids for Metropolitan Gate Valves. For reasons not stated in the record here, no contract was awarded at that time. The record contains no indication of the status of DEP's valve inventory in 1989, or of the volume of valves sought in the 1989 bid solicitation. Penn-Troy did not bid in 1989.

The valve specifications were revised after the 1989 bid solicitation, and a pre-solicitation conference was held, based on the revised specifications, on November 18, 1991. No reason appears for the delay from 1989 to 1991 other than the need to revise the specifications.

The pre-solicitation conference was informational, "so vendors can understand City requirements and the City obtains industry advice . . ." (Answer, Ex. 10). DGS solicited suggestions from vendors, whether or not they attended the conference, based on which DGS was to revise the "proposed specifications" and issue a "final bid package" (*id.*). Invitations to the conference went to "over one hundred vendors" (Answer, ¶ 6), including Penn-Troy. Since apparently relatively few vendors have ever manufactured or supplied Metropolitan Gate Valves, I assume that most of the invitees had no history of making or selling that particular valve. In particular, Penn-Troy had manufactured various valves, but apparently had never made or sold Metropolitan Gate Valves.

Penn-Troy and seven or eight other companies attended the conference on November 18, 1991. Penn-Troy maintains that DGS

representatives stated at that conference that any firm that had manufactured gate valves for three years would be permitted to bid (Petition, ¶ 2(b)). Although DGS generally denies this allegation (Answer, ¶ 25), it supplies no contrary information. Therefore, I take Penn-Troy's allegation to be true. (Penn-Troy made the same allegation on May 18, 1992, and on September 1, 1992 (Answer, Ex. 6, 9), and DGS did not deny it. On the contrary, Commissioner Knuckles's decision, dated October 19, 1992, appeared to assume that the allegation was true (Answer, Ex. 1; see Answer, ¶¶ 36-38).)

Also at the conference, DGS stated that the bids to be solicited would be for a three-year supply of Metropolitan Gate Valves, at an "EST. \$ AMT." of \$3,000,000 (Answer, Ex. 10). DGS said that "NYC was in a rush for Gate Valves, and that the bid would be put out in a matter of a few weeks" (Answer Ex. 6).

Following the conference, the specifications were modified further, resulting in a delay of the bid solicitation. Relying on statements at the conference that manufacturers of gate valves other than Metropolitan Gate Valves would be eligible to bid to supply Metropolitan Gate Valves, Penn-Troy invested in "tooling to satisfy NYC Metro-Gate valve needs" (Answer, Ex. 6; see Petition, ¶ 3). Also, Penn-Troy offered to supply "a sample gate valve . . . before the bid," but was told that samples were only required after the bidding, and only from the low bidder (Answer, Ex. 6, p. 2).

By memorandum dated April 23, 1992, DEP's deputy agency chief contracting officer determined that the bid under consideration constituted a "special case," justifying rejection of open bidding

in favor of bidding limited to a list of prequalified vendors (Answer, Ex. 3). The deputy ACCO stated two bases for her determination: "the complexity of the items being acquired and the time limitations for procurement" (*id.*). In particular, DEP's dwindling supply of valves required fast replacement (Answer, ¶ 5 and Ex. 3). The need for fast replacement required resort to reliable vendors - "highly competent and experienced Vendors" (Answer, Ex. 3) - presumably to minimize delays caused by manufacturing problems, by limiting bid eligibility to vendors who had satisfactorily supplied Metropolitan Gate Valves before.

The April 23 memorandum also referred to a three-part classification of the valve procurement, "to obtain as much competition as possible given the urgency of our needs" (Answer, Ex. 3). The memorandum did not specify how dividing the procurement into three "classes" would enhance competition.

Finally, the April 23 memorandum estimated the cost of "this contract" at "between 7 and 8 million dollars" (*id.*). The memorandum did not state how long the valve supply to be procured would last, but the memo said that DEP intended to use "a more commonly available and accessible valve for future procurements," in order to avoid "future special case conditions" (*id.*).

DEP engineers and DGS procurement personnel decided on prequalification criteria and developed a prequalification questionnaire. The questionnaire and bid documents were "sent to all potential candidates for prequalification" on May 4, 1992, with a return deadline of May 20, 1992 (Answer, ¶ 9). Penn-Troy responded

with a completed questionnaire dated May 19, 1992, and a memorandum dated May 18, 1992.

In the questionnaire, Penn-Troy acknowledged that it did not meet one of the criteria for prequalification: past successful supply of Metropolitan Gate Valves to New York City. In the memorandum, Penn-Troy objected to that prequalification requirement. Penn-Troy contended that the city has historically paid a premium price for valves because of unduly limited bid competition. Penn-Troy predicted that only two firms would meet the prequalification requirements, one of which was in bankruptcy and was of dubious integrity, and that the limited competition would elevate the contract price.

Penn-Troy apparently followed its May 18, 1992, memo with a June 3, 1992, letter that is referred to, but not included in the record (see Answer, Ex. 7).

In response to the objection, DGS Deputy Commissioner Cecile O. Pace wrote on July 28, 1992, that the use of a prequalified vendor list was appropriate "because of the urgent need to obtain the valves within the shortest possible time" (*id.*) Bidding was limited to prior vendors of the Metropolitan Gate Valve "[b]ecause of the dwindling inventory and the complexity of the product itself . . ." (*id.*). Deputy Commissioner Pace anticipated that the use of prequalification for procurement of Metropolitan Gate Valves "will be limited to this bid only" (*id.*).

A prequalified vendor list consisting of three vendors was promulgated on an unspecified date. Penn-Troy and one other applicant were denied prequalified status.

On August 5, 1992, Penn-Troy wrote to Deputy Commissioner Pace, objecting to both the use of and the criteria for prequalification.

The deputy commissioner responded by letter dated August 17, 1992, again upholding the decision to use prequalification, denying Penn-Troy's application for inclusion on the prequalified vendor list, notifying Penn-Troy of its right to appeal to Commissioner Knuckles pursuant to 9 RCNY section 7-06(b)(2), and reminding Penn-Troy that the use of prequalification was anticipated only for "this bid" (Answer, Ex. 2, p. 2).

By letter dated September 1, 1992, Penn-Troy appealed to Commissioner Knuckles. Penn-Troy argued that it was capable of delivering on the contracts to be bid, that it had invested "considerable resources" "in tooling to satisfy the City of New York's Metropolitan Gate Valve requirements," that the use of prequalification was unjustified, and that the prequalification criteria were arbitrary (Answer, Ex. 9). Commissioner Knuckles's ruling, dated October 29, 1992, upheld the use of prequalification "for this procurement," and upheld the limitation of prequalification to previous suppliers of the Metropolitan Gate Valve (Answer, Ex. 1). As to Penn-Troy's investment in re-tooling, the commissioner stated that any such investment was "a business judgment" taken at Penn-Troy's risk, and noted that, even absent the use of a prequalified vendors list, Penn-Troy never had any assurance that it would receive

all or part of the award (*id.*). Based on these considerations, Commissioner Knuckles upheld the denial of Penn-Troy's prequalification application. (It should be noted that the Commissioner referred to an April 1992 special case determination by DEP's ACCO. No such determination is in the record. (*Cf.* 9 RCNY § 3-11(c) (June 30, 1991) - special case determination to be made by ACCO. The April 23, 1992, memo that is in the record was written by the deputy ACCO. Commissioner Knuckles may have intended to refer to that memorandum.)

This appeal followed. By its petition, Penn-Troy contested the denial of its application for prequalification as arbitrary and capricious, both because the special case determination was improper and because the prequalification criteria were irrational and unfair.

DGS answered, and Penn-Troy replied, in documents signed by counsel but not verified. DGS then submitted a sur-reply, unverified and unsigned. By letter dated December 28, 1992, Penn-Troy objected to submission of the sur-reply "without prior approval by the Administrative Law Judge." DGS responded by letter dated December 30, 1992, contending that "[t]here is no express preclusion of a sur-reply in OATH's Rules"

Two procedural matters warrant comment before turning to the merits of the appeal.

First, contrary to counsel's assertion, OATH rules do expressly prohibit submission of sur-reply papers:

§ 2-04 Further Proceedings.

An appeal shall be decided on the petition, answer and reply,
unless the administrative law judge directs further

written submissions, oral argument, or an evidentiary hearing, as may be necessary to the decision of the appeal.

48 RCNY § 2-04 (Nov. 30, 1992). Section 2-04 furthers the purpose of speedy and simplified presentation and adjudication of prequalified vendor appeals. Indeed, review of the sur-reply submitted here is ample demonstration of the general disutility of sur-reply papers.

Nearly all of the sur-reply statements were repetitions of statements in DGS's prior papers. (See, e.g., Sur-reply, ¶ 3 - "for reasons stated in respondent's Answer . . ."; ¶ 4 - "As noted in respondent's memorandum of law . . ."; ¶ 7 - "as noted previously") Little was new, and nothing at all was "necessary to the decision of the appeal" (48 RCNY § 2-04).

In the event that counsel believes sur-reply material is necessary to disposition of an appeal, proper procedure is an application for leave to file sur-reply papers. The application may be made by telephone conference call with opposing counsel. It would seem to be the better practice to make such a conference call before devoting scarce resources to drafting, especially since the intention of our rules is that leave to file sur-reply papers will rarely be granted.

Second, both DGS's answer and Penn-Troy's reply contained factual allegations signed only by the parties' attorneys. It does not appear that the facts alleged are within the personal knowledge of the attorneys. Indeed, the allegations are made in the style of "omniscient narrator," and the source of the allegations is not stated.

Our rules permit the parties to record material that was not written

before the ACCO's and agency head's prequalification decisions were made (48 RCNY § 2-03(b)(d) (Nov. 30, 1992)). However, such material is to be recorded and submitted in the form of "affidavits or affirmations, documentary exhibits, or other evidentiary material" (*id.*). Obviously the answer and reply are not affidavits, affirmations, or documentary exhibits. Nor are they "other evidentiary material," even under the relaxed standards of evidence applicable to administrative proceedings. Although hearsay is permissible, even unsworn hearsay, competence rules remain applicable. That is, a fact can only be alleged by a person who is, and who shows that she is, in a position to know that fact. If the allegation is related as hearsay by a second person - here, by the parties' lawyers - then the allegation must include an indication of the source of the allegation and the competence of that source to know the thing alleged.

The matter is of little importance here, since few if any material facts are disputed, and since both parties have erred in precisely the same respect. Nonetheless, our rules did not contemplate that facts could be asserted in these proceedings solely in a form that amounts to a pleading. I grant that our rules may not have made this intention crystal clear, and I hope that this discussion remedies that failing.

On the merits of the appeal, DGS correctly casts the issue as whether "the agency's decision" to deny prequalified status was "arbitrary and capricious." 9 RCNY § 7-07(c) (June 30, 1991). The "arbitrary and capricious" phrase is also used in CPLR section 7803(3).

We have therefore characterized prequalified vendor appeals as "analogous" to Article 78 proceedings, and we have looked to Article 78 case law for guidance in construing the "arbitrary and capricious" standard. *Rod Knox Architect v. Department of General Services*, OATH Index No. 304/93, memorandum decision at 6 (Dec. 10, 1992). Nonetheless, these are not Article 78 proceedings, which are writs of certiorari, mandamus and prohibition; these are administrative appeals. Therefore, while Article 78 case law will often provide useful guidance, we are not bound to it. *Cf. New York City Transit Authority v. O'Connell*, OATH Index No. 1076/91, memorandum decision at 3 ("Although the CPLR is not applicable here, we have looked for guidance to CPLR § 317 and Rule 5015 in deciding motions to vacate defaults"; citations omitted); *New York City Transit Authority v. Godas*, OATH Index Nos. 1357-59/90, report and recommendation at 19 (looking to Penal Law for guidance, "[a]lthough we are not bound by the substance of the Penal Law, much less its procedural aspects"); *Torres v. County of Westchester*, 582 N.Y.S.2d 451, 452 (2d Dep't 1992) ("the Penal Law definitions of the terms used in the charges do not apply in this civil [*i.e.*, administrative] disciplinary proceeding").

DGS argues that limiting the issue to whether the denial of Penn-Troy's prequalification application was arbitrary and capricious precludes any inquiry into the correctness of the decision to use prequalification in the first place. The correctness of that decision, according to DGS, is beyond OATH's jurisdiction; therefore, "it must be taken as a given in this proceeding that DGS was entitled to utilize prequalification for this procurement" (Resp. Mem.

at 8). On the other hand, Penn-Troy argues that the decision to use prequalification was irrational, and therefore denial of Penn-Troy's prequalification application was arbitrary.

The issue thus presented is analogous to one decided in *Rod Knox Architect v. DGS*, mem. dec. at 8-13. There, a vendor's contract was terminated by DGS for poor performance by the vendor. Then, citing that termination, DGS revoked the vendor's prequalified status. DGS argued that the decision to terminate the contract was not subject to dispute in the prequalified vendor appeal. The vendor argued that the termination could be challenged here *de novo*.

Judge Kramer rejected both positions in favor of a more moderate course. He held that OATH's jurisdiction extended far enough to include consideration of whether the contract termination had sufficient basis that reliance on it to revoke prequalification was itself rational. *Id.*, mem. dec. at 15. He noted the obvious examples of contract terminations that are fraudulent, collusive or pretextual for discriminatory action, which could not rationally be relied on to justify revocation of prequalification. *Id.*, mem. dec. at 11.

That reasoning applies here. For example, if DGS and DEP had decided to use prequalification as a ruse to rig the outcome of a bid, that decision could hardly supply a rational basis for the decision to deny Penn-Troy prequalified status. Therefore, the scope of this appeal is broad enough to allow Penn-Troy to show that the prequalification denial was irrationally based, even if that denial was based upon some prior decision not directly reviewable here.

Such a scope of review "does not involve a trespass into another forum's jurisdiction." *Rod Knox Architect v. DGS*, mem. dec. at 11.

Nullification of the decision to use prequalification cannot result from this appeal; that is a matter to be handled elsewhere, for example by writ of mandamus pursuant to Article 78 of the Civil Practice Law and Rules.

This broader scope of review is especially appropriate in this case. DGS distinguishes between the decision to use a prequalified vendor list and the decision what the criteria for prequalification should be. DGS argues that the latter is reviewable here, but the former is not. Penn-Troy challenges both. However, the record strongly suggests that the decision to use prequalification and the decision to limit prequalification to previous suppliers of Metropolitan Gate Valves were essentially one decision. The reason for prequalification was the "dire situation" caused by the dwindling valve inventory (Answer, Ex. 3); that was also the reason for limiting prequalification to "Vendors whose ability to perform has been clearly demonstrated" (*id.*). It was the need for speed that justified abandonment of open bidding, and speed would be assured, in DEP's view, not by prequalification alone, but by prequalification limited to vendors with proven records of supplying Metropolitan Gate Valves.

In this case, therefore, review of the prequalification criteria and review of the use of prequalification itself are only theoretically distinguishable.

A final support for my view of the scope of this appeal is the fact that DGS itself shared my view during the previous stages of

this adjudication. Neither Deputy Commissioner Pace nor Commissioner Knuckles declined to consider the propriety of prequalification. They both considered it, and they both sustained it (Answer, Ex. 1, 2; see Answer Ex. 7).

Although I conclude that the special case determination is subject to review here, I do not conclude that Penn-Troy has shown that determination to have been irrational.

The Charter permits use of prequalification whenever "competitive sealed bidding is . . . not advantageous to the city . . ." (section 317(a)). The regulatory constraints are only slightly narrower: "where the need for advance screening of qualifications outweighs the benefits of a broader search for competition . . ." (9 RCNY § 3-11(d) (June 30, 1991)). The Charter and regulations are open-ended in providing for general criteria for prequalification (Charter, § 324(a) - "general criteria . . . may include but shall not be limited to . . ."; 9 RCNY § 3-11(e)(1) - "General criteria . . . may include but are not limited to . . .").

In addition, general criteria can be supplemented by "specific criteria applicable to particular procurements or categories of procurement" (9 RCNY § 3-11(e); see Charter, § 324(a)).

One of the criteria endowed with regulatory approval is "Experience in similar projects" (9 RCNY § 3-11(e)(1)(i); see Charter, § 324(a) - "experience, past performance").

Here, if speed was important, then limiting bidders to those with histories of satisfactory delivery of Metropolitan Gate Valves was plainly rational. The record indicates that manufacture of

Metropolitan Gate Valves is not a trivial venture. If valves are needed quickly, then they are also needed correctly, since time would be lost in correcting defects. (Thus, contrary to Penn-Troy's argument, liquidated damages and other remedies, do not leave "the City of New York . . . fully protected from harm" (Answer, Ex. 9, p. 2). There is a difference between compensation for harm and prevention of harm.) It was manifestly rational to conclude that vendors who previously satisfied contracts to deliver Metropolitan Gate Valves were somewhat more likely to do so in this case than were vendors who had never had such contracts before.

Penn-Troy attacks the use of prequalification from several different angles.

First, Penn-Troy argues that there was no emergency, and, if there was, it was created by the delays of DGS and DEP. The evidence that there was no emergency is inadequate. Penn-Troy argued in effect that DGS's and DEP's delays from August 1989 to November 1991, then from November 1991 to May 1992, constituted actions inconsistent with those agencies' claim that an emergency existed. However, neither agency ever claimed that an emergency existed in 1989. The agencies only asserted that the supply of valves was low by November 1991 (see Answer, ¶ 5, Ex. 6), and that the shortage became acute during 1992.

In other words, the delays do not disprove the existence of an emergency; they caused the emergency.

DGS does not specifically deny that DGS or DEP is responsible for some or all of the delay. Instead, DGS argues that it is not

barred from taking emergency action where "its own conduct . . . contributed to the emergency" (Answer, ¶ 41).

There is some merit to DGS's position. Laying blame for past delay would not have helped speed procurement that was still in the future. Looking at the options open to DGS and DEP from their point of view, they could either indulge further delay by conducting regular competitive bidding, aggravating the delay and increasing its costs, or they could shorten the delay by resorting to less competitive procurement, incurring the costs of that option.

Penn-Troy suggests that the public costs of limiting the competition in this case were substantial. Penn-Troy argues that very few firms could meet the prequalification criteria, and in fact only three did so. By contrast, over a hundred firms were invited to the November 1991 conference, when it was expected that the procurement would be by competitive bidding. Eight or nine attended the conference. Penn-Troy alleges that the city has historically paid a premium for Metropolitan Gate Valves, "due to the fact that there has been a limited number of bidders" (Answer, Ex. 6, p. 2).

Implicitly, Penn-Troy suggests that it could deliver at a lower price than has historically been paid.

An important purpose of the city's procurement framework is to minimize the cost of procurement, by maximizing competition for contracts. Any measure that drastically reduces competition, including specifically resort to prequalification, risks increasing prices and is firmly disfavored (see 9 RCNY § 3-01(b) - "Preference for competitive sealed bidding"). When unnecessary delay by an agency

artificially creates the exigency justifying reduced competition, the public cost is unnecessarily increased. This quite troubling consequence impairs the purposes of the procurement framework: it undermines public confidence in procurement procedures (9 RCNY § 1-01(b)(4)); it is unfair to would-be bidders excluded from the competition (*id.*, § 1-01(b)(5)); it undermines broad-based competition and obstructs entry into the market by new enterprises, many of which are minority- or women-owned (*id.*, § 1-01(b)(7)); it creates room for suspicion about the integrity of the system (*id.*, § 1-01(b)(8)); and it limits the equality of opportunity among businesses wishing to contract with the city (*id.*, § 1-01(b)(10)).

Here, the record contains no indication that either DEP or DGS acted in bad faith. For instance, there is no proof that either agency deliberately delayed the bidding in order to create the emergency that justified use of prequalification. Absent evidence of gross neglect or bad faith, I must assume that the delays were caused by benign indiligence rather than by impropriety. In that circumstance, it was not arbitrary and capricious to address an emergency by resort to a prequalified vendor list limited to past Metropolitan Gate Valve vendors - even if the emergency was created in whole or in part by the agencies' indiligence.

The agencies have made repeated assertions that the use of prequalification to buy DEP's water and sewer valves will not recur.

DEP stated its intention to end use of the Metropolitan Gate Valve with this procurement, and to use "a more commonly available and accessible valve for future procurements and hope to avert future

special case conditions" (Answer, Ex. 3). DGS advised Penn-Troy that "[w]e anticipate that the pre-qualification of vendors for Metropolitan Gate Valves will be limited to this bid only" (Answer, Ex. 7, see Answer, Ex. 2, p. 2; see also Answer, ¶ 22). There is no evidence that these assertions were disingenuous. (On the contrary, it appears that a contract for supply of Metropolitan Gate Valves was competitively bid during October 1992. Penn-Troy submitted a bid, but was not the low bidder.)

However, Penn-Troy's reply papers raised a question whether DGS limited the use of prequalification to rectification of the emergency that justified it. The bid documents called for production of more than 13,000 valves (Answer, Ex. 4, pp. C001-C003). Delivery times varied considerably, although it was unclear whether this was due to variable production time by the vendor or variable need by DEP.

Penn-Troy characterizes the order for more than 13,000 valves as an effort "to stockpile huge quantities of valves for future use" (Reply, p. 4). Penn-Troy asserts that it was told at the November 1991 conference that the procurement was for a three-year supply of valves (Reply, p. 4 n.1).

Therefore, by conference call with counsel on January 26, 1993, I requested further written submissions on the general question whether the entire valve procurement, or only part of it, was rationally justified by the existence and scope of the emergency that justified resort to procurement from prequalified vendors. See 48 RCNY § 2-04 (Nov. 30, 1992). By supplemental papers dated February 11, 1993, DGS repeated its contention that OATH lacks jurisdiction

to consider the propriety of resort to prequalification, and therefore OATH lacks jurisdiction to consider whether resort to prequalification was only partly proper. On the merits of the general question I had posed, DGS accepted Penn-Troy's contention that the bid was for a three-year supply of valves, but maintained that those valves were intended "to alleviate a three-year *backlog* of requisitions for Metropolitan Gate Valves" (Resp. Supp. Mem., p. 11; emphasis in original). Therefore, the procured valves were not expected to last three years from the date of the bid, but considerably less than that.

By supplemental papers dated February 22, 1993, Penn-Troy repeated its insistence that the staggered delivery times stated in the bid documents, apparently up to 300 days after entry into the contract, proved that at least some of the valves procured were not needed on an emergency basis. It would certainly have been preferable for DGS to have addressed this question in its supplemental papers, especially since DGS plainly understood the question to be within the scope of my request for further submissions (see Resp. Supp. Mem., p. 2), ¶ 2(c)). Nonetheless, it is Penn-Troy's burden to prove that DGS acted irrationally, and it has not done so. I recognize that carrying that burden is made difficult by the prohibition of discovery (48 RCNY § 2-05), and may have been made more difficult by DGS's omission to address the matter. The fact remains that Penn-Troy has not proved that any part of the gate valve procurement was not rationally related to the emergency that justified the use of prequalification. The different delivery times for different

categories of gate valves may have had to do with production times, or complexity of manufacture, or other factors that vary among the categories of gate valves. Penn-Troy, an experienced valve manufacturer, if not a veteran of manufacturing Metropolitan Gate Valves, presumably had access to the kind of technical information that would have enabled it to show, or at least to argue in some detail, that the bid schedule of staggered delivery times was inconsistent with DGS's and DEP's stated need for emergency procurement of valves.

Instead, Penn-Troy asserted wholly conclusorily that the staggered delivery times were inconsistent with the emergency situation.

Penn-Troy's second attack on the use of prequalification is that the use of prequalification was unfair to Penn-Troy. Penn-Troy argues that, apparently following the November 19 convergence, Penn-Troy invested in "tooling" necessary to make Metropolitan Gate Valves (Answer, Ex. 6), such that a later decision effectively depriving Penn-Troy of the opportunity to compete on the bid was inequitable.

However, there is no evidence that DGS or DEP deliberately misled Penn-Troy at the conference, or that either agency represented to Penn-Troy that it had a certainty, or probability, of winning all or part of the bid. The conference was informational, and the bid package was expressly subject to post-conference revision (Answer, Ex. 10). Even had open competitive bidding been used, there was no assurance that Penn-Troy would win any part of the award. Indeed, it is Penn-Troy's position that open bidding would have allowed competition by numerous vendors without a history with Metropolitan

Gate Valves; therefore, Penn-Troy's anticipation of winning all or part of the bid was a hope, not an expectation.

Third, Penn-Troy argues that the decision to use a prequalified vendor list was unfair because "Respondent . . . made it impossible for Petitioner to satisfy the . . . pre-qualification criteria" (Reply, p. 2; see Petition, ¶ 1(b)). Penn-Troy argues that it was arbitrary to require previous experience with the Metropolitan Gate Valve, without allowing vendors an alternative means to prove their ability. In particular, Penn-Troy complains that DGS rejected its offers to supply a sample Metropolitan Gate Valve to demonstrate its ability to manufacture the valves.

However, the requirement of previous satisfactory performance of a contract to supply the valves was a rational means to ensure that the competing bidders would be able to perform this contract satisfactorily. It was not irrational *per se* to distinguish between manufacture of one valve, or any number of valves, under test conditions, and manufacture of valves under "real life" conditions.

Finally, Penn-Troy argues that prequalification drastically reduced the pool of eligible bidders, barring "newcomers" from competing (Petition, ¶ 2(a)). The assertion is true, but adds little to the discussion. The Charter and the applicable rules both explicitly acknowledge that procurement methods vary in the degree of competition they permit (e.g. Charter, § 317(a); 9 RCNY § 3-01(e)(3)

(June 30, 1991)). Nonetheless, the Charter and the rules permit the use of less competitive procurement mechanisms in certain circumstances. Where those circumstances exist, a less competitive procurement method may be used. The fact that prequalification is less competitive than open bidding does not by itself help to determine whether DGS and DEP acted properly in determining that open bidding need not be used here.

CONCLUSION

Both the decision to use prequalification and the formulation of prequalification criteria were based on an emergency need for Metropolitan Gate Valves. Penn-Troy did not meet the prequalification criteria, and therefore its application for inclusion on the prequalified vendors list was denied.

In considering whether that denial of prequalification was arbitrary and capricious, OATH may consider whether the decision to use a prequalified vendor list and the choice of prequalification criteria were sufficiently sound to provide a rational basis for denial of Penn-Troy's application for prequalification.

Here, both the decision to use prequalification and the choice of prequalification criteria were rational, based on an emergency not shown to have been created or aggravated by bad faith or gross neglect by DGS or DEP. Penn-Troy failed to prove that any part of

the procurement was not rationally needed on an emergency basis. Nor was the denial of prequalification proved to be otherwise arbitrary and capricious.

Therefore, the petition on appeal is denied.

Charles R. Fraser
Administrative Law Judge

March 2, 1993