

S. Riback



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Better Service

File: B-265751.2

Date: January 18, 1996

Daniel A. Weiss for the protester.
Turhan E. Robinson, Esq., General Services Administration, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest against agency's bundling of copier machine service for government-owned machines with sales of copiers under a federal supply schedule solicitation is sustained where the agency has not shown that the bundling is necessary for it to meet its minimum needs.
2. Protest against agency's deletion of a clause requiring manufacturers awarded a federal supply schedule (FSS) contract to sell spare parts to service vendors under the FSS is denied; agency is not required to compel copier machine vendors to sell parts to service vendors.

DECISION

Better Service protests the terms of request for proposals (RFP) No. FCGR-92-0041-N, issued by the General Services Administration (GSA) to allow an open season for adding vendors to its multiple award federal supply schedule (FSS) for the purchase, rental, maintenance, repair and lease-to-purchase of photocopiers, supplies and accessories. Better Service argues that the solicitation improperly requires firms to offer photocopier sales in connection with an offer to provide maintenance and repair service for government-owned equipment. Better Service also contends that GSA improperly deleted a solicitation provision requiring manufacturers of photocopier equipment receiving award of an FSS contract to make spare parts available at reasonable prices to FSS vendors providing maintenance and repair services.

We sustain the protest in part and deny it in part.

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BUNDLING OF SALES AND SERVICE

At issue in this case are two solicitation provisions that Better Service maintains are unduly restrictive of competition. The first provision requires firms offering repair and maintenance services for government-owned equipment to also offer copier machines for sale; firms are essentially required to offer sales and service as a total package, and are thus precluded from offering only repair and maintenance service.

Because procurements conducted on a bundled or total package basis can unduly restrict competition, we will sustain a challenge to the use of such an approach where it is not necessary to satisfy the agency's minimum needs. National Customer Eng'g, 72 Comp. Gen. 132 (1993), 93-1 CPD ¶ 225.

GSA does not dispute that its bundling approach reduces competition and, specifically, precludes the protester and similarly situated firms from competing. It contends only that applicable regulations require multiple award schedule contracts to be national in scope and that such contracts are more efficient for user agencies and permit GSA to negotiate more favorable prices initially. The record does not show, however, and it is not apparent to us, how separating the sales requirement from the service requirement would inhibit GSA's ability to negotiate favorable contracts for repair and maintenance on a national basis. It would seem that the only direct result of separating the requirements would be to have two, instead of one, national scope acquisitions. Better Service states that it is fully prepared to offer national coverage for repair and maintenance.

GSA contends that separating these two requirements will increase the number of offers to be evaluated and the number of contracts to be administered, thus resulting in a significant duplication of effort. GSA's contention in this regard, however, does not justify bundling the two requirements. First, GSA has presented no evidence showing that any expected additional contracts would involve significant additional cost to the government. See Richard M. Milburn High Sch., B-244933, Nov. 27, 1991, 91-2 CPD ¶ 496. Further, the fact that bundling will be more administratively convenient is insufficient to support this inherently restrictive approach. Id. When concerns of administrative convenience are being weighed against ensuring full and open competition, the Competition in Contracting Act (CICA), 41 U.S.C. § 253 et seq. (1994), and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition. National Customer Eng'g, supra.

GSA also contends that having repair and maintenance service as a "natural complement" to sales makes it easier for user agencies to purchase a total package of both sales and service and avoid having to obtain the two separately. At the same time, GSA contends, because the repair and maintenance service line items of this FSS contract are nonmandatory, agencies can elect to purchase their service

requirements separately; the protester thus is not precluded from competing for the service aspects of the requirement outside of the FSS program.

Again, it is not apparent to us why combining these requirements makes it easier in any significant way for user agencies to purchase their requirements from the schedule. It would seem to be no more difficult, and involve no significant additional administrative effort or cost, to simply place an order for purchase or lease with one vendor and an order for service with another vendor. The agency's position also ignores the fact that agencies will not be purchasing machines when they merely require maintenance or repair of equipment already owned by the government; bundling the requirement will not facilitate the purchase of such services. GSA has offered no explanation of why it is necessary for agencies to obtain their service requirements from vendors that also happen to offer copier machines for sale. In fact, allowing vendors to contract separately for services under the schedule would provide the user agency more choice as to how to meet its requirements--since it would not be bound to use the same vendor for sales and service--and the presence of additional vendors could result in a wider range of prices for these services. In any case, administrative convenience is not a proper basis for restricting competition. National Customer Eng'g, supra.

Additionally, the fact that the protester may be able to compete for some agency service requirements outside of the FSS does not eliminate the need to ensure full and open competition under the FSS contract. Even if the agency is correct that there will be competitions outside the FSS, the FSS contract represents a key source of government contracting business (GSA reports that in fiscal year 1995, repair and maintenance service requirements had a value of \$122,341,886). In this regard, FAR § 8.001 encourages agencies to use nonmandatory FSS contracts, and it is easier for user agencies to contract with schedule vendors than to conduct a new competition since technical acceptability and vendor responsibility have already been determined by GSA. Thus, only by being on the schedule can vendors benefit from the large numbers of federal agency requirements met under the FSS.

Finally, GSA contends that combining sales with service is reasonable because it enables the agency to find that sales rather than service is the primary purpose of the contract. This is important, according to GSA, because it means that the requirements of the Service Contract Act (SCA), 41 U.S.C. § 451 et seq., are inapplicable to the requirements being purchased. GSA maintains that if it separates sales from service, the terms of the SCA will clearly apply to the service portion of the requirement, and GSA will be required to obtain a prevailing wage rate determination from the Department of Labor (DOL).

This essentially is an administrative convenience argument. There is no legal authority permitting agencies to bundle their procurements in order to avoid the administrative burdens associated with complying with the SCA and, as already

discussed, mere administrative convenience is not a basis for structuring a procurement in a manner which restricts competition.

In view of the foregoing, we sustain Better Service's protest on this basis.

AVAILABILITY OF SPARE PARTS CLAUSE

Better Service also protests the agency's deletion of another clause that essentially requires manufacturers of copier equipment to make spare parts available to FSS service vendors at a reasonable price. The record shows that the clause was originally included in the RFP by mistake, and was subsequently removed by GSA. Better Service contends that the clause should be included in the RFP because it will enable it to obtain the spare parts it needs to effectively perform the repair and maintenance services called for under the solicitation. However, while Better Service may have a limited ability to obtain spare parts from certain manufacturers, GSA is not required by any applicable statute or regulation to compel manufacturers to furnish parts to a competing service vendor. See Group Technologies Corp.; Electrospace Sys., Inc., B-250699 et al., Feb. 17, 1993, 93-1 CPD ¶ 150 (agencies are not required to eliminate competitive advantage certain firms may enjoy where the advantage has not resulted from government action). We therefore deny this aspect of Better Service's protest.

In view of the foregoing, we are by separate letter of today to the Administrator of General Services recommending that the agency amend the solicitation to delete the requirement that a firm offer copier sales in order to offer maintenance and repair services. We also find Better Service entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1995). In accordance with 4 C.F.R. § 21.6(f), Better Service should submit its certified claim for these costs, detailing the time expended and the costs incurred, to the agency within 60 days of its receipt of our decision.

The protest is sustained in part and denied in part.

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