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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-213122; B-213122.2 **DATE:** May 25, 1984

MATTER OF: Bell & Howell Company, Inc.; Pitney Bowes, Inc.

DIGEST:

1. Protest that an agency solicitation for a check-processing system requiring offerors to submit single proposals for both checkwriting and checkinserting equipment was unduly restrictive of competition is sustained in part, where the solicitation effectively precluded the two major domestic checkinserter manufacturers from competing despite the apparent fact that those manufacturers could offer to satisfy the agency's need for assured compatibility of the system components if given the realistic opportunity to compete.
2. A contracting agency may impose a restriction on the competition only if it can be shown that the restriction is deemed necessary to meet its actual minimum needs. Here, the agency met its prima facie burden of showing that its checkinserter speed requirement was a restriction reasonably related to its actual minimum needs, a showing not overcome by the protester's contrary assertion that the agency's monthly check-processing workload only demanded a substantially lesser speed.
3. A solicitation provision stating only a desired delivery date is not improper as long as any different delivery times offered in submitted proposals are within a "reasonable" time after the desired date.

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Bell & Howell Company, Inc. and Pitney Bowes, Inc. protest the award of any contract under request for proposals (RFP) No. F05600-83-R-0016 issued by the Air Force Accounting and Finance Center (AFAFC), Lowry Air Force Base, Colorado. The procurement is for the acquisition of one checkwriting and two checkinserting systems for use in a pilot test sponsored by the Department of the Treasury regarding the conversion of the federal government's check disbursements from punch card checks to paper checks. Bell & Howell and Pitney Bowes principally complain that the solicitation unduly restricts competition because offerors are required to propose both the checkwriting and checkinserting systems as a package despite the fact, as the protesters allege, that they are actually two completely separate and distinct systems. Additionally, Pitney Bowes contends that the speed required for the two checkinserters far exceeds the Air Force's actual minimum needs, and that the solicitation is defective, among other reasons, because it contains an indefinite delivery date. We sustain the protests in part and deny them in part.

Single Proposal Requirement

The Air Force states that its prime concern in the procurement is that the checkinserting systems will be able to read the bar codes or computer marks printed on the checks by the checkwriting system. Since the bar codes will control the performance of certain functions of the checkinserters, it is necessary that the printer and the inserters be compatible. For this reason, the Air Force believes it is appropriate to purchase the equipment from one prime contractor so as to assure itself that the writer and the inserters function properly as a system. Thus, the Air Force is seeking single contractor responsibility even though no individual firm manufactures both items of equipment.

The Air Force states that in discussions with document-processor manufacturers, it was learned that bar code technology is not universally standard; "[t]he specific mark required, the number of bar codes needed to perform specific functions and the location of the bar codes are among the technical differences found among manufacturers." Therefore, according to the Air Force, because the major concern was the compatibility of the two systems, in that the checkwriter must be able

to print bar codes and the checkinserters must be able to read them, the RFP specified at section L, paragraph 28 that:

"Offerors must propose on all items including, but not limited to, the options in the schedule. Any proposal which fails to cite a unit price for each shall be rejected as nonresponsive."

Bell & Howell and Pitney Bowes, apparently the two major domestic manufacturers of checkinserting equipment, protest that the requirement that an offeror propose both the checkwriting and checkinserting systems in a single proposal unduly restricts competition because, as manufacturers of checkinserters, they are effectively at the economic mercy of the manufacturer of the checkwriter. In that regard, Bell & Howell asserts that only one checkwriter manufacturer is able to offer a system meeting the Air Force's specifications. Bell & Howell related at our administrative bid protest conference that it had approached that manufacturer in an effort to arrange some form of joint proposal, but that the manufacturer refused either to sell Bell & Howell its checkwriter so that Bell & Howell could propose as the prime contractor or to propose Bell & Howell checkinserters in its offer in a subcontracting arrangement. According to Bell & Howell, the manufacturer has an exclusive arrangement with a West German manufacturer of checkinserters. Bell & Howell states that it then submitted a joint proposal with another checkwriting manufacturer, knowing that that particular system would probably not meet the Air Force's requirements. Apparently this was the case; the only acceptable proposal received was submitted by the checkwriter manufacturer originally approached by Bell & Howell. Bell & Howell uses this circumstance to illustrate its position that an offeror of checkinserters cannot realistically compete for this procurement unless some sort of business arrangement is made with the only apparently acceptable checkwriter offeror, an arrangement which Bell & Howell alleges, from its own experience, is an impossibility.

Bell & Howell contends that the Air Force is simply incorrect in its assertion that the complexity of the technology involved necessitates that an offeror propose both systems in order to ensure compatibility. To the contrary, Bell & Howell states that such technology has

been commercially available since 1965. Bell & Howell emphasizes that it can custom-manufacture its checkinserters to meet the capacities and capabilities of any checkwriter accepted by the Air Force, and accordingly believes that there is no reasonable basis for the Air Force's view that such technology is so complex that separate proposals for the checkwriter and checkinserters might result in the Air Force receiving offers for mutually incompatible systems.

Determinations of the government's minimum needs and the best methods of accommodating those needs are primarily the responsibility of the contracting agency. Walter Kidde, Division of Kidde, Inc., B-204734, June 7, 1982, 82-1 CPD 539. More specifically, we have recognized that government procuring officials generally are in the best position to know the government's actual needs, since they are the ones most familiar with the conditions under which supplies, equipment or services have been used in the past and how they are to be used in the future. Consequently, we will not question an agency's determination of its minimum needs unless there is a clear showing that the determination has no reasonable basis. Frequency Electronics, Inc., B-204483, April 5, 1982, 82-1 CPD 303. In that regard, while agencies generally must obtain the maximum competition practicable, there are instances when fulfillment of those needs may result in the imposition of some restriction on competition. Williams & Lane, Inc., B-210940, August 29, 1983, 83-2 CPD 269.

For example, in Jazco Corp., B-193093, June 12, 1979, 79-1 CPD 411, we held that the agency's decision to procure the fabrication and installation of air pollution control systems as a package rather than through separate procurements for materials and services or through a separate procurement for each system was a matter primarily within the discretion of the agency. We did not find the structuring of the procurement to be objectionable where the fact that four bids had been submitted created the strong presumption that the procurement was not unduly restrictive, and the protester did not meet its burden of proving its contrary assertion that such structuring was unreasonable. Likewise, in 53 Comp. Gen. 270 (1973), we did not object to the agency's procurement of a garbage removal system by purchasing an entire system, rather than by allowing proposals to furnish separate components (even though the protesting manufacturer of a particular component was thereby excluded), because we believed the

need for compatibility of the components was a reasonable basis for the agency to require proposals on the entire system, and there was nothing to indicate that competition by offerors of entire systems had been restricted. See also Allen and Vickers, Inc.; American Laundry Machinery, 54 Comp. Gen. 445 (1974), 74-2 CPD 303.

In general, however, while the need for compatibility of the components comprising a system may give rise to a legitimate basis for procurement on a system rather than on a component basis, the law's overriding preference for competition suggests that procurements should be conducted on a component basis if any needed compatibility can be reasonably obtained with that approach. Here, because the manufacturer of the only checkwriter that apparently can meet the agency's needs is not willing to provide the checkwriter to any other firm, adequate competition for the checkinserters is effectively precluded by the decision to purchase on a package basis. Moreover, we think the evidence suggests that the desired compatibility can be achieved if the procurement is separated into its major component parts.

We find nothing in the record to support the Air Force's assertion that the technology involved here is so complex that compatibility of the components can only be assured through single contractor responsibility, especially given the fact that the protesters, with presumably a great deal of design and manufacturing experience in this area, see little difficulty in assuring the required degree of compatibility. We note that there is nothing to indicate that the checkwriter's bar code or "computer marking" specifications are so unusual or otherwise technically complex that a checkinserter manufacturer cannot design its system to be compatible with them. The fact that the checkwriter may employ specific types and numbers of computer marks and locate them in particular areas of the check being printed does not necessarily establish that checkinserters offered by way of separate proposals cannot be fully integrated with the checkwriter to read and respond to those computer marks. Although it is for the agency to establish its minimum needs, when the statement of those needs is challenged, it is incumbent on the agency to rebut the allegation that the needs statement is unduly restrictive. The Air Force, faced with the protesters' assertions that they can provide the requisite compatibility, has not done that here.

Thus, while the Air Force has expressed that its original intent was to maximize competition, the agency should now be aware that the ultimate result of tying the checkwriter and checkinserter acquisitions into a requirement for a single proposal for the complete system has been to limit realistic competition for the procurement to only one offeror, the manufacturer of the acceptable checkwriter. See Interscience Systems, Inc.; Cencom Systems, Inc., 59 Comp. Gen. 438 (1980), 80-1 CPD 332, affirmed, 59 Comp. Gen. 658 (1980), 80-2 CPD 106.

We do not dispute that compatibility of the components is of critical importance. Nevertheless, the apparent fact that only one offeror of a complete check-processing system can effectively compete for the award, because that offeror will not sell its checkwriter to manufacturers of checkinserters or enter into other business arrangements so that they might compete for the complete system as well, does not allow us to find that the present structuring of this procurement meets the test for reasonableness expressed in Jazco Corp., supra, and 53 Comp. Gen. 270, supra, where, in sharp contrast to this case, there was the presence of adequate competition from offerors of complete systems.

Therefore, we recommend that the checkwriter be purchased on a separate basis, since the evidentiary record strongly supports the conclusion that only this particular checkwriter can meet the Air Force's needs. Accordingly, the solicitation should be amended to request proposals for checkinserters only, with the technical acceptability of those proposals dependent upon an affirmative demonstration that the offered checkinserter will conform to the checkwriter so as to assure that both items function as a fully compatible system. This portion of the protest is sustained.

Checkinserter Throughput Rate

The RFP at section C, paragraph 3.1 provided background data which informed offerors that AFAFC issued an average of 500,000 checks each month, with a peak period at the end of each month when 300,000 checks are processed in a period of 6 to 7 days. Paragraph 3.2 of that section required that the "throughput rate" (speed) of the checkwriter be 15,000 checks per hour. Although the solicitation as originally issued provided no throughput rate specification for the two checkinserter systems, the Air Force by Amendment 0001 added paragraph 3.3.7 to section C of that portion of the RFP setting forth the checkinserter requirements, which in addition specified that the minimum throughput rate for each checkinserter was to be 7,000 single inserts per hour.

Pitney Bowes contends that the requirement for a minimum throughput rate of 7,000 single inserts per hour "is unreasonable because current inserter industry technology is not capable of meeting this throughput rate."

Pitney Bowes asserts that this requirement far exceeds AFAFC's actual minimum needs, as evidenced by the fact that the information provided to offerors regarding the facility's monthly check-processing workload does not correspond to that throughput rate. Pitney Bowes contends that, based upon the Air Force's own background data in the RFP, if AFAFC must process 300,000 checks at the end of each month in 6 to 7 days, or approximately 48 hours at the shorter estimate, then each inserter therefore would need a throughput rate of only 3,125 inserts per hour.

As Pitney Bowes has challenged the throughput rate requirement of the checkinserters, it is incumbent upon the Air Force to establish prima facie support for its position that that rate is reasonably related to its actual minimum needs. Amray, Inc., B-209186, June 30, 1983, 83-2 CPD 45. A contracting agency may impose a restriction on the competition only if it can be shown that the restriction is deemed necessary to meet its actual minimum needs, since the benefit of competition both to the government and to the public in terms of price and other factors is directly proportional to the extent of the competition. Tennant Company, B-205914.2, December 20, 1982, 82-2 CPD 546. Thus, this Office has taken the position that restrictions on competition need not be regarded as unduly restrictive when they represent the actual needs of the agency. See Data Card Corporation, Orbitran Division, B-202782, October 8, 1981, 81-2 CPD 287.

We have already indicated that the background data in the RFP provided that of the 500,000 checks processed monthly by AFAFC, 300,000 checks have to be processed in 6 to 7 days. Based upon that data alone, we would agree with Pitney Bowes that the actual throughput rate needed is only 3,125 inserts per hour for each checkinserter. In its administrative report, however, the Air Force has stated that the throughput rate is also directly related to the fact that 135,000 retiree and annuitant checks must be processed by AFAFC in one working day every 6 months. According to the Air Force, that single workday "runs from 0600 through 1800 hours daily as the result of Flextime and Compressed 9-hour Tours." Essentially, it appears that the workday consists of a core time of 12 hours during which the checkinserters will be fully operational (although we note here that the Air Force

has not specifically mentioned that any time is being allowed for equipment malfunctions, adjustments or other such considerations). Our analysis shows that under these operating conditions each inserter would take some 9.6 hours to process 67,500 checks if operating at the required throughput rate of 7,000 checks/hour. Thus, contrary to Pitney Bowes' assertion, the biannual task of processing the retiree and annuitant checks can be accomplished within the framework of a single AFAC workday with the checkinserters operating at the speed required by the RFP. The Air Force also advises that the necessity for processing those checks in a single workday is imposed by "contingency considerations" principally involving Postal Service delivery schedules. In view of these factors, we feel that the Air Force has met its burden of showing that the checkinserter throughput rate is a restriction reasonably related to its actual minimum needs. See Champion Road Machinery International Corporation; Border Machinery Co., B-211587, B-211587.2, December 13, 1983, 83-2 CPD 674.

Date of Delivery

Section F, paragraph 2.a. of the RFP, as amended, specifically provided, in pertinent part:

"The government desires that the items . . . be delivered and be operational no earlier than, but no later than 01 January 1984. If circumstances dictate that this date cannot be met, the bidder hereby certifies that said items will be delivered and be operational within _____ calendar days after receipt by the contractor of a written Notice of Award or signed copy of the contract."

Pitney Bowes contends that the RFP is materially defective because it does not require a final acceptable date of delivery and does not inform offerors as to whether proposals offering a date later than the required date will be rejected as unacceptable. In support of its position, Pitney Bowes relies upon our decision in 46 Comp. Gen. 745 (1967), wherein we held that where an early delivery was not of the essence, such as in invitations stating only a desired delivery schedule, the invitation should nonetheless state a final acceptable date and clearly advise bidders that bids offering delivery beyond that final date will be considered non-responsive. We feel Pitney Bowes' reliance to be misplaced.

We point out initially that the above decision dealt with a formally advertised procurement, unlike the present situation where the procurement enjoys the greater flexibility of negotiation. In addition, we note that Defense Acquisition Regulation § 7-104.92, which sets forth examples of time of delivery clauses for use in invitations for bids, also provides at subsection (a) that such clauses may be modified to state particular delivery requirements or any special procedures, and also may be suitably modified for use in negotiated procurements. Subsection (c) further provides a model clause for use "when delivery by a certain time is DESIRED, but not essential" We believe that the Air Force had a reasonable basis for not requiring a final acceptable delivery date where, not knowing the extent of the market, it did not want to preclude the submission of proposals from potential offerors. Therefore, we deny Pitney Bowes' protest on this issue because, while we believe that our earlier decision is still the proper holding concerning delivery clauses in invitations for bids, we cannot say that the same conclusion necessarily applies to requests for proposals. In that same regard, we have held that where a request for proposals contained only a desired delivery schedule, award made to an offeror proposing a different delivery time was not legally insufficient as long as the offered time was within a "reasonable" time after the desired date. United Telecontrol Electronics, Inc., B-191981, February 14, 1979, 79-1 CPD 104.

Pitney Bowes has also alleged that the RFP was defective concerning the requirement for "dual com"¹ checkinserters and the requirement that each check-inserter fit into a space of not more than 145 square feet. Although Pitney Bowes continues to argue that the

¹According to the Air Force, a "dual com" system is a more sophisticated type of check-processing system "where two unburst, continuous form webs are fed simultaneously into a machine's two cutters/bursters and matched for processing down one channel." Essentially, it appears that such a system is able to burst and/or cut stubs and also match the corresponding checks and stubs during insertion in a single operation.

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"dual com" requirement was ambiguous, the firm itself admits that at a meeting held with the Air Force after the closing date for proposals, the Air Force "made clear that it did not seek a dual com system." Because of this fact, we feel the issue is moot.

Pitney Bowes also asserts that no commercially available checkinserters that would meet the Air Force's requirements can be accommodated within a 145 square foot area. The Air Force disputes this assertion by stating that, regarding the two proposals submitted, "[n]either offer received indicated they could not fit into the space or asked for dimension waiver." Where Pitney Bowes' position remains essentially unsupported, the firm has failed to meet its burden of proving that the space restriction is unreasonable. See Gas Turbine Corporation, B-210411, May 25, 1983, 83-1 CPD 566.

The protests are sustained in part and denied in part. By separate letter, we are advising the Secretary of the Air Force of our recommendations.

for Milton J. Fowler
Comptroller General
of the United States