



The Comptroller General
of the United States

Washington, D.C. 20548

Glass

Decision

Matter of: Ricoh Corporation

File: B-234655

Date: July 5, 1989

DIGEST

Where record shows that only one source currently is capable of furnishing required equipment and that other firms are developing capability to meet agency requirements, agency should only procure its immediate needs using noncompetitive procedures.

DECISION

Ricoh Corporation protests request for proposals (RFP) No. DCA200-88-R-0011, issued by the Defense Communications Agency (DCA), for lease of an estimated quantity of 500 high speed digital secure facsimile machines, on an "as required" basis, plus estimated option quantities of 125 machines in each of 4 additional years. The machines will be used to satisfy requirements of the Air Force, Army, Navy, Department of Defense (DOD) agencies and other government agencies. Ricoh essentially contends that a solicitation provision (military standard (MIL-STD)-188-161A) will necessarily result in a de facto sole source procurement.

We sustain the protest.

The RFP, issued on September 19, 1988, contemplates a fixed-price requirements contract and required the submission of proposals by October 19. The RFP initially provided that contractors which did not comply with the military standard at time of contract award could request a waiver for a 1-year exemption from compliance. Delivery is required 45 days after receipt of order (ARO).

The military standard was promulgated by the Joint Tactical Command, Control and Communications Agency and was published on July 4, 1988 for industry comment. The basic objective of the military standard is to establish technical parameters and standards to ensure compatibility and commonality among digital facsimile machines. A joint

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government and industry meeting was held in November 1988 and, as a result of the technical discussions, a "revised change notice" was issued on February 17, 1989, amending MIL-STD-188-161A. A subsequent meeting on March 2 resulted in a "draft version" of MIL-STD-188-161A which was to be published effective March 17, 1989.

In the meantime, amendment 0006 to the RFP was issued on February 6, 1989, which changed the proposal due date to March 1, 1989, and eliminated the 1-year waiver for vendor compliance with MIL-STD-188-161A. On February 28, Ricoh filed this protest. The date for receipt of proposals has since been indefinitely suspended.

Ricoh argues that the elimination of the 1-year waiver for compliance with MIL-STD-188-161A is restrictive of competition because only one company, Cryptek, Inc., is presently able to comply with the standard, and that therefore immediate implementation of the standard will result in a de facto sole-source procurement. Ricoh contends that the agency has not allowed sufficient time for industry to modify existing equipment or to manufacture new equipment to meet the military standard which is still "unsettled" and continually changing.

The agency responds that the MIL-STD-188 series addresses telecommunications design parameters and is mandatory for use within DOD under DOD Directive 4640.11. The agency states that the overriding requirement is for compatibility within DOD, among all services and agencies and with NATO allies, especially during times of national emergency. The goal of the agency is to eventually obtain secure facsimile communications whether classified or not. According to DCA, the 1-year waiver was included in the original solicitation as a matter of routine based on a similar solicitation which had been issued earlier. However, the user activity had never requested a waiver, and therefore the waiver provision was ultimately eliminated to prevent the contractor from delivering nonconforming facsimiles and to avoid the possibility of default by the contractor at the end of the waiver period.

We initially note that the record shows that only one firm, Cryptek, is currently prepared or able to furnish facsimile equipment complying with MIL-STD-188-161A so that the agency cannot obtain competition in acquiring the equipment until other firms have additional time to develop conforming

products.^{1/} The record shows that on February 8, 1989, Cryptek wrote a letter to DCA acknowledging that the firm "is the only one with a product which complies with the MIL-STD and that this causes competitive contracting problems." In addition the Army, on January 27, 1989, issued invitation for bids (IFB) No. DAEA08-88-B-0064 incorporating the standard for facsimile machines, with a bid opening date of April 28 and only one responsive bid, from Cryptek, was received.^{2/}

Whatever the agency's initial expectation for competition for this procurement, it is clear that there is only one source available which can meet the RFP requirements at this time. Thus, while the agency has issued a competitive solicitation, there is no reasonable expectation of obtaining competition. Although the Competition in Contracting Act of 1984 (CICA) generally requires agencies to obtain full and open competition through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A) (Supp. IV 1986), noncompetitive purchases are not objectionable when that is the only way the agency's needs can be satisfied. See Hydro Rig Cryogenics, Inc., B-234029, May 11, 1989, 89-1 CPD ____.

The record shows, however, that at least 4 firms are currently developing a conforming facsimile product, and all of these firms are apparently asking for less than 10 months from June 1989 to complete development of their products. The agency has not disputed that competition will exist in a reasonable time. Consequently, in a situation like this, where competition does not exist but will exist in the near future, we think the CICA mandate requires

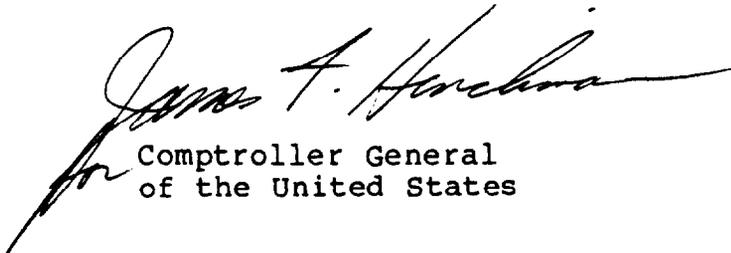
^{1/} Several firms in the industry have joined in Ricoh's protest as interested parties.

^{2/} DCA argues that under solicitation No. MDA903-89-B-0013, the Defense Supply Service-Washington (DSSW) received three bids on February 23, 1989 (the low bidder was again Cryptek). However, the record shows that the third low bidder submitted an unreasonably high price and cannot meet certain requirements. The second low bidder, Omni, Inc., is an interested party in Ricoh's protest and agrees with the protester that insufficient time has been afforded offerors to comply with the standard which "restricts any competition for this procurement." We denied Ricoh's protest of this DSSW procurement as unduly restrictive of competition because the agency had justified its immediate need for the equipment. Ricoh Corp., B-234617, June 29, 1989, 89-1 CPD ____.

agencies to purchase, in the noncompetitive environment, only what is necessary to satisfy needs that cannot await the anticipated competitive environment. Cf. Honeycomb Co. of America, B-227070, Aug. 31 1987, 87-2 CPD ¶ 209.

The agency states that facsimile equipment being acquired under this solicitation will be used by several military departments and other federal agencies. The agency states that the Defense Investigative Agency (DIA) is "representative" of the agencies whose need for secure facsimile equipment will be met by this requirement. According to the agency, DIA "desperately needs secure facsimile equipment" due to expiration of maintenance contracts for leased equipment. DCA further states that "[b]ased on the lack of maintenance at several sites, the DIA has been forced to terminate secure facsimile service." The agency, however, has not alleged, and the record does not show, that the entire basic requirement or the option quantities represent immediate critical agency needs.

We therefore recommend that the agency cancel the RFP and solicit its immediate needs using noncompetitive procedures. We are so advising the Director of DCA by separate letter of today. We also find that Ricoh is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1988).



James A. Hirschman
Comptroller General
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