

B. Miller



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

Decision

Matter of: Very Smart Machine, Inc.

File: B-245044; B-246011

Date: December 9, 1991

Dasil E. Velez for the protester.
Karen W. Chambers and James V. Mason, Equal Employment Opportunity Commission, for the agency.
Behn Miller, Esq., Ralph O. White, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly canceled solicitation for computer equipment where the agency reasonably determined that original solicitation's new equipment clause unnecessarily discouraged qualified offerors from proposing used equipment.

DECISION

Very Smart Machine, Inc. (VSM) protests the cancellation of request for proposals (RFP) No. 91-35, issued by the Equal Employment Opportunity Commission (EEOC) for computer systems. Additionally, VSM has filed a second protest that the EEOC failed to provide it with a copy of the resolicitation--RFP No. 91-55.

We deny the first protest and dismiss the second protest.

The EEOC issued RFP No. 91-35 on May 7, 1991; under the RFP, offerors were required to submit both a price and technical proposal for 38 computer systems to be used by the EEOC's field and district offices to process discrimination cases. With regard to the technical acceptability of the proposed equipment, the RFP provided, at section C, "New or Reused Hardware," that "[t]he equipment to be acquired . . . may be new or used equipment." This provision also established a scheme by which offerors proposing used equipment could address agency concerns about maintaining such equipment.¹

¹In particular, offerors could demonstrate that used equipment would be acceptable by: (1) providing a certification from the original equipment manufacturer (OEM) that the hardware delivered will be maintained without additional

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On May 22, apparently due to previous problems with used computer equipment, the EEOC determined that the solicitation should be revised to state "that the government preferred new equipment." Accordingly, on May 29, the EEOC issued amendment No. 0001, deleting the "New or Reused Hardware" provision, and advising offerors that any used or reconditioned material should be offered in accordance with Federal Acquisition Regulation (FAR) § 52.210-5 entitled "New Material."

FAR § 52.210-5, which had been incorporated by reference in section I of the original RFP, and was set forth in full in amendment No. 0001, provides:

"Unless the contract specifies otherwise, the Contractor represents that the supplies or components . . . are new, including recycled (not used or reconditioned) and are not of such age or so deteriorated as to impair their usefulness or safety. If the Contractor believes that furnishing used or reconditioned supplies or components will be in the Government interest, the Contractor shall so notify the Contracting officer in writing. The Contractor's notice shall include the reasons for the request along with a proposal for any consideration to the Government if the Contracting Officer authorizes the use of used or reconditioned supplies or components."

By this same amendment, the EEOC also extended the RFP's original June 6 closing date for receipt of initial proposals to June 14.

In response to the RFP, the EEOC received offers from Solution Systems, Inc. and VSM. Solution Systems's proposal was rejected as technically unacceptable; the VSM proposal was determined to be acceptable. In its initial proposal, VSM represented that "[a]ll machines are reconditioned and are warranted by the manufacturer for [60] days."

On June 27, the contracting officer held telephone discussions with VSM, and by letter dated that same day, requested a best and final offer (BAFO) by July 2. In the BAFO request, the contracting officer informed VSM that although its proposal was technically acceptable, the "EEOC would

charge; (2) agreeing, via contract with the agency, to cover all costs incurred in order to receive certification from the OEM after delivery of the hardware; or (3) providing an alternative means of on-site maintenance at the same terms, or better, as offered by the OEM.

like to exercise the agency's option under section M of the RFP to evaluate a sample of the [computer model VSM has proposed]."

On July 1, VSM submitted its BAFO. VSM's BAFO specifically advised the EEOC that it intended to "fulfill the requirement with used, but refurbished [manufacturer] certified systems, warranted as new." VSM also answered the agency's June 27 clarification requests, and advised the agency that if it was selected for award, it would furnish a computer model to the agency for trial evaluation. On July 25, VSM received a notice from the agency canceling the RFP, and stating that "[c]ancellation is clearly in the Government's interest." On August 2, VSM filed a protest here challenging the cancellation as improper.

Under FAR § 15.608(b)(4), a contracting agency may reject all proposals received in response to an RFP if cancellation is "clearly in the Government's interest." Thus, while an agency need not have a "compelling reason" to cancel an RFP as it would to cancel an invitation for bids, FAR § 14.404-1(a), it must have a reasonable basis for such an action. Pro-Fab, Inc., B-243607, Aug. 5, 1991, 91-2 CPD ¶ 128. As relevant here, an unduly restrictive specification provides a reasonable basis for cancellation where the requirement discourages qualified potential offerors from competing. See Lucas Place, Ltd., B-235423, Aug. 30, 1989, 89-2 CPD ¶ 193. In short, a procuring agency properly may cancel a negotiated procurement based on the potential for increased competition. See General Projection Sys., 70 Comp. Gen. 21 (1991), 91-1 CPD ¶ 308; Bell Indus. Inc., B-233024, Jan. 25, 1989, 89-1 CPD ¶ 81.

In this case, the agency reports that after receiving VSM's confirmation that it was proposing used equipment for the instant requirement and after reviewing Federal Information Resources Management Regulation (FIRMR) Bulletin C-29² (cautioning agencies that procurements requiring new computer equipment models--if not sufficiently justified--have been determined unduly restrictive by the General Services Board of Contract Appeals (GSBCA)), the contracting officer concluded that the agency could not properly make award to VSM for used equipment based on her determination that the original solicitation, as amended, may have discouraged qualified used equipment offerors from submitting proposals. Because FAR § 52.210-5 does not explicitly state that an offer proposing used equipment will in fact be considered by the procuring agency, the

²FIRMR Bulletins are published by the General Services Administration to provide assistance to federal agency procurement personnel.

contracting officer decided to resolicit and reinstate the "New or Reused Hardware" provision that was previously deleted by amendment No. 0001.³

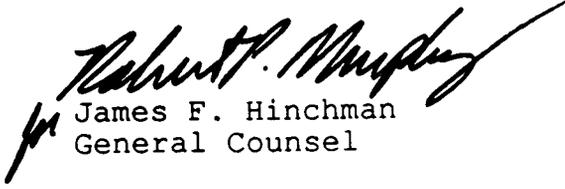
We agree with the contracting officer that FAR § 52.210-5--especially when compared with the reinstated "New or Reused Hardware" provision set forth in the new RFP--can reasonably be interpreted as discouraging qualified used equipment offerors from competing since FAR § 52.210-5 evidences a clear preference for new computer equipment. Unlike the "New or Reused Hardware" provision which provides for "automatic" consideration of a used equipment offer by expressly stating that "the equipment to be acquired . . . may be new or used," FAR § 52.210-5 provides no guarantee that a used equipment offer--if submitted--will be considered. Given this distinction between the clauses, we find reasonable the contracting officer's determination that FAR § 52.210-5 may have discouraged used equipment offerors from competing. Thus, since FAR § 52.210-5 apparently overstated the EEOC's minimum needs and thereby limited the pool of competition, we find that RFP No. 91-35 was properly canceled.⁴ See HBD Indus., Inc., B-242010.2, Apr. 23, 1991, 91-1 CPD ¶ 400; Program Resources, Inc., B-215201, Sept. 25, 1984, 84-2 CPD ¶ 356.

The EEOC issued the new solicitation--RFP No. 91-55--on July 23, 1991. On October 2--after the new solicitation's initial closing date had passed--VSM filed a second protest with this Office, protesting the agency's failure to provide it with a copy of this new solicitation. It is now our understanding that the EEOC will permit VSM to submit an offer under the new procurement, thus taking corrective action. Under these circumstances we dismiss VSM's second protest as academic. See East West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379.

³As quoted above, FAR § 52.210-5 contemplates that the used equipment vendor obtain permission to offer used equipment by submitting a separate proposal to the contracting officer prior to the closing date stating what "consideration" would be furnished the government if it permitted the proposing of used equipment. In contrast, the "New or Reused Hardware" clause grants blanket permission to offer used equipment.

⁴Despite VSM's assertion to the contrary, the fact that the contracting officer discovered the potential restrictiveness of the RFP after evaluating VSM's BAFO proposal does not make her decision to cancel the solicitation unreasonable; an agency properly may cancel a solicitation regardless of when the information warranting cancellation arises. See Research Analysis and Maint. Inc., B-236575, Dec. 12, 1989, 89-2 CPD ¶ 543.

The first protest is denied, and the second protest is dismissed.


for James F. Hinchman
General Counsel