147739 Bednarz

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Westbrook Industries, Inc.

File: B-248854

Date: September 28, 1992

Allen D. Westbrook for the protester.
Gerald P. Kohns, Esq., and Joe Zima, Esq., Department of the Army, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Invitation for bids for the rental and maintenance of washers and dryers at a Department of the Army installation reasonably specified that contractor must furnish equipment in use for no more than 2 years, where the record demonstrates that older machines malfunction more frequently and the restriction is necessary to reduce the delay and inconvenience caused by inoperative machines.

2. An invitation for bids (IFB) for the rental of washers and dryers, which contains a requirement for maintenance and installation, was reasonably determined by the procuring agency not to be covered by the Service Contract Act because the IFB is not principally one for services.

DECISION

Westbrook Industries, Inc. protests the terms of invitation for bids (IFB) No. DAKF40-92-B-0009, issued by the Department of the Army, for the lease and maintenance of washers and dryers at Fort Bragg and Camp Mackall, North Carolina. Westbrook claims that the IFB overstates the government's minimum needs and wrongfully omits the applicable provisions of the Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1988).

We deny the protest.

The Army issued the IFB on March 27, 1992, as a 100 percent small business set-aside. The IFB, as amended, contemplates the award of a firm, fixed-price requirements contract for the lease and maintenance of an estimated 1,000 washers and 1,047 dryers during a 1-year base period and two 1-year options. Under the IFB, the contractor must maintain the

equipment that it leases in a serviceable condition, repairing or replacing any inoperative units within 48 hours after receiving notice from the contracting officer or his representative. The IFB requires the contractor to install machines that are no more than 2 years old, such that all initial and replacement units must be no older than 1990 models.

Westbrook claims that the 2-year age limitation on equipment overstates the government's minimum needs. Westbrook argues that since the IFB otherwise requires the contractor to maintain the machines in an operative condition, there is no need for any age restriction. Westbrook also asserts that machines in use for more than 2 years are not significantly less reliable than machines in use for less than 2 years. Westbrook notes that other military installations do not impose similar age restrictions in soliciting washer and dryer units, which demonstrates that the IFB provision in this case lacks a reasonable basis.

The determination of the government's minimum needs and the best method of accommodating them is primarily the responsibility of the procuring agency, since government procurement officials are most familiar with the conditions under which supplies, equipment, and services have been employed in the past and will be utilized in the future. John Morris Equip. and Supply Co., B-218592, Aug. 5, 1985, 85-2 CPD ¶ 128; JLS Rentals, B-219662, Nov. 20, 1985, 85-2 CPD ¶ 570. Accordingly, we will not question an agency's determination of its minimum needs unless it lacks a reasonable basis. Id.

The record here contradicts Westbrook's claim that older machines function as well as newer machines. The Army has produced data showing a marked deterioration in the performance of washers and dryers over the course of the current contract, which is held by the protester's predecessor firm. According to the Army, the predecessor firm installed new machines at the start of its contract in 1989, and received 66 work orders for washer repairs and 58 work orders for dryer repairs that year. In 1990, the number of work orders nearly doubled; 123 washer work orders and 98 dryer work orders were placed. The average number of work orders in 1991 increased 10-fold from the 1989 figures, with 784 washer work orders and 470 dryer work orders. Data compiled for January 1992 showed a 15-fold increase in the combined number of work orders. While Westbrook disputes the accuracy of the Army's data based upon the incumbent contractor's records, the protester's own version of the facts--that the number of work orders increased by 40 percent in 1990 and doubled by 1991--still supports the intuitively obvious conclusion that older washers and dryers need significantly more maintenance than newer machines.

The 2-year age restriction in the present solicitation is reasonably intended to reduce the occurrence of machine breakdowns and the inconvenience that service members must endure while the inoperative units await repair. The government could reasonably conclude that such reliability was necessary to satisfy its minimum requirements. That the IFB also requires the contractor to repair or replace inoperative units within 2 days after receiving notice does not affect the apparent reasonableness of the Army's effort to reduce the number of inoperative periods. See John Morris Equip. and Supply Co., supra, and JLS Rentals, supra (which found reasonable similar age restrictions on washers and dryers leased to other Army facilities).

We are also unpersuaded by the protester's argument that the 2-year age restriction here is unreasonable because there are some military installations that have provided for more lenient age restrictions. Each procurement action is a separate transaction, and the action taken under one is not relevant to the propriety of the action taken under another for the purposes of a bid protest. Shirley Constr. Corp., 70 Comp. Gen. 62 (1990), 90-2 CPD ¶ 380. In developing the age restriction in this case, the Army relied upon technical guidance positing a 5-year life expectancy for washer and dryer units on military bases, which reasonably supports the 2-year age limitation at the start of this 3-year contract.

Nor do we view the 2-year age restriction as overly restrictive of competition, as the protester contends. In analyzing the cost impact of the age restriction, the agency found that the higher purchase price of newer machines was roughly offset by the higher service costs that the contractor would absorb to maintain older machines. To the extent that the protester believes that the age restriction is prejudicial because it prevents Westbrook from using many of the machines currently in place under the incumbent contract, a contracting agency need not eliminate the disadvantages suffered by virtue of a firm's incumbency.[1] Robertson and Penn, Inc., B-226992, June 9, 1987, 87-1 CPD ¶ 582; John Morris Equip. and Supply Co., supra.

Westbrook also protests that the IFB should have incorporated the terms of the Service Contract Act. The Act generally applies to any federal contract, "the principal purpose of which is to furnish services," and requires the contractor to pay its employees minimum wages and fringe

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[1]Westbrook appears to understand this point, noting that, "[w]hen a base decides it shall allow equipment at least as old as the preceding contract for the subsequent contract, it automatically sets up a likely winning bid for the incumbent."

benefits, as determined by the Department of Labor, 41 U.S.C. § 351. Where the procuring agency reasonably determines that a contract is not subject to the Service Contract Act, there is no duty on its part to notify the Department of Labor or to include Service Contract Act provisions in the solicitation. Tenavision, Inc., B-231453, Aug. 4, 1988, 88-2 CPD ¶ 114. The agency must obtain Labor's views only if it has some reason to doubt or question the possible application of the Act to the procurement. 29 C.F.R. § 4.4(a)(1) (1992); Federal Acquisition Regulation § 22.1003-7; Hewes Eng'g Co., Inc., B-179501, Feb. 28, 1974, 74-1 CPD ¶ 112.

Here, the procuring agency states that it relied upon our decision in Tenavision, Inc., supra, in determining that the procurement was not subject to the Service Contract Act, since this IFB was for the same work. Tenavision involved the applicability of the Service Contract Act with respect to the Army's current contract (with the protester's predecessor firm) for the rental, maintenance and installation of washers and dryers. During that protest, the agency obtained a letter from the Department of Labor, stating that the Service Contract Act did not apply to the proposed contract. We agreed that the contract was primarily for equipment, not services, given the fact that the rental value of the equipment far exceeded any maintenance costs. The Army states, and no evidence contradicts, that this contract is substantially identical to the last.[2] Thus, we find reasonable the Army's position that the Service Contract Act does not apply.

The protest is denied.

for James F. Hinchman
General Counsel

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[2]In this regard, the relative value of rental equipment and services has not changed. If the IFB permitted the use of aged, fully amortized machines in the performance of the contract, then the service costs may exceed the equipment costs, as hypothesized by the protester. However, this is irrelevant, since the agency reasonably permitted only newer machines.