



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Westinghouse Electric Corporation

File: B-224449

Date: October 27, 1986

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### DIGEST

1. Protest that agency was required to use a mandatory multiple-award Federal Supply Schedule (FSS) for a multi-million dollar procurement of modular furniture lacks merit where the schedule contracts contain a maximum order limitation of \$75,000, and where reference in FSS solicitation reference to the use of a "requote" procedure for procurements over \$75,000 appears to have been included for informational and administrative purposes only.
2. Protester is not an interested party under Bid Protest Regulations to protest a specification requirement that it admits it can meet.
3. Protest that specifications unduly restrict competition is denied where the agency amended the solicitation to respond to many of the protester's concerns, and with respect to its remaining concerns, the protester has not met its burden of proving that the agency's requirements are clearly unreasonable.

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### DECISION

Westinghouse Electric Corporation, Furniture Systems Division protests request for proposals (RFP) No. NOR26503, issued by the General Services Administration (GSA) for modular furniture, ergonomic seating, lateral files and drafting tables. The furniture is to be installed in the new Federal Building East, Portland, Oregon and will be used by the Bonneville Power Administration (BPA). We deny the protest in part and dismiss it in part.

Westinghouse questions GSA's failure to use its mandatory multiple award Federal Supply Schedule (FSS), covering modular furniture, for this procurement. The protester also argues that many of the specifications in the RFP are unduly

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restrictive of competition and asserts that the agency at least was required to use the more general commercial item descriptions for modular furniture developed by GSA for its FSS contracts.

#### FAILURE TO USE FSS

GSA asserts that it could not use the modular furniture FSS here because the FSS contracts contain a maximum order limitation (MOL) of \$75,000 and this is a multi-million dollar procurement. The Federal Property Management Regulations (FPMR) provide that agencies may not submit orders, and contractors may not accept orders, exceeding the MOL stipulated in an FSS contract. FPMR, 41 C.F.R. § 101-26.401-4(c)(1) (1985).

Westinghouse asserts, however, that the provisions of the solicitation for the modular furniture FSS became a part of the resulting FSS contracts, and that one of the provisions stated that:

"The maximum order limitation of any contract resulting from [this] solicitation will be \$75,000. Any Modular projects [exceeding] \$75,000 will be covered by contracts issued under the resulting Federal Supply Schedule through a process of RFQs (Request for Quotations), where successful offerors will requote their discounts to agencies on a project-by-project basis. These requotes will not trigger the Price Reduction clause. This will allow vendors to tailor the volume of business to their capacity and provide a more flexible discount structure."<sup>1/</sup>

Westinghouse argues that under this clause, GSA is required to use the modular furniture FSS "requote" procedure for this procurement.

GSA notes that the provision relied on by Westinghouse appeared only in a summary page at the beginning of the solicitation while the actual "contract clauses" section of

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<sup>1/</sup> The "resulting Federal Supply Schedule" referenced in the clause is a newly established schedule which has not yet been printed. We understand that contracts for the modular furniture FSS were first awarded in July of this year, after the protested solicitation was issued.

the solicitation contained a specific prohibition on agencies placing or the contractor accepting orders in excess of \$75,000:

"Maximum Order Limitation: (All dollar amounts are exclusive of any discount for prompt payment.) The total dollar value of any order placed under this contract shall not exceed \$75,000. The contractor agrees not to accept or fulfill any orders in violation of this clause. Violation may result in termination of the contract pursuant to the Default clause of this contract."

The agency also points out that, as awarded, Westinghouse's contract contains an additional clause stating that a "Basic Order Limit of \$75,000 applies to this contract. No single order may be accepted in excess of \$75,000 government net value." Accordingly, GSA argues that it has no contractual commitment to use a "requote" procedure for modular furniture projects over \$75,000 and that it is prohibited from placing orders in excess of \$75,000 under Westinghouse's existing contract.<sup>2/</sup>

We agree with GSA that the solicitation provision referring to use of a requote procedure appears to have been included for informational and administrative purposes only, and not to establish any commitment to the contractor to utilize a "requote" procedure for projects exceeding \$75,000. Furthermore, it appears that Westinghouse itself has made no commitment either to respond to any RFQ that might be issued for projects exceeding \$75,000 or to offer any minimum discount if it does respond. Under these circumstances, we are not persuaded that GSA is required to employ the requote procedure here.

We note that Westinghouse also relies on a GSA Bulletin, FPMR E-211, Mar. 3, 1986, which announced GSA's intent to establish the modular furniture FSS. Westinghouse notes that

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<sup>2/</sup> GSA also states that under a current solicitation for new Offers for FSS modular furniture contracts, the existing MOL provision will be replaced by a clause providing specifically that modular furniture requirements in excess of \$75,000 will be "repriced" using the "Request for Quotes" procedure established under FSS 71, II, E (Systems Furniture). We understand that this is the only FSS for which a specific requote procedure has been established. The procedure provides that RFQs will be issued to schedule contractors only and that award will be made to the low, responsive offeror.

the bulletin states that a requote procedure will be used for procurements over \$75,000. However, the bulletin also specifically states that its purpose is to provide general information concerning GSA contracting for modular furniture and ergonomic seating. Thus, the bulletin clearly is informational in nature only and does not establish any requirement that agencies use a requote procedure for procurements over \$75,000. Furthermore, the bulletin contains an expiration date of April 15, 1986, almost 2 months before the protested RFQ was issued. We therefore find no merit to the protester's assertion in this regard.

#### ALLEGED RESTRICTIVENESS OF SPECIFICATIONS

In its initial protest, Westinghouse objected to twelve specification requirements. The agency responded by issuing two solicitation amendments that it believes resolve all but four of Westinghouse's concerns. The agency's report on the protest documents those changes in detail, and the protester has not rebutted the assertion that its concerns have been satisfied by the amendments. Instead, the protester admits that the amendments address some of its complaints, but argues that this only proves that the solicitation is restrictive. However, since the protester has not shown that the amendments do not actually eliminate the restrictions they were intended to address, and our own review of the record discloses no reason to question them, we think the amendments provide an adequate remedy and we will not consider further the protest of the specifications involved. See United Instrument Corp., B-216740, Apr. 15, 1985, 85-1 CPD ¶ 428.

We also will not consider Westinghouse's allegation concerning the restrictiveness of the specification provision, which GSA did not amend, requiring that all fabric provide a minimum noise isolation classification of 22. Westinghouse states that it can meet this specification, but believes that the requirement is without merit and is being used only to limit competition. Since Westinghouse can meet the requirement, this basis of protest is essentially on behalf of other potential suppliers that would be economically affected by the specification's allegedly restrictive nature. Our Bid Protest Regulations require a protester to be an "interested party," as determined by the nature of the issues raised and the direct or indirect benefit or relief sought. 4 C.F.R. §§ 21.0(a), 21.1(a) (1986); Superior Boiler Works, Inc., B-216472, Mar. 25, 1985, 85-1 CPD ¶ 342. Under this

standard, the other potential suppliers, not Westinghouse, are the proper parties to complain about this specification. Id. We therefore will not review this aspect of the protest.

We turn then to a consideration of the alleged restrictiveness of the other specifications protested by Westinghouse that were not addressed by the solicitation amendments. Where a protester challenges a specification as unduly restrictive of competition, the burden initially is on the procuring agency to establish prima facie support for its contention that the restrictions it imposes are necessary to meet the government's minimum needs. Cardion Electronics, B-218566, Aug. 15, 1985, 85-2 CPD ¶ 172. Once the agency establishes this prima facie support, the burden shifts back to the protester to show that the requirements complained of are clearly unreasonable. Id.

The first requirement for our review is that "worksurface units shall provide the option of attaching drawer or file pedestals to the underside, on either left or right . . . ." Westinghouse asserts that this requirement is contrary to the terms of the mandatory FSS for modular furniture, and the commercial item description for such units.

GSA responds that the requirement is not contrary to the FSS for modular furniture, or the commercial item descriptions for such units. It also states that the requirement was designed to allow the units to be moved on dollies in fully loaded single units for ease of relocation. In this connection, the agency report indicates that BPA has a critical need for furniture that is both sturdy and easy to assemble, adjust, and move, because historically, BPA relocates approximately 40 percent of its work stations each year.

We find that BPA's need for furniture that is easy to relocate, based on the frequency of relocation historically experienced by the agency, provides prima facie support for the requirement that drawer or file pedestals be attachable to the underside of the work units. Further, we find that Westinghouse has not shown that this requirement is unreasonable.

As discussed previously, the modular furniture FSS schedule does not apply here, and, therefore, even if the specification is contrary to the FSS, this does not demonstrate that the requirement is unreasonable. Similarly, the fact that this requirement may be inconsistent with the commercial item descriptions for such units does not establish that the requirement is unreasonable. GSA states that the commercial item descriptions were developed for the modular furniture

FSS, and are not mandatory here. The agency also argues that even where use of commercial item descriptions is mandatory, the FPMR provides an exception for any acquisition that involves a one-time procurement. FPMR, § 101-29.402(a)(5) (1985). GSA asserts that this procurement falls under the "one-time" exception. Westinghouse has provided no rebuttal to these assertions and we therefore find no basis to conclude that the use of the commercial item description is mandatory here, or that the specification requirement unduly restricts competition.

Westinghouse also objects to the specification requirement that work surface colors "closely match" specified "Laminart" colors. Westinghouse asserts that Laminart is a plastic laminate used by one manufacturer only. The protester also argues that since no furniture currently exists for the new building here, the need to match Laminart colors is clearly restrictive.

The agency states that the colors selected are part of the design color scheme for the new building and that the solicitation merely requires that the colors furnished match the Laminart colors, not that Laminart brand be used. The agency also notes that the protester has not indicated that there would be any difficulty in matching the color, even with an off-the-shelf laminate, and further that if a custom laminate color is necessary, this is not unreasonable in a procurement of this size.

We find no basis to conclude that the color requirement is unduly restrictive. The fact that no furniture presently exists for the building does not establish that the color requirement is unreasonable since the agency's purpose is to procure furniture that will be harmonious with the color scheme established for the building. Furthermore, as the agency points out, there is no requirement that Laminart brand be used here, and Westinghouse simply has made no showing that it is competitively unable to meet the specification requirement for colors that closely match Laminart. See Julie Research Laboratories, Inc., B-218598, Aug. 20, 1985, 85-2 CPD ¶ 194. We therefore find no merit to this aspect of the protest.

Westinghouse also protests two specification requirements that the agency's amendments to the solicitation address only in part. In both instances, the amended specifications establish a preference for furnishings that meet the original requirement, but also provide that furnishings without the

features Westinghouse alleges are restrictive will be acceptable. The first such requirement is that file/shelf units be constructed of double-wall welded steel.

Westinghouse alleges that double-wall welded steel is only necessary where the gauge of steel used is not of sufficient strength for support, and questions why the agency does not simply specify the gauge of steel required for its needs. Westinghouse also asserts that the manufacturer that GSA and BPA allegedly prefer uses double-wall construction in its wall/shelf units.

In response to this basis of protest, GSA amended the RFP to specify that 20 gauge steel was an acceptable alternate to the preferred double-wall welded steel construction. With respect to the preference for double-wall construction, the record shows that BPA's experience had been that single wall construction was not sufficiently durable to withstand the frequent relocations to which its furnishings were subjected. We believe that this provides sufficient prima facie support for the preference established for double-wall construction. Further, the protester has not supplied any evidence that double-wall construction is not more durable than single wall construction. We therefore find that Westinghouse has not met its burden of proving that this aspect of the specifications unduly restricts competition. See Maryland Computer Services, Inc., B-216990, Feb. 12, 1985, 85-1 CPD ¶ 187.

The second specification requirement that the agency partially amended in response to Westinghouse's protest pertains to overhead storage compartments. Specifically, Westinghouse objects to the requirement that "binder bin" doors must recede into the cabinet when open.<sup>3/</sup> Westinghouse asserts that this requirement is unduly restrictive because most manufacturers, including Westinghouse, make binder bin doors that open over the top of the bins, rather than receding into them.

The agency's amendment to the solicitation provides that binder bin doors that recede into the cabinet are preferred, but that binder bin doors that "ride" over the top of the cabinet also are acceptable. The agency justifies the preference for doors that recede into the cabinet on the fact that they allow for storage on top of the cabinet, while doors that open over the top of the cabinet do not. We believe that this justification provides prima facie support

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<sup>3/</sup> Binder bins apparently are storage units that hold loose leaf binders.

for the preference established by the specification, and Westinghouse again has provided no evidence that the requirement is clearly unreasonable. Accordingly, we also find that this aspect of the protest lacks merit.

#### CONCLUSION

Based on our review of the record, we conclude that there is no merit to the protester's assertion that the agency was required to use the mandatory modular furniture FSS for this procurement. We also find no merit to the protester's contention that the specifications unduly restrict competition.

The protest is denied in part and dismissed in part.

*for* *Seymour Efron*  
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General Counsel