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Decision

Matter of: CHE Consulting, Inc.; Digital Technologies, Inc.

File: B-284110; B-284110.2; B-284110.3

Date: February 18, 2000

L. James D'Agostino, Esq., Leigh T. Hansson, Esq., Jeff S. Robinette, Esq., and Richard L. Moorhouse, Esq., Reed Smith Hazel & Thomas, for CHE Consulting, Inc.; and Robert A. Mangrum, Esq., and Paul S. Ebert, Esq., Winston & Strawn, for Digital Technologies, Inc., the protesters.

Joseph J. Petrillo, Esq., and Karen D. Powell, Esq., Petrillo & Powell, for CCL Service Corp.; and David R. Hazelton, Esq., and Erica P. McFarquhar, Esq., Latham & Watkins, for Federal Data Corp., intervenors.

H. Jack Shearer, Esq., and Robert R. Goff, Esq., Defense Information Systems Agency, for the agency.

Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In procurement of preventive and remedial maintenance for Department of Defense computer equipment, solicitation requirement that offerors obtain support agreements with original equipment manufacturers (OEM) to cover a minimum of 65 percent of the equipment is not unduly restrictive of competition. Record demonstrates that OEM support to that level reasonably reflects agency need to ensure prompt repair and limited downtime of critical computer resources.

DECISION

CHE Consulting, Inc. and Digital Technologies, Inc. protest the terms of request for proposals (RFP) No. DCA200-99-R-5011, issued by the Defense Information Systems Agency (DISA) for on-site preventive and remedial hardware maintenance on data processing equipment located at various facilities throughout the United States. The protesters object to the RFP's requirement that offerors obtain support agreements from original equipment manufacturers (OEM) to cover a minimum of 65 percent of the equipment to be maintained.

We deny the protests.

BACKGROUND

DISA Western Hemisphere is the principal information processing activity for the Department of Defense. It operates five mainframe processing centers (Defense Megacenters or DMC) and 18 regional support activities. These processing centers directly support a variety of military missions and support programs, and serve the military departments and major defense agencies.

The primary contract vehicles for preventive maintenance and repair of computer equipment at these facilities are currently two contracts, awarded prior to DISA's assumption of responsibility for the facilities. Under one, awarded by the Army, CCL Service Corporation functions as an integrator. Under the other, awarded by the Air Force, TRW provides maintenance support through its subcontractor, CHE. While neither contract requires OEM maintenance support, CCL routinely obtains such support, while TRW/CHE does not have OEM support agreements. The RFP at issue is DISA's second attempt to consolidate preventive maintenance and repair requirements under a single contract. In August 1998, DISA awarded seven contracts to CHE. CCL and PCC Federal Systems protested these awards to the Court of Federal Claims, alleging that CHE's proposal had failed to demonstrate its ability to perform the contract. CCL Serv. Corp. v. United States, 43 Fed. Cl. 680 (1999). DISA ultimately took corrective action in the form of terminating CHE's contracts for convenience and reverting to the use of the existing contracts with CCL and TRW/CHE for maintenance and repair pending resolicitation of the consolidated requirement.

The RFP, issued on September 3, 1999, contemplates the award of a fixed-price, indefinite-delivery/indefinite-quantity contract in each of four geographic regions in the continental United States. Proposals are to be evaluated under three factors, listed in descending order of importance: technical/management, past and present performance, and price. RFP § M.a. Non-price factors are "significantly more important than price." Id. Award in each region is to be made to the offeror whose proposal represents the best overall value to the government, based upon an integrated assessment of the proposals.

As the result of having experienced extended outages of critical computer equipment maintained under the current contracts, DISA included the following requirement calling for offerors to obtain, and submit with their proposals, written agreements with OEMs for back-up support:

The contractor must have OEM agreements which cover a minimum of 65% of the equipment inventory . . . within each region covered by its proposal. Primary emphasis should be to obtain OEM agreements covering mainframe and midtier CPU's, Communication Devices (Routers, Front End Processor, and Channel Extenders), and high densities of equipment from a single OEM. All OEM agreements with

the contractor must be written and co-signed and describe the relationship between the contractor and OEM to assure the Government that the OEM will respond with whatever service necessary, to include parts, diagnostics, and expertise to effect repair. The cost of OEM assistance is the responsibility of the contractor.

Statement of Work (SOW), as amended, § C.7.1.

The RFP also required offerors to propose, for remedial maintenance, a maximum repair time of 4 hours. SOW § C.7.3. As contemplated by the SOW, if a contractor has not diagnosed a malfunction and initiated repairs within the proposed repair time, the contractor must secure OEM support from those OEMs with which it has written agreements. If there is no written agreement covering the equipment, the contractor must attempt to secure OEM support. If the contractor cannot secure that support, the government reserves the right to obtain OEM support to effect the repairs. Charges levied by the OEM will be deducted from the amount due the contractor. SOW amend., § C.7.1.

OEM support is to be evaluated as one of six “relatively equal” technical subfactors (OEM support, response time, repair time, technical support experience/training, diagnostics, and microcode changes). RFP § M.b.1.a-f. Specifically, the government will evaluate the “breadth and depth” of the OEM agreements, which “must address the proposed level of OEM service, to include response and repair times, parts, diagnostics, and expertise” and the circumstances under which the OEM will be called in for support. RFP § M.b.1.a. The agency also will evaluate offerors’ stated rationales for why the proposed OEMs were chosen. Id.

Prior to the closing date of November 19, CHE and Digital filed protests challenging various aspects of the 65 percent OEM agreement requirement as being unduly restrictive of competition.¹ CHE contends that any OEM agreement requirement is overly restrictive because third party maintenance providers are capable of performing the majority of the contract without OEM assistance. While Digital

¹ The protesters also alleged that there was insufficient time to obtain the required agreements and that certain of the RFP provisions were ambiguous. These alleged ambiguities included a failure to identify the relative importance of the evaluation factors, how the 65 percent of equipment to be covered by OEM support agreements should be calculated, and how the agency would determine when repairs were initiated. To address and remedy these allegations, DISA amended the RFP (amendment No. 07) extending the due date for proposals an additional month and by clarifying certain of the RFP’s provisions. We have reviewed these matters and agree with the agency that amendment 07 cured the alleged solicitation flaws that it addressed.

agrees that an OEM requirement is valid, it argues that the 65 percent equipment level is overly restrictive.²

ANALYSIS

Procuring agencies are required to specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agencies' legitimate needs (or as otherwise authorized by law). 10 U.S.C. §§ 2305(a)(1) (A)(i), (B)(ii) (1994); Container Prods. Corp., B-280603.2, Nov. 4, 1998, 98-2 CPD ¶ 106 at 3. Where a protester challenges a specification as unduly restrictive, the agency must establish that the requirement is reasonably necessary to meet its needs; we will not question an agency's determination of its actual needs unless that determination has no reasonable basis. Instrument Specialists, Inc., B-279714, July 14, 1998, 98-2 CPD ¶ 18 at 2; Innovative Refrigeration Concepts, B-272370, Sept. 30, 1996, 96-2 CPD ¶ 127 at 3. Here, we find the agency has demonstrated reasonable bases for the challenged requirements.

The DMCs that use the equipment covered by this solicitation operate 24 hours a day, 365 days a year serving the military departments and major defense agencies, including the Defense Logistics Agency and the Defense Finance and Accounting Service. The centers directly support military logistics for ongoing military operations and future force projections all over the world. Their applications include combat simulations, war games, research, development, test and evaluation programs, weapon system status data, and military and civilian pay. Agency Report at 9.

In establishing the 65 percent requirement, DISA sought to balance between its need to provide critical information processing services in support of national security with minimal downtime and its desire to afford maximum competition. To this end, the RFP allows third-party³ maintenance contractors to provide all required maintenance without the use of OEMs, but requires that OEM agreements be in place for 65 percent of the equipment in order to minimize downtime when the contractor is unable to effect repairs within the 4-hour repair time. According to the agency, a requirement covering less than 65 percent of the equipment represented an unacceptable risk of prolonged service disruption for essential equipment. Agency Report at 25.

² Both protesters have raised a number of additional issues. We have reviewed them all and find that none has merit. This decision will address only the more significant matters raised.

³ A third-party maintenance provider is a contractor who has the capability to repair and maintain equipment that it did not manufacture.

The agency based its determination on its most recent experience under the current contracts for this service. While third-party maintenance providers were able to adequately maintain older equipment, DISA found that new, state-of-the-art equipment could not be constantly maintained without OEM participation for diagnostics, trained personnel, repair parts, and current firmware. Agency Report at 35. During the period of October 1997 through the end of November 1999, DISA experienced 517 incidents of outages on equipment under the hardware maintenance contracts, with 18 of the outages considered critical. All involved third-party maintenance providers. For example, during this period, CHE was not always able to diagnose and repair equipment malfunctions on its own and had to obtain assistance from OEMs [deleted]. In a few instances, DISA intervened to replace CHE with an OEM for repair service. In this regard, in March 1999, a [deleted] platform malfunctioned. After CHE spent 35 hours diagnosing the problems, ordering, receiving, and installing replacement components, the platform still could not be made to function. An OEM technician properly diagnosed and resolved the problem within 2 hours of arriving on site. The total time of the outage was 53 hours. Agency Report at 27. In another instance, CHE performed upgrades on a direct access storage device at DMC Columbus. After eight upgraded units were returned to service, DISA experienced iterative errors for some 24 hours, resulting in a non-operational condition. DISA then called in the OEM, whose technician diagnosed all equipment, effected repairs and returned all equipment to an operational state. The total outage time was 47.5 hours, adjusted to deduct the time spent waiting for the OEM to arrive. DMC Columbus estimated that its customers lost upwards of \$4 million as a result of this service outage.⁴ Agency Report at 27-28.

In view of the critical nature of the work performed at the DMCs on the equipment to be maintained, the potential detriment to defense missions from extended outages of that equipment, and the agency's own experience using contracts without OEM support, we believe the agency reasonably determined that OEM agreements represent an actual and legitimate need. Instrument Specialists, Inc., supra.

⁴ CHE maintains that the number of outages cited by DISA is de minimis when compared with the more than 3,000 service requests for maintenance and that CCL, another contractor which ostensibly used OEM support, had outages that lasted even longer than those cited by DISA. CHE Comments, Jan. 3, 2000, at 8-9. The agency explains that, even assuming that number of maintenance requests, the important consideration is whether the outages were critical. Of the 18 critical outages in 1998-99, 16 involved equipment maintained by CHE and required longer than the contract repair time. Supplemental Agency Report at 5. Moreover, the agency explained that outages on CCL-maintained equipment were not considered critical and the times for repair were, in fact, far shorter than indicated in the agency's documents. Supplemental Agency Report at 9-11.

While the protesters contend that the equipment is not “critical,” they have submitted no evidence to rebut the agency’s determination that service disruptions critically affect the ability of the military departments to perform their missions. Agency Report at 10. Their mere disagreement does not make the agency’s determination unreasonable. Instrument Specialists, Inc., *supra*. Likewise, while CHE maintains that it is capable of performing maintenance and repair without OEMs in the great majority of potential outages, the fact that OEM support is not always required does not make the requirement any less reasonable. Tidewater Marine, Inc., B-271999, July 25, 1996, 96-2 CPD ¶ 45 at 2 (specified contractor capability which is infrequently, though legitimately needed, represents a minimum, not a “maximum,” need). Further, the other protester, Digital, states that it “does not dispute the agency’s need to require OEM support.” Digital’s Comments at 8.

However, Digital contends that it is unreasonable for the agency to require 65 percent of the equipment in each region to be covered by the OEM support agreements. In Digital’s view, such a high percentage provides an unfair competitive advantage to those offerors able to secure exclusive agreements with some of the OEMs.⁵ We disagree.

Before setting the minimum equipment coverage level, DISA first excluded from RFP coverage most, but not all, of the equipment manufactured by two OEMs (Amdahl Corp. and StorageTek (STK)), intending to obtain maintenance from blanket purchase agreements negotiated under the General Services Administration (GSA) Federal Supply Schedule. Its rationale for excluding these OEMs’ equipment is their history of entering into exclusive support agreements and the agency’s desire to keep such OEMs from exercising a disparate influence on the competition. In setting the minimum OEM support level for the remaining equipment covered under the RFP, DISA “eliminated” the equipment of OEMs that each represented less than 1 percent of the RFP inventory. These OEMs account for approximately 12 percent of the total. DISA also “eliminated” another 14.5 percent of the RFP inventory,

⁵ In a related argument, Digital contends that the agency could have alleviated offerors’ difficulty in obtaining OEM agreements if it allowed them to offer GSA supply schedule prices for those vendors which had entered into exclusive teaming agreements with other offerors. Digital Protest at 5. The agency correctly observes that Digital essentially wanted the agency to act as its agent in obtaining the services, an arrangement that would defeat the purpose of a consolidated maintenance contract. In its comments, CHE observes that the agency could have given the protester permission to use the GSA schedule under the authority of Federal Acquisition Regulation (FAR), Part 51. CHE Comments at 9 n.6. CHE’s reliance is misplaced. Contracting officers may authorize contractors to use government supply sources only under limited circumstances, none of which is present here. FAR § 51.101.

which accounts for the STK and Amdahl equipment remaining in the RFP inventory.⁶ Agency Report at 44-45. Together, the “eliminated” equipment accounts for approximately 26.35 percent of the RFP inventory. This leaves more than 73 percent of the equipment manufactured by OEMs from which offerors could obtain non-exclusive support agreements. Agency Report at 45. Rather than require offerors to obtain agreements covering all 73 percent of the inventory, DISA set the minimum at 65 percent. The agency arrived at the lower minimum based on its calculation that slightly more than 64 percent of the equipment was manufactured by nine OEM’s, none of which (to the agency’s knowledge) would require exclusive agreements. Agency Report at 43. Under these circumstances, the agency has taken reasonable steps to determine and establish a minimum acceptable level of coverage that is not unduly restrictive of competition.⁷

Digital argues that the agency should completely exclude the remaining STK and Amdahl equipment because it alleges that the two offerors that have already submitted proposals each have an exclusive agreement with one of these OEMs. Digital argues that these offerors have an unfair competitive advantage over other offerors because they can obtain their 65 percent coverage more easily, and having those agreements will enhance those offerors’ evaluation under the “breadth and

⁶ In Region 4, STK’s equipment accounts for approximately 19.52 percent and another 3.55 percent represents equipment of a third OEM which Digital asserts will only enter an exclusive agreement. OEMs each providing less than 1 percent of equipment account for another 3.8 percent. Agency Report at 45 n.10. While this accounts for just over 27 percent of the equipment, offerors may still obtain 65 percent coverage without contracting with any of these OEMs.

⁷ Digital also argues that, by removing critical, state-of-the-art equipment from the requirement and obtaining OEM coverage through BPAs, the remaining equipment must not be “critical” and thus, the agency’s need to maintain critical equipment is not served by requiring OEM agreements. Digital Comments at 3. We disagree. First, the agency does not state that all critical equipment was removed from the solicitation requirement. Agency Report at 19. Rather it removed most of the equipment of contractors that historically entered exclusive agreements. (see note 9, *infra*). Second, to the extent Digital is arguing that setting the OEM support level at less than 100 percent implies that the requirement for OEM support is not truly critical, it ignores the agency’s rationale for setting the 65 percent minimum support level. As observed by DISA, based on the critical nature of its mission, it “may well have been justified to demand OEM support agreements for all hardware equipment maintenance.” Agency Report at 35. Instead, it sought to maximize competition by allowing third party maintenance with support agreements covering a minimum percentage. Agency Report at 35-36. The agency’s willingness to maximize competition through the least restrictive implementation of a justifiable need does not imply that the need is not legitimate.

depth” subfactor. In Digital’s view, offerors without agreements with these OEMs will also have to add a risk factor into their price proposals to cover the potential cost, should DISA require the OEM to perform certain maintenance.

While Digital’s speculation on the consequences of inclusion of STK and Amdahl equipment may prove true, such possible consequences do not constitute an unfair competitive advantage that the agency is required to eliminate. Any competitive advantage enjoyed by those offerors with exclusive agreements is not the responsibility of DISA. An agency is not required to cast its procurements in a manner that neutralizes the competitive advantages some firms may have by virtue of their own particular circumstances. Precision Photo Labs. Inc., B-251719, Apr. 29, 1993, 93-1 CPD ¶ 359 at 3. Here, each offeror is responsible for negotiating OEM support agreements and the agency is not responsible for any OEM’s decision to enter only exclusive agreements.⁸ Further, by ensuring that offerors may reach the 65 percent minimum without agreements with these OEMs, the agency has taken reasonable steps to alleviate any perceived advantage. With regard to any advantage in the “breadth and depth,” evaluation subfactor (RFP § M.b.1.a), we note that it is one of six equal subfactors. Thus, any competitive advantage enjoyed by one contractor in this area could be overcome by excelling under another technical subfactor or under the three management subfactors.⁹

CHE also argues that the requirement restricts competition because the majority of equipment in some regions is manufactured by a single OEM. For example, since IBM is the OEM for some 44 percent of the equipment in Region 1, any offeror

⁸ CHE and Digital also contend that the requirement for OEM agreements “encourages antitrust activities by the offerors and the OEMs.” CHE Comments at 16; Digital Comments at 18. Even if we assume, arguendo, that the agency’s requirement for obtaining OEM support agreements or the fact that some OEMs may desire to enter exclusive agreements raises issues of possibly encouraging violations of the antitrust statutes, allegations of restraint of trade and possible violations of antitrust laws are outside the scope of the bid protest process and should be referred to the Department of Justice, since the interpretation and enforcement of such laws are functions of the Attorney General and the federal courts. MR Resources, B-242475, Feb. 14, 1991, 91-1 CPD ¶ 176 at 2.

⁹ Moreover, there is nothing unreasonable about DISA’s inclusion of STK and Amdahl equipment notwithstanding the potential for exclusive agreements. The agency explains that some of this equipment is not covered under the GSA schedules; that the equipment is not as critical as other OEMs’ newer equipment, making some delays in repair more tolerable; and that the alternative would be to execute a number of separate agreements, instead of consolidating as much maintenance as possible in this procurement. Agency Report at 19.

wishing to compete for that contract must obtain an OEM support contract with IBM. CHE explains that it attempted to obtain such an agreement, but found that IBM (as well as other OEMs) would only enter an agreement whereby the OEM, not CHE, would be the primary maintenance provider on OEM equipment. Affidavit of CHE's President, Jan. 3, 2000, ¶¶ 9-19. Since we have found that the agency's requirement for OEM support represents an actual need of the agency, CHE's stated difficulty in meeting that requirement does not provide a basis for finding it unreasonable.¹⁰ Instrument Specialists, Inc., *supra*, at 3.

Further, while the RFP contemplates and allows third-party maintenance providers to perform primary maintenance, nothing in the RFP prohibits an offeror from agreeing to allow an OEM to perform that maintenance. Moreover, Federal Data Corporation (FDC), an offeror and intervenor in this matter, explains that it was able to obtain non-exclusive OEM support agreements with all the OEMs identified by CHE and was able to obtain agreements under which the OEMs would serve in a subordinate role. Affidavit of FDC Representative, Jan. 11, 2000, ¶¶ 3-5. In this regard, FDC's representative acknowledged that many OEMs desire to be the primary maintenance provider and some are reluctant to agree to nonstandard terms and conditions. *Id.* ¶ 3. However, through "complex negotiations" over several weeks, thereby arriving at "the right price and on the right terms," FDC was able to secure non-exclusive support agreements with [deleted] OEMs. *Id.* ¶¶ 4-5. Thus, it appears that CHE's difficulty in obtaining the necessary agreements also reflects a matter of its business judgment in negotiating with the OEMs, and does not evidence an overly restrictive solicitation requirement.

Finally, CHE contends that the RFP is ambiguous because the agency's requirement for a 4-hour maximum repair time is inconsistent with its additional requirement that contractors maintain equipment in good operating condition as defined by the OEM. SOW § C.7. CHE bases this claim on unidentified situations in which some OEMs require more than 4 hours for certain repairs. CHE Protest at 8. From our reading of the record, there is nothing ambiguous or inconsistent in these provisions.

¹⁰ Digital similarly argues that offerors with exclusive OEM agreements covering large percentages of equipment are able to satisfy the 65 percent requirement with fewer agreements, placing other offerors at a competitive disadvantage. Digital Comments at 9. While Digital estimates that it "may have to obtain as many as 68 agreements" (*id.*) to meet the requirement, it does not explain how it arrived at this estimate. On the contrary, the record indicates that it is possible to meet the requirement with ten or fewer agreements with those OEMs responsible for approximately 65 percent of the equipment (Agency Report at 47-48). Digital's choice to obtain OEM agreements with manufacturers of smaller percentages of equipment is a matter that reflects its business judgment, and is not the result of a restrictive specification or an unfair competitive advantage.

First, there is no ambiguity with regard to the RFP's required repair time. The SOW plainly sets it as 4 hours (SOW § C.7.3) and the agency reiterated the requirement in answers to potential offeror questions that raised the alleged ambiguity (RFP § J-13, Question Nos. 85-87). Second, there is no inconsistency among the cited provisions. CHE bases its inconsistency claims on its position that OEMs "require" certain repair times for equipment. While the record indicates that OEMs "propose" some repair times (Agency Report at 55), these are average times for repair and not absolute. Declaration of CCL President, Jan. 10, 2000, ¶ 2, at 1. Here, CHE has not submitted any OEM literature that specifies a required repair time. We also note that the 4-hour repair time is only relevant to remedial maintenance, that is, repairs of malfunctioning equipment. For preventive or scheduled maintenance (SOW § C.2.d) and "predictive maintenance" ("Fix before Fail Concept") (SOW § C.2.c), there is no stated time. Thus, a contractor is free to spend longer than 4 hours on these maintenance operations. Finally, the penalty for failure to meet the established repair time for remedial repairs is a "downtime credit" equal to 25 percent of the monthly maintenance rate proposed for the piece of equipment requiring service. SOW § C.15.a.2. Thus, to the extent an OEM "requires" a certain period longer than 4 hours to make a particular repair, nothing prevents an offeror from taking this into account in preparing its price proposal for that equipment.

The protests are denied.

Comptroller General
of the United States