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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Columbia Imaging, Inc.

File: B-286772.2; B-287363

Date: April 13, 2001

John R. Holsey and Wayne M. Horsman for the protester.
LTC Richard B. O'Keefe, Jr., Department of the Army, for the agency.
Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In solicitations for maintenance of medical equipment, requirements that vendors' technicians have factory training on specific models to be maintained and telephone access to technical support for software, and that vendors furnish proof of license agreement for access to diagnostic software, are not unduly restrictive where requirements are reasonably aimed at ensuring that vendors possess the capability to maintain the identified equipment.

DECISION

Columbia Imaging, Inc. protests the specifications in amended request for quotations (RFQ) No. DADA15-00-T-0053 (RFQ 0053) and RFQ No. DADA15-01-T-0224 (RFQ 0224), issued by the Department of the Army for maintenance of medical diagnostic and treatment equipment. Columbia asserts that the requirements for factory training and access to diagnostic software unduly restrict competition.

We deny the protests.

Each RFQ contemplated the award of a requirements contract for a period of 1 base year, with 3 option years, for preventive maintenance and unlimited on-site emergency repair of medical equipment manufactured by Philips Medical Systems (PMS). RFQ 0053 concerns cardiac catheterization laboratory (CCL) equipment at Walter Reed Army Medical Center in Washington, D.C. and RFQ 0224 concerns x-ray systems at DeWitt Army Community Hospital at Fort Belvoir, Virginia.

With regard to RFQ 0053, both Columbia and PMS submitted quotes by the September 15, 2000 deadline. The agency conducted discussions with both vendors

and each submitted a revised quote. After determining that Columbia's quote was technically unacceptable, the Army awarded a contract to PMS. Columbia challenged this award in a protest to our Office. The agency subsequently took corrective action, and we dismissed the protest as academic (B-286772, Nov. 20, 2000). The Army amended the statement of work (SOW) primarily to specify the model numbers of the equipment to be maintained. The agency then notified the vendors that it was reopening negotiations; in doing so, the Army specifically notified Columbia that its proposed personnel did not meet the factory training/experience requirement for the now specifically identified equipment, and requested that Columbia provide a copy of a licensing agreement with PMS regarding access to that firm's diagnostic software. After receipt of this notice, Columbia filed a protest with our Office challenging the RFQ amendments. During this same time frame, the Army issued RFQ 0224, which required vendors to offer software maintenance that included telephone access to technical support, and technicians with factory training and experience on PMS x-ray systems. Prior to the March 6, 2001 due date for quotes, Columbia filed a protest challenging these RFQ provisions.

Columbia challenges the requirements in RFQ 0053 that technicians have factory training on the models of the machines to be maintained, and that the firm submit a license agreement with PMS to demonstrate that it will have access to necessary diagnostic software.[1] With regard to RFQ 0224, Columbia challenges that solicitation's similar requirements for telephone software support and factory software training and experience. Columbia asserts that PMS will not allow the protester's personnel access to its factory training or telephone software support and will not negotiate a software license with it.

The determination of the government's needs and the best method of accommodating them is primarily the responsibility of the procuring agency, since its contracting 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. DGS Contract Servs., Inc., B-249845.2, Dec. 23, 1992, 92-2 CPD ¶ 435 at 2. Where a protester challenges a specification as unduly restrictive, it is the agency's responsibility to establish that the specification is reasonably necessary to meet its needs. CardioMetrix, B-259736, Apr. 28, 1995, 95-1 CPD ¶ 223 at 3. The adequacy of

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[1] The amended RFQ 0053 also eliminated evaluation subfactor 2.b.1, regarding the identification of key personnel; Columbia asserts that it was prejudiced by this action because it had allegedly scored higher than PMS under this subfactor in the original evaluation. This argument is without merit. First, the fact that a vendor's quote was evaluated highly under a subfactor under a prior evaluation would have no bearing on the propriety of the agency's subsequently omitting it. In any case, the record shows that Columbia's proposal was not scored higher than PMS's under this subfactor. In fact, PMS's initial overall score was 97 (out of an available 100 points) and Columbia's was 0. Price Negotiation Memorandum at 3.

the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether it can withstand logical scrutiny. Keeson, Inc.; Ingram Demolition, Inc., B-245625, B-245655, Jan. 24, 1992, 92-1 CPD ¶ 108 at 4. Where a requirement relates to national defense or human safety, as here, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness. Harry Feuerberg & Steven Steinbaum, B-261333, Sept. 12, 1995, 95-2 CPD ¶ 109 at 3.

With regard to the requirement for factory training, the original SOW in RFQ 0053 required "factory training and experience . . . in the servicing of [PMS equipment] including current software, as covered by this contract." RFQ 0053 § C.15. The amended SOW specifies the model numbers of the diagnostic and treatment machines to be maintained. Id. Likewise, RFQ 0224 requires the vendors' personnel to have "factory training and experience (minimum 1 years), in the servicing of [PMS] X-Ray Systems including current software, as covered by this contract." RFQ 0224 § C.10.

In explaining its need for factory training on the specific CCL models under RFQ 0053, the Army states that the CCL at Walter Reed annually uses these machines to perform more than 2,000 cardiac procedures, including angioplasties, coronary and renal stent placements, and pacemaker implantations. If these machines become inoperable, the "physicians are robbed of vitally-important diagnostic and treatment tools that they need to be instantly available in the event of cardiac medical emergencies." Contracting Officer's Declaration, Feb. 15, 2001 (hereinafter Decl. A), at 2. As for the x-ray systems covered by RFQ 0224, the agency explains that if either or both systems become inoperable, this would severely compromise DeWitt Hospital's capability to deal with mass casualties (e.g., a school bus crash) as well as more routine, though no less urgent, medical demands. Contracting Officer's Declaration, Mar. 15, 2001 (hereinafter Decl. B), at 2. Inoperative machines could lead medical authorities to have to divert patients to other treatment facilities with the possibility of "obviously adverse medical outcomes." Id. Based on the medical importance of the missions of the Walter Reed CCL and the DeWitt radiology department, the agency states that it demanded that vendors "demonstrate the specific capability to deal with the equipment actually in place" at both facilities. Decl. A at 2; Decl. B at 2. In this regard, the Army explains that the machines in both facilities are relatively new (2 years old), and that the CCL machines are significantly different from earlier generations of PMS equipment. Technical Evaluation Committee Chair Declaration at 2.

In light of the critical missions of the CCL and radiology department, the relatively young age of the machines, and the need to keep those machines in working order at all times, we think the requirements that vendors' technicians have a minimum of 2 years of factory training and experience for the CCL machines, and 1 year of factory training and experience for the x-ray systems to be maintained, are reasonable. On their face, these requirements appear to be aimed at ensuring the highest possible reliability and effectiveness of the machines. Although Columbia

asserts that it successfully maintains "similar" CCLs and x-ray systems manufactured by PMS at other Washington, D.C.-area hospitals, it has not submitted anything showing that the agency's position regarding the need for specific training/experience is unfounded. (Further, while Columbia apparently does not now have technicians who meet the requirement, nothing in the RFQ prevents it from hiring qualified technicians.)

The same factors which support the experience requirements also support the agency's request that Columbia submit a software licensing agreement with PMS and the requirement for telephone access to PMS's software support.[2] Because the CCL and x-ray equipment operate through the use of proprietary software, the agency has a legitimate need for vendors to establish that they have the proper access to the software and diagnostic keys. The protester itself recognizes the necessity for access to the appropriate diagnostic software. In fact, the discussion question under RFQ 0053 arose because the protester's proposal represented that PMS's service manager had "assured [Columbia] that all necessary diagnostic keys and software are available to [it] for a licensing fee." Columbia Quote, Vol. 3, at 1.

Columbia complains that the licensing requirement under RFQ 0053 will prevent it from competing because PMS now refuses to license the CCL software to Columbia. Similarly, it notes that PMS has the power to deny it access to the telephone software support required under RFQ 0224. However, 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. Where, as here, the agency is unable to furnish offerors data necessary for the performance of a contract, it properly may require that offerors obtain permission to use the data from the holder of the proprietary rights. American Diesel Eng'g Co., Inc., B-245534, Jan. 16, 1992, 92-1 CPD ¶ 79 at 5. The agency is not responsible for an original equipment manufacturer's decision not to license necessary software, or provide access to technical support for software, to a vendor. CHE Consulting, Inc.; Digital Techs., Inc., B-284110 et al., Feb. 18, 2000, 2000 CPD ¶ 51 at 8. So long as the data is reasonably related to the needs of the agency, the fact that there is only limited competition, or even only one source, does not render the requirement unduly restrictive. American Diesel Eng'g Co., Inc., supra. Accordingly, the license and telephone support requirements are unobjectionable.

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[2] The RFQ required vendors to "provide [s]oftware [m]aintenance in accordance with the manufacturer's latest established service procedure, to include telephone access to technical support for use of program software and trouble shooting of the operating systems." RFQ 0224 § C.3.

In its comments in response to the agency's reports, Columbia for the first time asserts that the agency's requirements are unduly restrictive because equivalent alternatives are available. Specifically, Columbia states that an unnamed "nationally recognized company" provides training on PMS's CCL and x-ray equipment. RFQ 0053 Comments at 3; RFQ 0224 Comments at 2. It also states that access to PMS's software is available without a license in accordance with the provisions of 21 C.F.R. § 1020.30(g), (h) (2000).[3] RFQ 0053 Comments at 5; RFQ 0224 Comments at 4. Under our Bid Protest Regulations, protests must be filed no later than 10 days after the basis for the protest was, or should have been, known, 4 C.F.R. § 21.2(a)(2), and where, as here, a protester files supplemental protest grounds, each new ground must independently satisfy our timeliness requirements. QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94 at 12-13. If Columbia believed the challenged requirements were unnecessary because less restrictive alternatives were available, it was required to so allege within 10 days after it became aware of the alternatives; we see no reason why Columbia would not have been able to raise these specific arguments in its original protest submissions. Since the protester's comments identifying the alternatives were filed in our Office well after its protests, these new bases of protest are untimely and we will not consider them.[4]

The protests are denied.

Anthony H. Gamboa
General Counsel

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[3] These provisions require the manufacturer of x-ray equipment (e.g., PMS) to furnish, on request, certain technical and safety information, and instructions for assembly, installation, adjustment, and testing of components to assure that the products will comply with the applicable provisions of related regulations which set forth proper operational parameters.

[4] In any case, there is no evidence that Columbia's technicians have obtained the necessary training and experience from an alternative training firm. Similarly, Columbia does not currently have access to PMS's diagnostic software under 21 C.F.R. § 1020.30, or otherwise; rather, it is only investigating with the Food and Drug Administration the legality of PMS's refusal to grant it a license. We note that it is the Army's position that the provisions would only require access to safety-related information and not all the diagnostic software necessary for maintaining and repairing the equipment in question.