

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

31229

FILE: B-216164

DATE: May 20, 1985

MATTER OF: CMI Corporation

DIGEST:

1. GAO denies protest alleging failure of agency to obtain delegation of procurement authority from the General Services Administration where the record establishes that delegation was obtained.
2. Protester claiming that agency requirement for new rather than reconditioned equipment is unduly restrictive has not shown that agency determination of minimum needs and necessity of restricting competition is unreasonable.

CMI Corporation protests the National Aeronautics and Space Administration's (NASA) purchase of a printer/plotter for the Lewis Research Center, Cleveland, Ohio, from International Business Machines Corporation (IBM). The agency made the purchase under IBM's nonmandatory automatic data processing (ADP) schedule contract with the General Services Administration (GSA). NASA rejected CMI's offer to supply a reconditioned printer at a price that is \$24,000 less than IBM's schedule price for newly manufactured equipment. CMI questions whether NASA obtained necessary authorization from GSA to purchase the equipment and argues that restricting the procurement to new equipment is unreasonable.

We deny the protest.

The acquisition was initiated pursuant to regulations governing the use of GSA schedule contracts, Federal Information Resources Management Regulation (FIRMR), Temp.

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Reg. 71, §§ 201-4.1104-1 and 201-4.1109.6.^{1/} The regulation provides that an agency may not place an order under a nonmandatory ADP schedule contract without publishing a synopsis in the Commerce Business Daily (CBD), announcing the agency's intent to place an order, and then determining whether placing the order would be the most advantageous alternative. The determination must be based on any responses of nonschedule vendors interested in meeting the agency's requirements. If evaluation of the responses indicates that using the GSA schedule contract would not be the most advantageous to the government, then the contracting agency normally should issue a formal solicitation and invite all vendors, including schedule contractors, to compete. The regulations also require that when the purchase price of the items covered exceeds \$300,000, a specific delegation of procurement authority must be obtained from GSA. FIRM, Temp. Reg. 71, § 201-4.1109-6(b)(2).

In this case, on July 7, 1984, NASA announced in the CBD its intention to issue a delivery order under IBM's schedule contract for an IBM model No. 3800 printer/plotter and related items. The announcement invited each vendor able to furnish the required equipment or its equivalent to provide a written statement of exactly what equipment was being offered, firm pricing, the delivery date, and other information. CMI responded with a letter proposing a reconditioned model No. 3800 at a price \$24,000 less than IBM's schedule price.

NASA evaluated the protester's submission and determined that an award to IBM under the GSA contract would be most advantageous to the government, primarily because a new rather than a reconditioned printer was required. On July 27, NASA ordered an IBM printer under the GSA schedule contract and, on August 7, NASA notified CMI of the agency's determination that only new equipment would satisfy its requirement.

^{1/} The text of these provisions is found in Federal Procurement Regulations (FPR), Temp. Reg. 71, §§ 1-4.1104-1 and 1-4.1109-6, 41 C.F.R. Ch. 1 App. (1984). FPR Temp. Reg. 71 was redesignated as FIRM Temp. Reg. 71 and given new chapter designators (Ch. 201) in 49 Fed. Reg. 20,994, 21,001 (1984). The provisions have been largely reissued in FIRM Temp. Reg. 6, 50 Fed. Reg. 4,411 (1985), and will be codified at 41 C.F.R. Ch. 201.

CMI states two grounds for its protest. First, it questions whether NASA obtained the delegation of procurement authority required by FIRMR, Temp. Reg. 71, § 201-4.1109-6(b)(2). Second, CMI contends that NASA's requirement for new equipment is unreasonable. The firm states that the printer it offered would have the same guarantees and warranties as new IBM equipment and would be installed, certified, and maintained by IBM. CMI also points out that, under IBM's schedule contract, IBM's printers are warranted as "newly manufactured," but may contain some used parts.

NASA has provided a copy of a delegation of authority for this procurement, issued by GSA on May 18, 1984, for the record. Thus, CMI's allegation that proper authorization had not been obtained is without merit.

Concerning the protester's allegation that the requirement for new equipment unduly restricts competition, the determination of the government's minimum needs, the method of accommodating them, and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials, who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. Eaton Leonard Corp., B-215593, Jan. 17, 1985, 85-1 CPD ¶ 47. Further, it is proper for a contracting agency to determine its needs based on actual experience. Lucas Machine, Division of Litton Industrial Products, Inc., B-212982, Feb. 22, 1984, 84-1 CPD ¶ 217. Consequently, we will not question an agency's determination of its minimum needs unless there is a clear showing that the determination has no reasonable basis. Champion Road Machinery International Corp., B-206842, et al., Mar. 1, 1983, 83-1 CPD ¶ 203.

However, when, as here, a protester challenges a requirement as unduly restrictive, the burden is on the procuring agency to establish prima facie support for its position that the restriction it imposes is needed to meet its minimum needs. Once the agency establishes this prima facie support, the burden shifts to the protester to show that the requirement complained of is clearly unreasonable. Id. Thus, in this as in any protest, the protester has the burden of affirmatively proving its case. Lucas Machine, Division of Litton Industrial, B-212982, supra, 84-1 CPD ¶ 217.

We do not believe that CMI has carried its burden in this protest. NASA explains that the new equipment requirement is necessary to minimize downtime for equipment repairs. The agency contends that its past experience has shown that reconditioned equipment is likely to incur more downtime than new equipment. Specifically, during the past 4 years, the Lewis Research Center has operated an IBM printer similar to the model now being procured. For each year of operation, the number of hours during which the printer could not be used because of malfunctions has increased substantially: 20 hours, 36 hours, 52 hours, and 69 hours, respectively. The increase in downtime has resulted from annual increases in both the number of malfunctions requiring correction and the length of time necessary to repair the malfunctions. NASA anticipates similar usage of the new printer and, based upon the repair record for the current printer, NASA believes that reconditioned equipment will require more frequent and time-consuming maintenance and repair than will new equipment. The agency argues that the need to minimize delays in sometimes critical engineering, management, and administrative use of the printer requires that only new equipment be purchased.

We have recognized that the procedures used in manufacturing and maintaining ADP equipment are to some degree unique and may justify allowing offerors to propose remanufactured or reconditioned as well as entirely new equipment. International Business Machines Corp., B-198094, et al., Nov. 18, 1980, 80-2 CPD ¶ 363. However, in this case, CMI has not shown that NASA's justification is unreasonable. See Arwell Corp., B-210792, Dec. 14, 1983, 83-2 CPD ¶ 684. CMI's only response to the agency report was to repeat that its equipment will be guaranteed and warranted as new and installed and maintained by IBM. The protester offered no information regarding the maintenance and repair record of its reconditioned printers or similar equipment. CMI did not discuss changes made to printers during the reconditioning process or performance standards required of the reconditioned equipment for comparison with the IBM's "newly manufactured" printers containing some used parts. Therefore, CMI has not met its burden of showing that the requirement for new equipment unduly restricted competition.

In its protest, CMI also complained that the CBD synopsis of the NASA procurement did not state that only new equipment would be considered. While this fact was not argued as an independent ground for protest, we note

that the applicable regulations contain a presumption that equipment purchased by NASA shall be new and not used or reconditioned. They require that solicitations identify supplies that may be reconditioned, rather than those which must be new. NASA Procurement Regulation, § 1.1208, reprinted in 41 C.F.R. Ch. 18. See also 47 Comp. Gen. 390, 396 (1980) (interpreting a similar provision in the Armed Services Procurement Regulation). Consequently, we do not believe that NASA failed to meet its obligation to make its requirement for new equipment clear to potential offerors in the CBD synopsis. Cf. Masstor Systems Corp., B-215046, Dec. 3, 1984, 64 Comp. Gen. ___, 84-2 CPD ¶ 598.

The protest is denied.

Harry R. Van Cleve
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General Counsel