



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: MEDIQ Equipment and Maintenance Services, Inc.

File: B-245678

Date: December 16, 1991

Jovanna Carey for the protester.
Sandra G. Zimmerle, Esq., Department of the Air Force, for the agency.
John A. Carter, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against alleged defect in solicitation that is corrected by agency after protest is academic.
2. GAO will not consider contention raised in final comments that requirement for list of parts suppliers would not provide evidence of parts availability, since it should have been raised in initial protest.
3. Air Force reasonably determined that it required a single maintenance contractor for CT scanner, a complex piece of medical diagnostic equipment, who would have access to and be able to support the scanner software as well as the hardware, including upgrades.

DECISION

MEDIQ Equipment and Maintenance Services, Inc., protests certain requirements in request for proposals (RFP) No. F33601-91-R-9108 issued by the Department of the Air Force. The RFP is for the maintenance of a CT scanner system at the Air Force Medical Center, Wright-Patterson Air Force Base, Ohio. MEDIQ asserts that the RFP unduly restricts competition, and contests some of its informational requirements.

We dismiss the protest in part and deny it in part.

A CT scanner is a diagnostic system intended to produce cross-sectional images of the body through computer reconstruction of X-ray transmission data from the same

axial plane taken at different angles.¹ In effect, a CT scanner uses a computer to reconstruct pictures of "slices" of a patient from X-rays taken at various angles around the patient's body. The Medical Center acquired a General Electric Corporation (GE) Model CT 9800 scanner in 1986. GE provided the maintenance for the scanner from 1986 through most of 1990, initially through the factory warranty and, after expiration of the warranty, through a noncompetitive contract awarded by the Air Force to GE Medical Services.

The Air Force decided to compete the maintenance for fiscal year 1991; MEDIQ won this contract. The contract covered fiscal year 1991 and had options for 4 additional years. Rather than exercising the option in MEDIQ's contract for fiscal year 1992, however, the Air Force issued a new solicitation with a revised statement of work and informational requirements different from those under which MEDIQ competed for its contract. The Air Force states that it needed to revise the statement of work and RFP to more closely conform to its actual needs.

The current RFP requires that the contractor provide full maintenance, including software and hardware upgrades. To demonstrate the ability to do this, the RFP requires that offerors provide evidence of their ability to provide both hardware and software upgrades and enhancements. MEDIQ challenges a number of these requirements.

Initially, we note that several of MEDIQ's specific objections to the RFP either have been resolved in amendments to the RFP that have been issued or will be resolved in an amendment to be issued. For example, MEDIQ contends that a requirement for the contractor to provide "only new parts" should be replaced with a requirement for "new or parts remanufactured to manufacturer's specifications." Similarly, MEDIQ contests a requirement that services be provided by factory-trained employees; MEDIQ contends that training equivalent to factory training should be sufficient. The Air Force has amended the RFP to incorporate these changes, as well as others proposed by MEDIQ. Because these questions have been resolved, we will not consider them.

In its initial protest, MEDIQ challenged a requirement to provide a list of "all vendors" from which the prospective contractor would acquire replacement parts on the basis that it was not possible to identify with certainty all of the vendors from which MEDIQ might acquire supplies. The Air Force, in its report, responded to this objection with the

¹See 21 C.F.R. § 892.1750 (1991); CT is an abbreviation for computed tomography.

comment that the requirement was being changed to require a list of only primary sources. The Air Force explained that it needed this list to assure the availability of adequate spare parts. In its comments on that report, MEDIQ essentially ignores the Air Force's proposed change and reiterates its objection to the "all vendors" requirement, and further argues that the list would only provide evidence of sources for parts, not parts availability. MEDIQ contends that the Air Force should rely instead on uptime as the measure of performance of the service provider.

MEDIQ has provided no evidence that the proposed change to a requirement for a list of only primary suppliers would not resolve MEDIQ's initial assertion that it would not be possible to list "all vendors" from which MEDIQ might acquire spare parts. Since MEDIQ did not respond to the change, we view its initial contention as academic and will not consider it further. See Professional Carpet Service, B-243942, Sept. 10, 1991, 91-2 CPD ¶ 236.

We also will not consider MEDIQ's belated contention that the requirement for a list of parts vendors would not provide evidence of parts availability and should be replaced by an uptime measure. Our Bid Protest Regulations do not contemplate piecemeal presentation of arguments or information relating to a protest. J&J Maintenance, Inc., B-240799.2, B-240802.2, Feb. 27, 1991, 91-1 CPD ¶ 223. The time to raise an objection to the vendor list requirement on the basis stated in MEDIQ's final comments was in MEDIQ's initial protest, when the issue could have been addressed by the Air Force and resolved by our Office without undue disruption or delay to the procurement. Because MEDIQ could have raised this contention in its initial protest, but delayed raising the issue until its final comments, we will not consider its merits. See, e.g., G&A General Contractors, B-244094, Aug. 27, 1991, 91-2 CPD ¶ 204; Source AV Inc., B-244755.2, B-244755.3, Sept. 10, 1991, 91-2 CPD ¶ 237.

MEDIQ states that the manufacturer is responsible for the correction of safety-related defects in the scanner. MEDIQ asserts that the Air Force, by requiring the contractor to be responsible for all hardware and software upgrades, including those intended to remedy safety-related defects, thus improperly combined sole-source and competitive requirements in the RFP.² MEDIQ cites Interscience

²CT scanners are radiological equipment regulated by the Food and Drug Administration. See, e.g., 21 C.F.R. Subchapter J (1991). The FDA requires manufacturers of regulated equipment to remedy, without charge, defects or failures to meet federal standards, or replace the equipment.

Systems, Inc.; Cencom Systems, Inc., 59 Comp. Gen. 438 (1980), 80-1 CPD ¶ 332, as support for its proposition that a solicitation that combines sole-source equipment upgrades with maintenance services that can be acquired competitively is defective. MEDIQ also objects to a requirement for offerors to submit licensing agreements with their proposals showing that they have access to the CT 9800 software.

The Interscience Systems decision does not apply here. In that case, the agency had no reason to include sole-source items in the same solicitation with services that the agency could have procured from other contractors, and we therefore found that the sole-source vendor had an unfair competitive advantage. Here, in contrast, the agency has demonstrated a need for all equipment and services to be provided by a single contractor (as discussed below).

We agree with an Air Force suggestion that the most applicable case is Johnson Engineering and Maintenance Co., B-228385, Jan. 14, 1988, 88-1 CPD ¶ 34. In that case, the protester objected to a requirement for a licensing arrangement with the manufacturer in a solicitation for maintenance of a computerized energy control system. The agency contended that because the hardware and software were integral components of the system, all services would have to be provided by a single contractor and that the contractor would need the license to acquire and install the manufacturer's periodic updates to the software. The agency also said that the separate acquisition of updates would be burdensome and potentially costly. We found the solicitation requirements to be reasonable.

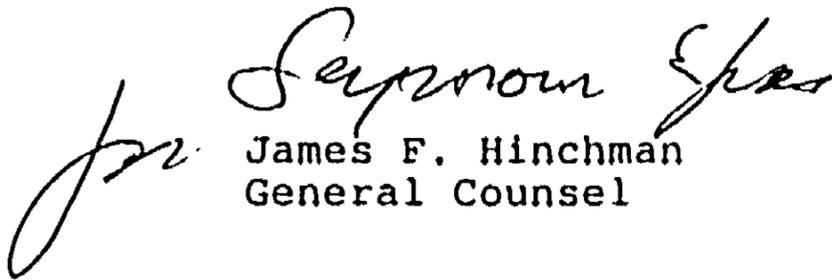
The position taken by the agency and the facts in Johnson Engineering closely parallel those in the present matter. The Air Force justifies its requirement for a single contractor on the basis that CT scanners are complex pieces of equipment, combining X-ray and computer technology in which hardware and software are integral components, both of which must function correctly for the scanner to perform properly. The Air Force also asserts that the separate acquisition of upgrades would be burdensome and potentially costly, and the contractor will need a license in order to acquire and provide software upgrades. MEDIQ provides no basis for our Office to question the reasonableness of these determinations. Consequently, MEDIQ's protest of the single contractor and licensing requirements is denied.

Finally, MEDIQ objects to a provision in the statement of work for reductions to be computed from contract charges for

or refund the purchase price to the purchaser. See 21 C.F.R. Parts 1003-1004.

deficient performance, based on the percentage of downtime that the CT scanner experiences during normal office hours. MEDIQ contends that the computation of downtime should not include the scheduled downtime associated with preventive maintenance and X-ray tube changes. The Air Force, in response, points out that the statement of work excludes scheduled downtime from the computation of contract charges by requiring that preventive maintenance occur outside of normal office hours. Our review of the solicitation confirms the Air Force's position.

The protest is dismissed in part and denied in part.

 James F. Hinchman
General Counsel