



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Federal Computer International Corporation

File: B-251132

Date: February 24, 1993

R. Stephen Berry, Esq., Berry & Leftwich, for the protester.
Robert J. Patton, Esq., for Xerox Corporation, an interested party.

Jo H. Dubose, Esq., Defense Logistics Agency, for the agency.

Kathleen A. Gilhooly, Esq., and Michael R. Volpe, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Although the Competition in Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements through the use of competitive procedures, the sole-source award of a contract under the authority of 10 U.S.C. § 2304(c)(1) is not objectionable where the agency reasonably determined that only one source could provide the required services because that source holds proprietary rights for the systems to be serviced under the contract. The protester has failed to prove its allegation that access to the proprietary information is unnecessary to perform the contract.

DECISION

Federal Computer International Corporation (FCIC) protests the award of a contract to Xerox Corporation under request for proposals (RFP) No. DLAH00-92-R-0195, issued by the Defense Logistics Agency (DLA) for maintenance services for Xerox automated data processing equipment (ADPE), printers and peripherals, at DLA locations worldwide. FCIC contends that DLA improperly determined that Xerox was the only responsible source capable of meeting the agency's needs.

We deny the protest.

The contracting officer prepared a justification and approval (J&A) for the procurement of the services on a sole-source basis, citing 10 U.S.C. § 2304(c)(1) (1988), as implemented by Federal Acquisition Regulation § 6.302-1. This statutory provision permits a noncompetitive award where only one known responsible source is available and no other type of property or services will satisfy the needs of the agency. The J&A stated that "the existence of limited rights in data, copyrights and secret processes (Xerox proprietary diagnostics manuals, firmware and software) make the supplies and services available from only one source." The J&A also provided that DLA was in the final stages of requirements definition for a competitive acquisition which was planned to allow total replacement of all the Xerox ADFE prior to the end of Fiscal Year 1997. The sole-source action was approved by the appropriate DLA official.

On April 20, 1992, DLA published in the Commerce Business Daily (CBD) a notice of its intention to negotiate, on a sole-source basis, with Xerox, a contract for hardware and software maintenance for Xerox systems located DLA-wide. The notice referenced a standard CBD note stating that interested persons may identify their interest and capability to respond to the requirement, and that information received will normally be considered solely for the purpose of determining whether to conduct a competitive procurement. The notice cautioned that "Responses must contain sufficient technical information to enable an evaluation of ability to perform this maintenance."

Five firms other than Xerox responded to the CBD synopsis. Two included technical data. All five were sent copies of the RFP, which was issued September 17, 1992. Vendor questions were addressed in amendments to the solicitation. Amendment 0003, issued October 28, 1992, stated that no vendor responding to the CBD notice furnished sufficient technical information to enable an evaluation of the vendor's ability to perform the required maintenance services. This protest followed. DLA has since determined that it is necessary to proceed with an award to Xerox notwithstanding the pendency of the protest.

FCIC protests that Xerox, the original equipment manufacturer (OEM), is not the only vendor qualified to perform the services solicited by the RFP. FCIC contends that DLA has failed to provide sole source justification adequate to demonstrate a reasonable basis to conclude that the only source is the OEM.

While the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A),

CICA does permit noncompetitive acquisitions in specified circumstances such as when only one known responsible source is available to provide the item or service which can satisfy the government's needs. 10 U.S.C. § 2304(c)(1); Kollman, A Division of Sequa Corp.; Applied Data Technology, Inc., B-243113; B-243113.2, July 3, 1991, 91-2 CPD ¶ 16. Where the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), calling for the written justification for and higher-level approval of the contemplated sole-source action and publication of the required CBD notice, we will not object to the sole-source award unless it is shown that there is no reasonable basis for the award. Rotek, Inc., B-240252, Oct. 26, 1990, 90-2 CPD ¶ 341. In sum, excepting those noncompetitive situations which arise from a lack of advance planning, a sole-source award is justified where the agency reasonably concludes that only known source can meet the government's needs within the required time. Johnson Engineering and Maintenance, B-228184, Dec. 3, 1987, 87-2 CPD ¶ 544, aff'd on reconsid., B-228184.2, Mar. 23, 1988, 88-1 CPD ¶ 298.

Here, DLA has complied with the procedural requirements of CICA at 10 U.S.C. § 2304(f), calling for the written justification for and higher level approval of the contemplated sole-source action and publication of the requisite CBD notice. The propriety of the agency's decision therefore rests on whether or not it was reasonable to conclude that only one source was available. Hydra Rig Cryogenics Inc., B-234029, May 11, 1989, 89-1 CPD ¶ 442.

DLA contends that the requirement for the maintenance services can only be satisfied by Xerox because of the proprietary nature of the Xerox diagnostics, manuals, maintenance routines, software revisions, updates, modules, enhancements and source code, all of which DLA states are critical to maintaining the Xerox printing systems and keeping the Xerox systems at the current OEM engineering change level. DLA cites a February 6, 1992 letter from Xerox stating that Xerox does not provide technology retrofits or spare parts for any Xerox equipment to third party service providers.

FCIC responds that it is capable of meeting DLA's requirements, citing several contracts an affiliate has with other federal agencies for similar printer services. FCIC argues that only a limited number of spare parts are available only from Xerox, and that those parts could be obtained from a Xerox affiliate in the United Kingdom which has not adhered to Xerox's attempt to stop their flow to independent service providers. Furthermore, FCIC argues, the needed parts are available from Xerox for DLA inventories. FCIC also states that the only possibly

essential software controlled by Xerox is the software upgrades and retrofits, and Xerox policies allow end users with independent service assistance to obtain such materials directly from Xerox.

We find that DLA had a reasonable basis for the sole-source award to Xerox. The record shows that the Xerox ADPE provides vital printing support--the only printing support available at some DLA locations--across the broad spectrum of all DLA Automated Information Systems, and that its continued operational status is absolutely necessary to enable DLA to meet its assigned missions. These systems are required to operate 24 hours a day, 7 days a week, and the RFP provides that the contractor must respond on-site within 2 hours of notification that equipment is malfunctioning and bring that malfunctioning item to a fully operational status within 4 hours of the notification time. Given this undisputed statement of DLA's needs, we cannot conclude that the agency was unreasonable in determining that the maintenance services could only be timely provided by Xerox, the only firm with immediate, complete access to software, documentation and parts needed to perform the maintenance.

In support of its argument that other vendors can meet DLA's requirements, FCIC, in comments on the agency report, lists contracts on which an affiliate is currently providing services which FCIC asserts are similar to those sought by DLA. The list, however, does not include all the Xerox models for which DLA needs service. Moreover, there is no indication that the stringent response times required by DLA are contained in these contracts. The other actions which FCIC argues are available to circumvent Xerox's proprietary rights, such as ordering parts from Xerox affiliates overseas, or having DLA obtain materials directly from Xerox, would likewise not meet DLA's needs for bringing malfunctioning items to a fully operational status within 4 hours of notification that equipment is malfunctioning. Since the protester has not demonstrated that the proprietary data is unnecessary to satisfactorily perform the required repair services, we have no basis to question the agency's determination that the services could only be provided by one known source.

The protest is denied.


James F. Hinchman
General Counsel