

Protest of) Date: December 21, 1990
PACIFIC BELL)
Solicitation No. 059990-90-A-W074) P.S. Protest No. 90-51

DECISION

Pacific Bell timely protests the terms of Solicitation No. 059990-90-A-W074 for an Electronic Private Automatic Branch Exchange System ("EPABX") for the San Francisco, CA, Field Division. Pacific Bell complains that the solicitation is unduly restrictive of competition.

Background

The solicitation was issued on July 10, 1990, by the Procurement & Materiel Management Service Center in San Bruno, CA, with a due date, as amended, of August 27. Section B.2 required award to be made to the technically acceptable offer (determined in accordance with evaluation criteria set forth in Attachment D)^{1/} with the lowest present value cost to the Postal Service over an estimated ten-year system life.

The specifications set forth three major requirements relevant to this protest. First, the system specified by the solicitation was to be owned by the Postal Service.^{1/} Second, the system was to be located on the premises of the field division. Finally, the system was to be "of digital design capable of converting an analog signal into a binary-encoded equivalent...[and] of the current standard production of the manufacturer at the time of bid [sic] opening and shall be modular in design and electronic in nature."^{1/}

Pacific Bell seeks to offer its Centrex system in response to the solicitation. The requirements set out above preclude this, because Pacific Bell's Centrex system is

^{1/}Attachment D listed the following technical evaluation factors: SPECIFICATIONS; INSTALLATION AND MAINTENANCE; TRAINING; INSTALLATION; DRAWINGS; and VENDOR QUALIFICATIONS. Subfactors were also identified.

^{2/} As issued, section 1.1 of the EPABX specification incorporated into the solicitation provided that the EPABX system was to be "leased or purchased." By amendment AO1, the reference to lease was removed.

^{3/}Another relevant specification requirement was a provision that the system must be "[w]ired and equipped to accommodate ... T1 carrier channels. The vendor shall have the capability to provide direc[t] connectivity for the above T1 channels."

offered only on a lease basis;^{1/} would have its switching equipment located at Pacific Bell's central office, not the postal premises; and is of analog, rather than digital design. Pacific Bell concludes that these requirements unreasonably eliminate it from competing for award in contravention of the "full, open and fair competition" required by the Competition in Contracting Act, 41 U.S.C. " 251 et. seq. (1982) ("CICA")^{1/} and Postal Service procurement regulations.^{1/} It contends that the specification is unduly restrictive and improperly substitutes the Postal Service's judgment for that of the marketplace as to what best meets its needs.^{1/}

Pacific Bell contends that the purchase requirement is improper because it unnecessarily precludes Pacific Bell from submitting an offer, as it is required by law to offer its Centrex system on a lease basis only. It complains that the requirement for a premise-based system does not seek the best price and services for a functional telecommunications system, as the Centrex system is functionally equivalent and price competitive. It also asserts that its analog system is functionally equivalent to the required digital system. Finally, it claims that these restrictions preclude an entire class of qualified offerors from submitting proposals.

In her report on the protest, the contracting officer justifies the purchase-only requirement as the result of funding availability. When this solicitation was issued, the San Francisco Division had capital funds available for purchase of the system, but the availability of expense funds for a leased system was uncertain.^{1/} Eventually, it was

^{4/}Pacific Bell contends that California law precludes it from selling its Centrex system, allowing it only to lease its services. Cal. Pub. Util. Code ' 851 (1975).

^{5/}As noted in International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989, CICA does not apply to Postal Service procurements.

The PCM requires, at 1-301.1, that "[a]ll purchasing ... shall be made on a competitive basis to the maximum practicable extent," and, at 1-1101 (a), that:

specifications . . . shall state only the actual minimum needs of the Postal Service and describe the supplies and services in a manner which will encourage maximum competition and eliminate, insofar as possible, any restrictive features which might limit acceptable offers to one supplier's product, or the products of a relatively few suppliers.

^{6/}Pacific Bell cites the Procurement Manual ("PM") as the appropriate body of regulations under which its protest should be decided. While the PM is the regulation generally applicable to postal procurements, procurement of telecommunications services is a form of "structured contract" under the PM for which procedures have not yet been promulgated. Instead, a blanket deviation authorizes issuance of this solicitation pursuant to the earlier Postal Contracting Manual ("PCM"). See, e.g., Pitney Bowes, Inc., P.S. Protest No. 89-86, December 20, 1989.

^{7/}Pacific Bell cites Chesapeake and Potomac Telephone Company, Comp. Gen. Dec. B-220512.2, 86-1 CPD & 228, March 7, 1986. In that case, the requirement that a system be "lease-to-own," premised on a study which found that structure to be the most economical, was found to be unduly restrictive under two Federal Information Resources Management Regulations.

^{8/}Within the Postal Service, capital funds and expense funds are used for different purposes, may come

decided that the division's budget would not include expense funds for the lease of the system, necessitating that the system be purchased.

Pacific Bell replies that uncertain funding does not justify preclusion of a leased system. It contends that the San Francisco Division did not conduct the required procurement planning or market research^{1/} so as to ensure that its needs were met in an effective, economical, and timely manner. Pacific Bell implies that any budgetary constraint is the sole result of improper actions by the Postal Service which cannot serve to justify the restrictive specification. The contracting officer states, in response, that Pacific Bell is incorrect in assuming that the Postal Service did not engage in procurement planning. She contends that proper budget authorization was obtained for the estimated cost of the requirement and extensive market research was conducted.

Pacific Bell contends that the purchase-only limitation is controlled by Doehler-Jarvis Division of N. L. Industries, P.S. Protest No. 77-19, July 22, 1977, where this office found that it was improper to preclude potential offerors "which otherwise meet the minimum needs of the Postal Service ... merely because they utilize material and labor which is more costly." Similarly, Pacific Bell argues that it is unreasonable to restrict competition based upon the pricing option proposed by an offeror whose offer otherwise meets the minimum needs of the Postal Service. It states that, even if the budgetary limitation was reasonable, the solicitation could have been structured in a less restrictive manner, such as by reallocation of capital funds to the expense budget or by permitting a proposal offering a leased system based on an up front payment which, it alleges, it could offer.

Pacific Bell argues that the premise-based requirement will result in neither the best price nor service because its central office-based (CO-based) system is priced competitively and is functionally equivalent to a premise-based system. It contends that its service meets or exceeds the functional requirements of the specification and offers advantages over premise-based systems including twenty-four hour maintenance and repair, elimination of site preparation costs, and reduction of electrical power costs.

The contracting officer explains that a premise-based system is necessary to provide postal personnel the capability of making hardware and software changes on the system quickly and at no additional cost. She contends that a CO-based system would limit the Postal Service's ability to make daily software changes and would require payment for the changes at non-negotiable rates to the local operating company. She also asserts that the premise-based system is inherently more secure, reducing the risk of fraudulent calls made at the Postal Service's expense. Additionally, the contracting officer asserts that the T1 carrier channels which the system was to support could only be installed on a premise-based system. She denies that site preparation costs will be a substantial factor, and states that power consumption costs for a premise-based

from different sources, and are accounted for separately. See Investment Policies and Procedures, Publication 191, September, 1989.

^{9/}Pacific Bell cites to PM 2.1.1 a, 2.1.1 d.3 and 2.1.2. As noted above at footnote 6, those sections are not applicable to this procurement.

system will not differ significantly from those of a CO-based system.

Pacific Bell contends that the contracting officer's proffered justifications are unsupported and asserts that its CO-based Centrex system will allow the Postal Service to make changes, effective within 24 hours, by use of a customer access terminal without any interaction with Pacific Bell. It argues that the instantaneous changes anticipated by the contracting officer would require the Postal Service to employ a full-time technician at a considerable cost to do nothing other than EPABX changes. Pacific Bell questions the contracting officer's prediction that daily changes will be required, asserting that, historically, the Postal Service's Sacramento and Oakland locations have between 3 and 12 change requests per month. It concludes that its CO-based system would be more cost effective than a premise-based system. Pacific Bell asserts that its system is at least as secure as any premised-based system, as the latter's employees will have access to postal premises and the EPABX system. It suggests that fraudulent calls are just as likely to occur with a EPABX system as with a Centrex system. It declares that the Postal Service's T1 Multiplexer Network will interface with Pacific Bell's Centrex system through the use of Pacific's Direct Digital Interface service ("DDI"). Pacific Bell faults the contracting officer's assertion that there will be no site preparation costs for an EPABX system, since she presents no supporting empirical engineering data and Section 10 of the specifications specifically addresses such possible costs. It claims that its Centrex service would protect the Postal Service from escalating power consumption costs because the rates for this service have decreased over the past six years, whereas rates charged by the local utility for electricity have increased.

The contracting officer responds that postal personnel can effect software changes in two or three minutes. She states that while Pacific Bell's customer access terminal is a convenient way to place a change order, the changes would not take effect immediately. She denies that a full-time technician would be required, since experience in comparable Postal Service facilities indicate that ad hoc personnel can perform these tasks adequately. Additionally, she points out that Pacific Bell charges between \$5.00 and \$50.00 for each change transaction, whereas a premise-based system would allow the Postal Service to make the necessary changes without incurring additional charges. The contracting officer states that the Sacramento and Oakland locations are not comparable to the San Francisco facility as to the frequency of required changes; rather, the San Francisco division headquarters is more similar to the Los Angeles General Mail Facility, which makes approximately 50 multiple transaction changes per month.

The contracting officer contends that an EPABX system is more secure than a Centrex system because an EPABX contractor would not have access to the authorization codes for the PEN network, which are not stored locally, but a Centrex contractor would have such access, as the Centrex system captures all the digits dialed by users. She states that additional site preparation is not necessary, as the San Francisco General Mail Facility ("GMF") had site preparation completed with the original system and that the specifications merely require an offeror to list any special requirements it might have unique to its system. She also maintains that Pacific Bell is misinformed about the frequency and nature of fraudulent calls and that the EPABX system expedites trouble shooting, since it is directly wired to the T1 Multiplexer, while a Centrex system

requires the lease of a separate line from Pacific Bell's facility to the postal facility and integration and placement of the voice and data traffic on another line to the network.

Pacific Bell suggests that the contracting officer is confusing a need to make timely changes, which it can provide, with a need to make instantaneous changes, which is unnecessary since most moves and changes can be foreseen. It reasserts that ad hoc personnel are not competent to make moves and changes requiring access to the switching system's software and implies that use of such employees could endanger the entire system. It insists that the contracting officer is mistaken about additional costs for moves and changes, stating that it assesses only an initial, nonrecurring charge "within the system ordered," rather than for each move or change. It characterizes as unsupported the Postal Service's belief that an EPABX is more secure than its system, contending that unauthorized use of its customers' access codes by Pacific Bell employees would be traceable to the employees and would cost them their jobs. It asserts that the contracting officer has failed to set forth any facts to meet her burden of establishing prima facie support for this restriction.

Pacific Bell alleges that the requirement for a digital system is restrictive because its analog system can meet the functional requirements of the solicitation. The contracting officer responds that the digital technology requirement is not restrictive of competition, because digital systems are the state-of-the-art while analog technology is outmoded, technically inferior and more susceptible to noise and static. The solicitation requires the system to be the manufacturer's current standard production, and Pacific Bell has the capability of providing digital systems, but with respect to this solicitation, the nearest Pacific Bell central office provides only an analog system. Finally, she states that an analog system would not meet the requirements in ' 4.7 of the solicitation for interfaces and modem pooling.

Pacific Bell asserts that the contracting officer's conclusion that analog switches are inferior to digital switches is unsupported. It contends that the difference between the processing efficiency of analog versus digital switches is minuscule and that the primary cause of static and interference is the introduction of foreign substances in the circuits. Since the solicitation does not require digital circuits, but only a digital switch, there is no basis for the Postal Service's position.¹⁰

Pacific Bell further replies that the current production requirement exists only to ensure that the manufacturer can support the system it provides. It maintains that its Centrex system meets this requirement because it is required by law to support its leased services. Pacific Bell affirms that its system will meet the interface requirements of the specification by the addition of its "David System Manager." Although it concedes that channel banks are required to convert an analog signal from the switch to a digital signal for the T1 system, it asserts that this would not impede the implementation of the network.

The contracting officer argues that, because digital systems represent the future

¹⁰Pacific Bell alleges that the solicitation contemplates that the circuits between the EPABX and each telephone will be analog. The basis for this assertion is not provided.

progress in telephone technology, the Postal Service requires any telephone system over 40 station lines to be digital. She declares that Pacific Bell's promotion of its analog system belies the reality that it does not purchase new analog switching equipment and requires all new central offices to be of digital design. She disagrees as to the cause of static and interference in telecommunications systems. The contracting officer declares that the current production model requirement is justified by the need to take advantage of rapidly developing changes in the telecommunications market as well as the need for adequate system support. She notes that, although Pacific Bell's "David System Manager" can provide the interfaces required by the specifications, many existing Postal Service networks will be incapable of being fully integrated with an analog telephone system, unlike a digital EPABX.

Pacific Bell alleges that the requirement for digital technology cannot be reasonable unless the contracting officer shows that it is necessary to meet the requirements of the solicitation, citing Memorex Corporation, P.S. Protest No. 82-51, August 24, 1982. It states that the Postal Service's minimum needs, as set forth in the solicitation, can be met by analog technology.^{11/} Pacific Bell maintains that the specifications require neither end-to-end digital functioning capability nor a digital network,^{11/} and contends that the technical requirements may be met by a "bare bones" EPABX that will utilize analog outputs just like the Centrex system. Pacific Bell asserts that offerors will propose "bare bones" systems to receive award based on the solicitation's evaluation criterion of the technically acceptable proposal with the lowest net present value cost, causing the Postal Service to incur extensive capital outlays for technology upgrades in the future.

Pacific Bell alleges that the solicitation precludes an entire class of vendors from proposing because all other Bell operating companies offering CO-based Centrex service would be eliminated from competing for award of contracts based on this solicitation.^{12/} The contracting officer disagrees with this conclusion and states that Pacific Bell is free to submit a proposal for a premise-based Centrex system or to submit an offer based on an EPABX system through its subsidiary, Pacific Bell Business Systems. She indicates that Pacific Bell and other local operating companies have been successful offerors where Postal Service requirements were capable of being met with either Centrex or PBX systems, but asserts that this particular solicitation is based on unique requirements of the San Francisco Division.

^{11/}While Pacific Bell contends that its analog system meets the minimum needs of the Postal Service, to support this contention, it refers only to the functional requirements of the specification, and does not claim to be able to meet the rest of the technical requirements in the specifications.

^{12/}For example, Pacific Bell contends that the specifications do not require digital data transport or digital voice switching technology.

^{13/}Pacific Bell does not suggest that purchase-only requirements are improper in other procurements, but that in the telecommunications area, the restriction prevents adequate competition by precluding a significant segment of offerors, citing Pacific Northwest Bell Telephone Co. - Reconsideration, Comp. Gen. Dec. B-227850.2, 88-1 CPD & 294, March 22, 1988. Chesapeake and Potomac Telephone Co, supra.

Pacific Bell states that Pacific Bell Business Systems is an affiliate of its parent corporation, Pacific Telesis, not its direct subsidiary and contends that, in any event, the Postal Service may not legitimize the restrictive terms of a solicitation by requiring a vendor to enter into new business arrangements in order to be eligible to submit a proposal. Pacific Northwest Bell Telephone Co. -- Reconsideration, supra. The contracting officer responds that the other Bell operating companies are precluded by reason of geographical location, not restrictive solicitation requirements.^{14/}

Discussion

The applicable standard for our review when a protester contests that the terms of the solicitation are restrictive is as follows:

[t]he 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. Generally, when a specification has been challenged as unduly restrictive of competition, it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984, quoting Amray, Inc., Comp. Gen. Dec. B-208308, 83-1 CPD & 43, January 17, 1983; see also International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989, (citations omitted.)^{15/} This office will not substitute its judgment for that of the technical personnel absent "fraud, prejudice, or arbitrary and capricious action." Crown Industries, Inc., P.S. Protest No. 85-40, August 12, 1985.

Prior decisions upholding specification restrictions demonstrate the rationale deemed adequate to support such restrictions.^{16/} In Crown Industries, Inc., P.S. Protest No. 82-

^{14/}Comcraft, Inc., submitted comments on the protest which contend that the solicitation is not restrictive.

It maintains that the premise-based system requirement serves the best interest of the Postal Service in the long term and that the non-digital solution offered by Pacific Bell would limit the Postal Service's choices with respect to emerging technologies. Furthermore, Comcraft claims that the system offered by Pacific Bell does not meet most of the salient features of the requirements.

^{15/}Pacific Bell misstates this standard when it suggests that the terms of the solicitation are unduly restrictive when they are not "reasonably related to the information that results from the Agency's experience with Centrex services."

^{16/}Of course, it is axiomatic that all specifications are restrictive, the question being whether the specification terms at issue are unduly restrictive. See ^{16/}DHL Airways, Inc. P. S. Protest No. 89-36, July 7, 1989.

83, January 6, 1983, the restriction of a solicitation to bronze-anodized aluminum stanchions and the exclusion of bronze-painted steel stanchions was determined to be reasonable because of the expressed need for interchangeability and standardization of stanchions, as well as the burden of repainting the painted stanchions.¹⁷ In Portion-Pac Chemical Corp., supra, a restriction on packaging of liquid detergent in bottles rather than packets was upheld because of frequent leaking or breakage of such packets in the past. Finally, in DHL Airways, Inc., supra, a restriction on air transportation of Express Mail and Priority Mail to offerors whose gross revenues from carriage of expedited mail were less than 10 percent of their 1988 total revenues was upheld because of the contracting officer's determination not to want to provide competitors of Express Mail with financial or informational support.

These decisions illustrate both the level of justification necessary to make out the contracting officer's prima facie case and the extremely high level of proof necessary for a protester to show that the restriction complained of is clearly unreasonable.

As to each of the restrictions at issue here, the contracting officer has enunciated grounds which serve to establish the prima facie support necessary to justify the requirements.¹⁷ The purchase-only requirement stems from the absence of expense funding in the budget for this item, requiring capital funds to be used to purchase the system. The premise-based requirement flows from the Postal Service's desired need to make quick changes to the system and to have those changes controlled by postal employees. The digital requirement stems from a desire to have the current technology that will be integrated with future

¹⁷This restriction was upheld even though another contracting officer had allowed bids on bronze-painted steel stanchions on another solicitation.

¹⁸Pacific Bell alleges repeatedly throughout its comments that the contracting officer's justifications are ad hoc rationalizations hastily served up to disguise the total absence of contemporaneous thought behind the restrictions. Because Pacific Bell has provided no factual basis for these assertions, we afford them no weight. See DHL Airways, Inc., supra.

postal systems. All these explanations survive the first hurdle of our analysis, establishing a prima facie justification for the restriction. The question then becomes whether any of these restrictions are clearly unreasonable.¹⁷

The contracting officer's decision to limit this procurement to a purchased system is not unreasonable, where only capital funds are available and cannot be used for other types of expenditures.¹⁸ Pacific Bell states that the lack of expense funding was attributable to poor planning. This assertion is unsupported by any evidence, but, even if true, would not justify rejecting this requirement. The decisions of the Postal Service as to the type of funding to be used in a particular purchase or the manner in which a particular procurement is to be budgeted are business judgments properly within the considered discretion of the Postal Service and are subject to review by our office only for abuse of that discretion. See, e.g., Pitney Bowes, Inc., P. S. Protest No. 89-22, July 7, 1989.¹⁹

Pacific Bell has not shown that the premise-based requirement is clearly unreasonable. Its arguments revolve around proving that its CO-based system can be functionally equivalent to that of an

¹⁹The contracting officer's statement that Pacific Bell may, and indeed, has submitted an alternate proposal does not settle these matters. Alternate proposals may only be submitted as alternates to compliant proposals, and it appears clear that Pacific Bell cannot submit a compliant proposal. Further, it seems doubtful whether an alternate proposal of the type which Pacific Bell could submit would be acceptable.

²⁰The cases Pacific Bell relies on are inapposite. This is neither a situation where the Postal Service's requirement is an overstatement of its needs, Pacific Northwest Bell, supra, (requirement developed for administrative convenience insufficient to reflect government's minimum needs) nor where an offeror's proposed materials or services have been pre-judged as less cost effective. Chesapeake, supra (limiting solicitation to lease-to-own proposals, based on pre-proposal cost study showing this method to be most cost effective, is restrictive); Doehler-Jarvis, supra (expected bid price not a reasonable basis upon which to define minimum needs). Rather, it pertains to the availability of funds.

²¹Management Instruction FM-520-85-2, Financial Lease Versus Ownership Analysis of Equipment, October 28, 1985, describes, at section V, how budgetary decisions are to be made concerning the alternatives of lease and/or purchase of equipment. This MI supports our view that such decisions are committed solely to the informed discretion of the Postal Service.

EPABX. However, the solicitation was not for a generic telecommunications system, but specified an EPABX. Pacific Bell cannot offer an EPABX and, although it presents various arguments in support of its Centrex system, it has failed to demonstrate how the requirement for a premise-based EPABX is clearly unreasonable. Pacific Bell strongly disagrees with the contracting officer's conclusions regarding the Postal Service's needs, but falls short of demonstrating that the judgment of the technical personnel was arbitrary or capricious.^{1/}

The requirement that the system be digital is also not clearly unreasonable. The protest file supports the factual basis that digital technology is an integral part of the Postal Service's plans for future telecommunications projects. That an analog system may be able to perform the functionality of the digital system set forth in the specifications does not make the restriction unreasonable. Crown Industries, Inc., supra.

Pacific Bell contends that since award will be based on the lowest present value cost over the evaluated system life, the Postal Service is most likely to end up with a "bare bones" system that will provide no greater benefits than its Centrex system. Under the evaluation scheme, there is no harm to the Postal Service if it acquires a "bare bones" system which meets the specification's minimum needs. Furthermore, since the solicitation clearly reserves the right of the Postal Service to make award to other than the lowest priced offeror, this contention is unavailing. See Novadyne Computer Systems, Inc., P.S. Protest No. 90-49, November 9, 1990; Avtec, Inc., Comp. Gen. Dec. B-238824, 90-1 CPD & 581, June 22, 1990.

Our findings that the restrictions complained of are not clearly unreasonable does not mean that the points raised by Pacific Bell lack some merit. A leased, CO-based Centrex analog system may well meet most, or even all, of the functional requirements of the specification. However, this does not make the restrictions imposed by the contracting officer and her technical advisers unreasonable. We note that "if a specification is otherwise reasonable, the fact that one or more potential offerors may be precluded from participating in the solicitation does not render its terms restrictive if they reflect the legitimate needs of the procuring activity." International Technology Corporation, supra. Pacific Bell has failed to carry its burden of proof and therefore, its challenge to the specification requirements must be denied.^{1/}

^{22/}The arguments presented by both parties with respect to whether the Postal Service has demonstrated a need for the ability to effect daily software changes, considered the associated costs, and addressed site preparation requirements and security issues, represent factual disputes. "[Q]r bid protest forum, unlike a judicial one, is ill-suited to resolving factual disputes, as we cannot conduct adversary functions to any significant extent or degree. In a factual dispute we adopt the contracting officer's position absent sufficient evidence to overcome the presumption of correctness which attaches to the contracting officer's action." Columbia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988 (and cited cases). The Postal Service is adequately suited to decide its requirements in this regard and Pacific Bell has not provided evidence sufficient to overcome the presumption of correctness which attaches to the contracting officer's conclusions.

^{23/}As to the alleged restrictive effect of this solicitation on future Postal Service procurements, it is premature. "A speculative protest which anticipates agency action is premature and will not be

The protest is dismissed in part and denied in part.

[DDAnna for:]

William J. Jones

Associate General Counsel

Contracts and Property Law

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considered." Kahn Industries, Inc., P. S. Protest No. 85-56, August 26, 1985. Additionally, the contracting officer's assertion that the requirements of this solicitation were tailored to meet the needs of the specific location may well indicate that, in other situations, some or all of these restrictions may not be applicable.