

Protest of) Date: November 12, 1991
MICROGRAPHIC TECHNOLOGY)
CORPORATION)
Delivery Order No. 104230-91-N-5022) P.S. Protest No. 91-50

DECISION

Micrographic Technology Corporation ("MTC") protests the issuance of delivery order no. 104230-91-N-5022 to Anacomp, Inc. ("Anacomp") under a General Services Administration ("GSA") Federal Supply Schedule ("FSS") contract for microfiche processor equipment. MTC, a non-FSS contractor, argues that the procurement should have been conducted on a competitive basis so that it could have been provided an opportunity to submit an offer.

On July 12, 1991, the Office of Procurement, Headquarters, received a requisition for Anacomp Microfiche Processor Equipment from the Minneapolis Postal Data Center ("PDC"). The requisition specified that the equipment should be purchased under Anacomp's GSA contract GSOOK90AGS5756 PS01. Attached to the requisition was a benefit analysis of the Anacomp equipment, which to the contracting officer was an indication that a complete analysis of the requirement had been done. The contracting officer arranged a meeting with Anacomp to obtain its GSA schedule, to determine if its prices were reasonable, and to negotiate three "open market items" which were not on the GSA schedule. After reviewing Anacomp's GSA schedule prices and comparing them to its "list prices," its "most favorable customer prices," and the prices Anacomp was proposing for its new GSA schedule, the contracting officer determined that the prices Anacomp was offering were fair and reasonable. A delivery order was issued to Anacomp on July 25. This office received MTC's timely protest on August 5.

In its protest, MTC complains that award was made without competition from a GSA schedule. MTC states that for the past year it had worked with employees from the Minneapolis PDC, during which time it demonstrated its equipment in Mountain View, California, performed benchmark tests and provided a detailed cost analysis. MTC asserts that it was never advised that it would not have an opportunity to provide a quotation. Instead, the protester claims that it was told by the Postal Service to check for an announcement of the issuance of a solicitation for this requirement in the Commerce Business Daily ("CBD").

Commenting on the protest, the contracting officer states that the Postal Service has the right and obligation to purchase equipment that meets its requirements. The fact that MTC worked with the PDC in Minneapolis and had its equipment evaluated for this requirement does not entitle MTC to provide an offer if its equipment "is not acceptable for the requirement." The contracting officer argues that although the protester may complain that it demonstrated its equipment and was not given a reply, there is no basis for a protest since the procurement was completed in accordance with the Procurement Manual ("PM"). Finally, the contracting officer states that this procurement was not required to be published in the Commerce Business Daily since it was an award against a negotiated GSA schedule.

In response to the contracting officer's statement, the protester states that it was not advised at any time that its equipment was unacceptable. MTC states that "[a]t worst case the competitors for this business, Anacomp and [MTC], were equal in capabilities." After stating that in February of 1990 it submitted an unsolicited proposal to employees in the Minneapolis PDC, offering the equipment for approximately \$67,000 less than its competitor, MTC questions how it could have been in the best interests of the Postal Service to pay more for equipment with no significant differences in its capabilities.^{1/} Finally, MTC alleges that it was misled in its dealings with the Postal Service and questions why it was allowed to incur the costs of demonstrations, benchmarks and proposals when the Postal Service intended to purchase the equipment from the GSA Schedule. MTC claims that as late as June 1991, it was "advised by the procurement people in Chicago to watch for the bid publication in the CBD" ^{2/} MTC requests that the delivery order for the Anacomp system be withdrawn and a competitive procurement be conducted for this requirement.

In response to a request from this office for additional information, the contracting officer described the steps he used to determine that Anacomp's price was reasonable. The contracting officer explains that other manufacturers' equipment and pricing was not evaluated because the procurement office was "not aware of any other acceptable equipment for this application." The contracting officer restates that he evaluated Anacomp's GSA prices by comparing them to its list prices and to its most favorable customer prices, and found them to be both fair and reasonable. According to the contracting officer, the only other source for this equipment would have been a distributor and Anacomp, the manufacturer, was offering its most favorable pricing, which was less than the distributor's price.

The contracting officer further explains that it was necessary to purchase the three open market items from Anacomp because it was highly unlikely that another vendor could furnish them. The contracting officer notes that it is difficult to acquire items from

^{1/} MTC claims that a further major cost associated with the use of this equipment is the cost of film. According to MTC, Anacomp is the only source of the film required in Anacomp's equipment, thereby making it impossible to procure this item on a competitive basis. MTC's film, on the other hand, is available from multiple vendors.

^{2/} The protester explains that after learning from one of the employees from the Minneapolis PDC that the procurement would most likely be handled out of the Chicago Procurement Office, he called an individual in that office who indicated that he had not yet seen anything concerning this procurement, but that when he received the request it would be published in the CBD.

different vendors when the equipment must function and fit together as one integrated system. Finally, the contracting officer states that the equipment has already been delivered to the Minneapolis PDC and is in operation.

Discussion

A Federal Supply Schedule contract is an indefinite quantity contract awarded by the General Services Administration to commercial contractors for various standard use supplies, equipment items, and services. GSA terms and conditions, rather than those used by the Postal Service, apply to FSS contracts. These GSA contracts are designed to obtain volume purchase discounts for the various government agencies while still giving those agencies the option of ordering items directly from contractors. In order to utilize these discounts, the Postal Service issues a delivery order against a FSS. PM 3.1.5 b.2(a) provides that "[p]urchasing offices may order against FSS contracts that meet their quality and delivery requirements if [the] prices are reasonable and competitive with those of commercial sources."

"The decision whether to place an order with a . . . schedule contractor . . . or to conduct a competitive procurement . . . is a business judgment which we will not question absent a clear showing of abuse of discretion." Precise Copier Services, Comp. Gen. Dec. B-232660, January 10, 1989, 89-1 CPD & 25. In this case, the contracting officer received a requisition specifying Anacomp as the supplier and was not aware of any other equipment that met the needs of the Postal Service.^{3/} Based on a comparison of Anacomp's GSA prices to its list prices and to its most favorable customer prices, the contracting officer concluded that Anacomp's prices were reasonable. We do not find the contracting officer's conclusions to be unreasonable, nor do we find that he violated any regulatory provisions. Therefore, we have no basis upon which to question the contracting officer's decision to purchase the equipment from a GSA Schedule.

The protester's concerns in this procurement appear to arise from its belief that it was misled or deceived by employees at the PDC as to how this procurement would be conducted. To the extent that the protester charges these individuals with bad faith, its contention must fail. A protester must prove allegations of bad faith by "well-nigh irrefragable proof" of specific, malicious intent by procurement officials to harm the protester. Sheldon Transfer & Storage Co., P.S. Protest No. 91-08, March 13, 1991. The protester has not provided any proof to show that it was intentionally misled when told by Postal Service employees that the procurement would be done on a competitive basis. The protester itself acknowledges that the "deception" that allegedly occurred may have been inadvertent. Although it is unfortunate that there may have been a lack of communication or misunderstanding between the Postal Service and the protester, that does not affect the validity of a procurement that was otherwise not objectionable.

^{3/} Although MTC believes that the Postal Service representatives with whom it dealt at the Minneapolis PDC found its equipment to be acceptable, it has provided nothing other than its opinion in that regard.

The protest is denied.

[Signed]

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 5/17/95]