



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Mortara Instrument, Inc.

File: B-272461

Date: October 18, 1996

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Mitchell W. Quick, Esq., Michael, Best & Friedrich, for Marquette Medical Systems, Inc., an intervenor.
Nicholas P. Retson, Esq. and Stephen D. Sanders, Esq., Department of the Army, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting officer's decision to procure cardiology medical information system on an unrestricted basis, and not through a small business set-aside, is not an abuse of discretion where agency concluded that the requirements were technically complex and involved installation at more than 200 locations in the United States and overseas and only one small business firm responded to the draft solicitation and subsequent Commerce Business Daily notice.
2. Protest that various requirements for a cardiology medical information system can only be met by incumbent contractor is denied where the solicitation did not specify a particular method for designing the system and offerors were free to choose any approach that could meet the challenged requirements.
3. Contracting agency is not required to acquire and furnish to prospective offerors information concerning certain components of the system currently in use that is proprietary to the incumbent contractor where agency asserts it has no rights to the information, and protester has not shown otherwise.

DECISION

Mortara Instrument, Inc. protests certain provisions in request for proposals (RFP) No. DAMD17-94-R-0052, issued by the Department of the Army, Army Medical Research Acquisition Activity (AMRAA), seeking proposals to provide a cardiology

medical information system (CMIS) to be used world-wide in military medical facilities. Mortara, a small business, raises numerous issues regarding provisions of the solicitation which it alleges favor the incumbent Marquette Electronics, Inc.,¹ and alleges that the agency improperly permitted Marquette to gain an unfair competitive advantage in the procurement by virtue of its employment of a former government employee.

We deny the protest.

The objective of the CMIS procurement is to replace the Computer Assisted Processing of Cardiograms (CAPOC) system in use since 1979 with a computer-based CMIS network that can support the management of electrocardiogram (ECG) data acquired in military medical facilities located within the continental United States and locations overseas,² and to ensure access to cardiology medical information regardless of provider location. To that end, the proposed CMIS must permit the data acquisition, storage, and retrieval of cardiology medical information through various network hubs and be adaptable to future integration of other types of images and data from other cardiology procedure equipment. The acquisition includes the necessary and ongoing services for configuration planning, implementation assistance, common industry hardware, software and communication upgrades.

Prior to initiating this procurement, the agency issued a draft RFP on June 22, 1994, soliciting industry comments on its CMIS requirements. Thereafter, on July 8, AMRAA published a notice in the Commerce Business Daily (CBD) announcing its intention to purchase a CMIS to replace the CAPOC system. On April 5, 1996, under full and open competitive procedures, AMRAA issued the RFP to 18 companies. The RFP, as amended, anticipates award of a firm, fixed-price requirements contract for 1 year with seven 1-year options to the offeror whose proposal represents the best value to the government, considering technical merit and price.³ It includes a statement of work which describes in great detail the

¹Marquette Electronics, Inc. is now Marquette Medical Systems, Inc. To avoid confusion, we refer only to Marquette throughout this decision.

²The geographic distribution of military medical facilities is identified in the solicitation as consisting of 15 major medical centers and approximately 200 hospitals/medical clinics.

³By the July 10, 1996, extended closing date for receipt of proposals, three offers were received, including offers from Mortara and Marquette. The three companies submitting proposals were among the four companies that had furnished industry comments in response to the draft RFP.

functions to be performed, the performance required, and essential physical characteristics of the proposed CMIS.

Of relevance to this protest are the RFP requirements that the proposed CMIS have an open system architecture for its information system that will accept and generate information that can be used by other local and remote systems; be compatible with existing CAPOC equipment such as the ECG carts currently in use; accept input from any ECG cart regardless of manufacturer;⁴ and be capable of accessing, retrieving, storing, and converting information archived under the CAPOC system. The solicitation advised offerors that only Marquette carts are currently being used and provided a current inventory of the ECG carts that a prospective offeror could replace, upgrade, or modify in creating its proposed CMIS.

Mortara first protests the determination that the procurement should not be set aside for small businesses. The protester contends that the contracting officer made virtually no effort to determine whether the criteria in Federal Acquisition Regulation (FAR) § 19.502 (FAC 90-41) for small business set-asides were met, and did not investigate the matter even after Mortara first raised the issue in its May 1995 comments on the draft RFP. The protester identifies another small business, in addition to itself, which it asserts is capable of performing the work.

The agency reports that this is not only the first time it has attempted to procure a CMIS to be used by all military facilities within the Department of Defense (DOD) but that the protested RFP requires that the equipment be installed, maintained, and supported in more than 100 different locations throughout the United States and overseas. According to the agency, given the complexity of the required CMIS and the great number of user sites to be linked into the CMIS, the contracting officer concluded, with the concurrence of the Small Business Utilization Specialist, that it was unlikely that two or more responsible small businesses would make offers at reasonable prices.

Contracting officers generally are required to set aside for small business all procurements exceeding \$100,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small businesses. FAR § 19.502-2(b). While as a general rule the decision to set aside a particular procurement for small businesses is within the discretion of the contracting agency, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. Espey Mfg. & Elecs. Corp., B-254738.3, Mar. 8, 1994, 94-1 CPD ¶ 180. However, there is no particular method prescribed for assessing the

⁴An ECG cart is medical equipment with data acquisition capabilities; it generates a preliminary interpretation of a patient's ECG test.

availability of small businesses, although it is appropriate to refer to factors such as prior procurement history, nature of the contract, type of contract, market surveys, and/or advice from the agency's small business specialist. FKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270.

Here, this is a first time buy for a DOD-wide cardiology system, and the contracting officer, in consultation with the Small Business Utilization Specialist, decided that due to the technical complexity and the required installation at more than 200 user sites, there was no reasonable expectation of 2 or more small business competitors. Given the scope and technical complexity of the requirements, as well as the fact that this was a first-time buy, we think the contracting officer could reasonably believe there was no reasonable likelihood of receiving adequate small business competition. See Espey Mfg. & Elecs. Corp., *supra*. In this regard, the agency issued a draft RFP and a CBD notice in 1994, and only one small business, Mortara, expressed interest in the acquisition. While the protester argues that the results of the CBD notice are 2 years old and thus should not be given great weight, the record shows that during the intervening years there has been no additional small business interest expressed in this procurement. Although the protester refers to another small business firm, that firm has never identified its interest to the agency. Under these circumstances, we have no basis to object to the agency's decision to conduct an unrestricted competition. See American Overseas Book Co., Inc., B-257989, Dec. 1, 1994, 94-2 CPD ¶ 217.

Mortara protests that the solicitation is unduly restrictive or otherwise defective. First, as Mortara explains, the solicitation provision which provides for the upgrade or replacement of ECG carts favors Marquette because other prospective offerors do not have access to the proprietary design of these ECG carts. Second, prospective offerors, other than Marquette, are unable to competitively price the cost to access, retrieve, store, and convert existing data archived in the CAPOC system as required by the RFP because the solicitation does not include information regarding the file system structure, data compression scheme of the existing CAPOC system, or the ECG carts program, algorithms, and electronic design. The protester insists that this information is necessary for prospective offerors to understand the scope of such work and to assure fair and equal competition.

Third, Mortara alleges that the solicitation should be revised or clarified to require that an offeror using upgraded ECG carts must establish that they comply with Food and Drug Administration (FDA) approval and medical device requirements.⁵ Lastly, the protester argues that the solicitation should require the proposed CMIS to be an open system which uses non-proprietary protocol between any of its

⁵This reference is to section 510(k) of the Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 360(k) (1994).

components. In this regard, the protester asserts that the RFP should exclude the use of proprietary protocol with the existing CAPOC equipment as well as with the equipment to be provided with the CMIS.

The agency and Marquette vigorously dispute that the solicitation unduly favors Marquette or is otherwise defective. While it cannot provide any information pertaining to the file system structure, the data compression scheme of the CAPOC system and its ECG carts's programs, algorithms or electronic design because this information is proprietary to Marquette, the agency states that this information is not necessary for an offeror to propose a CMIS that can perform the required functions and possess the physical characteristics listed in the RFP. In any event, the agency points out that the RFP allows prospective offerors to replace the existing ECG carts, thus avoiding the need for such proprietary information. According to the agency, under the evaluation scheme set forth in the RFP, such an approach would not give rise to any competitive price disadvantage because the technically superior approach is more important than price. Thus, if a proposal to replace the ECG carts is technically superior but more costly than a proposal to upgrade the existing system, the agency could decide to award to the firm with the technically superior proposal notwithstanding the proposal's higher cost.

On the other hand, if an offeror, other than Marquette, wants to propose a CMIS that uses the existing ECG carts, the agency insists that the solicitation contains information on the configuration and specifications for all ECG carts, not considered proprietary to Marquette,⁶ such that an offeror could modify the carts by means of a conversion unit or interface box linked or plugged into the cart. This information (the configuration and specifications for the ECG carts), the agency states, should enable offerors to price the cost to access information currently archived in the CAPOC system.

Concerning the open system architecture for the CMIS, the agency refutes the protester's assertion that the solicitation fails to clearly state whether the CMIS must be open and nonproprietary. AMRAA maintains that the RFP specifically calls for a CMIS with an open system architecture for its information system component

⁶Procuring agencies have an obligation to protect the proprietary information of a contractor or offeror. See Information Ventures, Inc., B-240925.2, Jan. 15, 1991, 91-1 CPD ¶ 39 (withholding of proprietary information proper due to the protections afforded under the Trade Secrets Act, 18 U.S.C. § 1905); 49 Comp. Gen. 28 (1969) (when government's use of proprietary or confidential data or trade secrets in a solicitation violates a firm's proprietary rights, our Office may recommend that the contracting agency either make a sole source award to the entity whose data was compromised or, if possible, cancel the solicitation and resolicit without using the proprietary data).

and further requires that the system "be implemented in conformity with the [g]overnment's open systems standards." As to the use of proprietary protocol, the agency explains that to prohibit use of proprietary protocol would be unnecessarily restrictive because it limits the competition to only those vendors who can offer a non-proprietary system. As a result, the solicitation allows the use of proprietary protocol for certain components of the CMIS so long as it is interoperable with the rest of the system.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, and include restrictive provisions only to the extent necessary to satisfy the agency's minimum needs. 10 U.S.C. §§ 2305(a)(1)(A)(i), (B)(ii) (1994); see Fisons Instruments, Inc., B-261371, July 18, 1995, 95-2 CPD ¶ 31. In seeking full and open competition, an agency is not required to construct its procurements in a manner that neutralizes the competitive advantages some potential offerors may have over others by virtue of their own particular circumstances where the advantages did not result from government action. Versar, Inc., B-254464.3, Feb. 16, 1994, 94-1 CPD ¶ 230, see also, Group Technologies Corp.; Electrospace Sys., Inc., B-250699 et al., Feb. 17, 1993, 93-1 CPD ¶ 150.

We have considered the specifications that Mortara has challenged, and we conclude that none of those requirements impermissibly favor Marquette or is otherwise objectionable. As discussed below, the record shows the agency has taken steps to minimize any incumbency advantages. For example, contrary to the protester's position that it is at a competitive disadvantage because unlike Marquette, it would have to replace rather than upgrade the ECG carts to meet the RFP requirements, the agency sought to neutralize any possible price advantages inuring to the incumbent by making technical merit more important than price. Moreover, although Mortara continues to disagree with the agency's approach which would allow an offeror to modify or upgrade the ECG carts and advances numerous reasons why this option is available only to Marquette, we are not persuaded that only Marquette can upgrade or modify the existing carts. As discussed previously, the agency has provided all information that is not proprietary to Marquette (for example, the configuration and specifications for the ECG carts) which it believes would allow an offeror to modify the Marquette carts by an appendage to the cart or an interface box linked or plugged into the cart.⁷ In this regard, the record

⁷While Mortara believes such an approach (using a conversion unit) is not a viable solution as it envisions that the safety, efficacy, and portability of the ECG carts would be affected, the record does not support this contention.

shows that at least one third party vendor believes it can convert the incumbent's existing ECG data for use by other contractors.⁸

Similarly, while the solicitation requires a CMIS that can access information currently archived in the CAPOC system maintained by Marquette but does not include the file system structure, data compression scheme, cart programs algorithms, or electronic design of the CAPOC (information that is proprietary to Marquette), we believe offerors other than Marquette can propose a system that satisfies this requirement. As we previously stated, the record indicates that technology exists to allow other offerors to access the information stored in the CAPOC system through the use of an interface box and at least one third party vendor believes it can establish such an interface. In addition, the agency has provided an inventory of the CAPOC configurations and the estimated number of ECGs conducted to enable offerors to price the cost of retrieving archived patient files. Further, in an amendment to the RFP, the agency states it will work with the successful contractor to facilitate conversion of archived patient records (which it owns) to a useable format. Thus, the record shows the agency engaged in reasonable efforts to mitigate Marquette's incumbency advantage. Even if Mortara is correct that the solicitation provisions it challenges favor Marquette, this advantage is no different from that enjoyed by an offeror due to its prior contract, and the record provides no indication of improper preference or unfair action by the agency. Moreover, to the extent Mortara alleges these requirements may impose significant risks upon itself and other offerors in pricing their proposals and in performing the contract awarded under the solicitation, the agency has the discretion to impose such risks. See J&J Maintenance, Inc., B-244366, Oct. 15, 1991, 91-2 CPD ¶ 333.

We also do not agree with the protester that the solicitation failed to provide the requisite level of information to enable offerors to compete on an equal basis. We think AMRAA took reasonable measures to provide potential offerors with all of the legally disclosable relevant information pertaining to the CAPOC system and related

⁸Mortara further advances its belief that modification of the existing ECG carts by the use of a conversion unit is not a realistic option for other offerors as this would trigger the requirement for resubmission of a 510(k) application. Here, the RFP provides that any ECG cart modification "shall not result in a degraded level of performance below the cart's initial performance specification" and to the extent the protester believes the modification would significantly affect the safety, efficacy and portability of the carts, the record shows the protester is correct that the offeror proposing such an approach would have to submit a new 510(k) application. However, the record before us does not clearly establish that any modification of Marquette's ECG carts will, in fact, result in a degraded level of performance necessitating a new 510(k) application.

equipment. Consequently, Mortara's insistence that the agency's needs can only be met by a contractor using non-proprietary protocol between any of its components essentially amounts to an argument that the solicitation should have been written more restrictively. The agency's approach under the RFP is to require an open system architecture for its information system component. However, the RFP permits offerors to propose a communication system which may be proprietary to a particular offeror but that system must be interoperable with the rest of the military's hospital information system, future system upgrades and expansion with other equipment manufacturers and vendors. In this regard, the RFP specifically states that "[p]roprietary waveform acquisition and display makes it impossible to interface ECG equipment from different manufacturers, and is therefore not desirable and not in the Government's best interest. If proprietary forms of storage are proposed, the offeror must include a solution for the transfer of ECG data to and from [an] open system standard." In the agency's view, this is less restrictive than prohibiting any proprietary components and we agree with the agency that permitting offerors to use some proprietary protocol so long as the proposed system ultimately meets the open system requirement is not objectionable. See Fisons Instruments, Inc., supra; Northwest EnviroServ., Inc., B-259434; B-259434.2, Mar. 30, 1995, 95-1 CPD ¶ 171.

Finally, Mortara alleges that Marquette obtained an unfair advantage by virtue of its employment of a former government employee. Mortara asserts that Marquette's employee, John McGinnis, is a retired contract administrator for the Air Force Procurement Facility at Hanscom Air Force Base which purchased the CAPOC system in 1979 from Marquette. This individual, the protester states, had signed the most recent CAPOC related contract awarded to Marquette and is the one who submitted comments and questions from Marquette regarding the procurement at issue. However, the record simply does not support the protester's allegation. Mr. McGinnis retired from the military in 1984 and was employed by Marquette in 1988. Mr. McGinnis was never an employee of AMRAA, the procuring agency for the CMIS, nor was he involved with any aspect of the CMIS acquisition at any time during his government service. Thus, we fail to see how he could have had access to some competitively useful information for the CMIS procurement which the agency initiated after Mr. McGinnis's retirement from the government. See Physician Corp. of Am., B-270698 et al., Apr. 10, 1996, 96-1 CPD ¶ 198.

Similarly, the record does not support the protester's argument that Marquette has an organizational conflict of interest as a result of contracts it previously performed for AMRAA. The mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an organizational conflict of interest for that firm. ETEK, Inc., 68 Comp. Gen. 537 (1989), 89-2 CPD ¶ 29. Here, the protester has not shown, nor does the record otherwise indicate, that Marquette was involved in the planning or preparation of the protested solicitation, or that the firm obtained inside confidential information not otherwise available to

all offerors. The fact that Marquette developed the CAPOC system and furnished the current inventory of ECG carts, does not by itself, provide an unfair advantage over other firms with respect to the selection of a contractor for the CMIS acquisition. See Meridian Corp., B-246330.4, Sept. 7, 1993, 93-2 CPD ¶ 129.

The protest is denied.

Comptroller General
of the United States