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The decision issued on the date below was subject to a GAO Protective Order. No party requested redactions; we are therefore releasing the decision in its entirety.

Decision

Matter of: CHE Consulting, Inc.

File: B-297534.4

Date: May 17, 2006

Steven E. Kellogg, Esq., The Kellogg Law Firm, PC, for the protester.
David S. Cohen, Esq., and John J. O'Brien, Esq., Cohen Mohr LLP, and Charles W. Steese, Esq., Steese & Evans, P.C. for Storage Technology Corporation, an intervenor.

Robert R. Goff, Esq., and James W. DeBose, Esq., Defense Information Systems Agency, for the agency.

Paul N. Wengert, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is denied where agency record provides reasonable basis for requirement in solicitation for critical maintenance services that each vendor demonstrate in its quotation how it would obtain support from the original equipment manufacturer in the event that the vendor's remedial maintenance efforts for a malfunctioning unit were not successful within the service standard specified in the solicitation.

DECISION

CHE Consulting, Inc. protests the terms of a request for quotations¹ (RFQ) issued by the Defense Information Security Agency (DISA) to several firms holding Federal Supply Schedule (FSS) contracts seeking quotations to perform on-site predictive, remedial and preventive hardware maintenance service for StorageTek equipment

¹ The RFQ apparently is not identified by number, and is variously identified by the parties as the "Level 1 StorageCentric Recompete," or "Level 1 StorageCentric Hardware Maintenance," or similar phrasing. The use of the term "recompete" is an apparent recognition by DISA that, during the course of an earlier series of protests regarding this requirement filed with our Office by Storage Technology Corporation (StorageTek) challenging the issuance of an order to CHE, DISA voluntarily took corrective action by canceling that order and issuing the revised RFQ, which CHE now challenges.

located at various agency locations. CHE argues that the RFQ overstates DISA's needs by requiring vendors to have a relationship with the original equipment manufacturer (OEM), StorageTek.

We deny the protest.

DISA distributed the RFQ at issue on February 6, 2006, seeking quotations to provide services for a base year and one annual option period, as well as hourly rates for certain other services. RFQ at 6. The work to be performed under the RFQ involves maintaining "over 1,100 pieces of [StorageTek] equipment." AR, Tab 4, E-mail from DISA Program Analyst to Contracting Officer (Jan. 18, 2006), at 1.²

The RFQ terms challenged by the protester require each vendor to provide support from the original equipment manufacturer (i.e., StorageTek) when the contractor is unable to return equipment to service within 4 hours by the contractor's own efforts, and to include in each quotation information explaining how the vendor would engage StorageTek without government intervention. RFQ at 8 (remedial maintenance statement of work); RFQ amend. 1, at 5 (instructions for preparation of quotation). Essentially, the requirement anticipates that the vendor will show that it has a service agreement in place to obtain assistance from StorageTek when needed. AR, Tab 11, Letter from Contracting Officer to Legal Counsel for CHE (Feb. 13, 2006). The requirement presents a problem for CHE, however, primarily because CHE does not have such an agreement and is either unable or unwilling to obtain one.³ CHE objects to the requirement as overstating the agency's needs.

While a contracting agency has the discretion to determine its needs and the best method to accommodate them, Mark Dunning Indus., Inc., B-289378, Feb. 27, 2002, 2002 CPD ¶ 46 at 3-4, those needs must be specified in a manner designed to achieve full and open competition; solicitations may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs. 10 U.S.C. § 2305(a)(1)(A)(i), (B)(ii) (2000). Where a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet the agency's needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Chadwick-Helmuth Co., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3.

² In its comments on the agency report, CHE argues that some of the 1,100 units are non-critical or will be taken out of service, and that the correct number of units to be maintained is 634. Protester's Comments, exh. C, Affidavit of CHE President, at 9. We do not view this difference as significant to our resolution of the protest.

³ Although our Office is aware that CHE and StorageTek are apparently engaged in litigation in other forums in which they make a variety of charges and counter-charges, the ultimate resolution of any of those disputes is unrelated to this protest.

A protester's mere disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 5.

CHE objects to the solicitation, referencing CHE's prior experience to show that assistance from StorageTek is rarely needed, and contends that DISA has the ability to use other contracting mechanisms—either existing ordering vehicles or issuance of purchase orders—to handle those situations where a vendor is unable to complete maintenance on a unit and lacks a relationship with StorageTek. DISA explains that failures of this equipment would jeopardize the missions of the military departments.⁴ Further, DISA contends that requiring, in effect, a single point of responsibility will avoid finger-pointing and blame-shifting, while providing assurance that the critical remedial maintenance is performed in a timely manner. Accordingly, DISA determined that the alternatives CHE had suggested in response to the RFQ, which would oblige DISA to use other contracting vehicles or urgent contracting procedures to obtain services from StorageTek, do not meet DISA's requirements to obtain critical maintenance—with the assistance of StorageTek itself when needed—quickly and efficiently. Agency Memorandum of Law at 11; AR, Tab 4, E-mail from DISA Program Analyst to Contracting Officer (Jan. 18, 2006), at 1.

Since DISA's procurement officials are the ones most familiar with the conditions under which the services have been provided in the past, our Office will not question an agency's determination of its minimum needs—or the best method to meet them—

⁴ DISA emphasizes remedial maintenance as the “most critical” aspect of the contract, and that in certain circumstances a “[f]ailure to provide remedial maintenance [of the StorageTek equipment] in a timely fashion can result in warfighter casualties and loss of lives.” Contracting Officer's Statement at 2 (the agency report combined the contracting officer's signed statement with the memorandum of law). Although CHE argues that DISA has not convincingly demonstrated how the delay in a critical repair will truly jeopardize lives, CHE's mere disagreement with DISA in this respect does not render DISA's judgment unreasonable. We also note that in a previous protest by CHE, of a very similar maintenance requirement issued by DISA, our Office concluded that

In view of the critical nature of the work performed at the [work sites] on the equipment to be maintained, the potential detriment to defense missions from extended outages of that equipment, and the agency's own experience using contracts without OEM support, we believe the agency reasonably determined that OEM agreements represent an actual and legitimate need.

CHE Consulting, Inc.; Digital Techs., Inc., B-284110 et al., Feb. 18, 2000, 2000 CPD ¶ 51 at 4.

unless there is a clear showing that the determination has no reasonable basis. Mid-South Dredging Co., B-256219, B-256219.2, May 25, 1994, 94-1 CPD ¶ 324 at 5. While an agency's assertion of a risk of finger-pointing or blame-shifting does not automatically justify restrictive terms in a solicitation, e.g., National Customer Eng'g, B-251135, Mar. 11, 1993, 93-1 CPD ¶ 225 at 8, DISA's requirement for vendors to show their own ability to obtain support from the original equipment manufacturer is reasonable in the circumstances here.⁵ Carahsoft Tech. Corp., B-297112, Nov. 21, 2005, 2005 CPD ¶ 208 at 5 (agency reasonably required single contractor where record supported agency's concern of finger-pointing among multiple contractors).

The protest is denied.⁶

Anthony H. Gamboa
General Counsel

⁵ The protester argues that DISA successfully contracted with the protester to perform these services at another facility in the past without the protested requirement. DISA points out, however, that the earlier contract involved a much smaller quantity of critical equipment, all of which was downgraded to a lesser criticality level approximately 1 year into performance. AR, Tab 11, Letter from DISA to Counsel for CHE (Feb. 13, 2006). Furthermore, even if there were not these significant distinctions between the two contracts, DISA has provided a basis for the requirement for original equipment manufacturer support under this RFQ, and the government is not bound by its contrary actions in a prior procurement. Welcon, B-247032.2, May 8, 1992, 92-1 CPD ¶ 429 at 4.

⁶ CHE also protested that, while the pricing in its earlier quotation was released when DISA initially selected CHE, DISA has not subsequently released the pricing of the several unsuccessful competing vendors. Protest at 9. DISA argued that CHE was not competitively prejudiced by the agency's decision to release limited information about CHE's pricing, which the agency did following the issuance of the order to CHE under the earlier version of the RFQ. Agency Memorandum of Law at 10. In its comments, CHE failed to respond to the agency's argument, so we view this ground of protest to be abandoned. See Symplicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 5 n.6.