DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

834 8336

FILE: B-191489 DATE: November 14, 1978

MATTER OF: Federal Leasing, Inc.

DIGEST:

1. Protest that certain provisions of Master Terms and Conditions (MTC) program, for procuring brand name automated data processing equipment (ADPE) from vendors in addition to the original equipment manufacturers, are restrictive of competition is denied, since provisions were determined to be minimum needs of Government and protester has not shown that determination was unreasonable, or that provisions unduly restrict competition.

2. Protest that MTC violates Brooks Act mandate that Administrator of General Services Administration procure ADPE in economic and efficient manner is denied, since Administrator is given discretion to develop and implement ADPE procurement policies so long as policies are not contrary to law or otherwise detrimental to Government's interest, and protester has not shown either condition.

Federal Leasing, Inc. (FLI), has protested the General Services Administration's (GSA) use of the Master Terms and Conditions (MTC) in two procurements for automated data processing equipment (ADPE), request for proposals (RFP) No. CDPR-D00005N and RFP No. CDPR-D00007N. FLI contends that certain MTC provisions restrict competition.

The MTC program was initiated in 1972 to encourage competition in the procurement of brand name ADPE where the equipment is available from sources in addition to the original equipment manufacturer (OEM). The MTC sets forth requirements such as bid bonds, performance bonds, acceptance testing, established maintenance requirements, evaluation criteria, and acceptable

price plans that the Government has determined are necessary when procuring from non-OEM sources (also known as the third-party market). Participants in the MTC program are required to agree to the terms and conditions each fiscal year, after which they are eligible for award on any MTC procurement for which they submit a proposal during the fiscal year. According to GSA, 95 vendors, including FLI, have signed the MTC in this fiscal year, without taking exception to any terms or conditions. Sixteen contracts have been awarded during that time, with an average of 10 vendors submitting proposals on each RFP.

FLI has not argued that anything peculiar to the two protested procurements is restrictive of competition, but rather that certain MTC provisions which are present in all MTC procurements are restrictive. According to FLI, its experience regarding the use of the MTC in a previous GSA ADPE procurement led it to believe that the MTC is restrictive of competition. We note that FLI is not protesting the use of the MTC as a procurement vehicle, but only the use of certain provisions of the MTC, and their nonnegotiability.

FLI contends that the following MTC provisions restrict competition:

1. The requirement that maintenance and hardware rental be offered as a package.

2. The required inclusion of maintenance credit provisions for malfunction of rental equipment.

3. The requirement that defective installed equipment be replaced by the contractor at no additional cost.

FLI also argues generally that GSA will not negotiate on any MTC provisions and that this forces vendors to accept terms and conditions without meaningful review of the requirements. According to FLI, such an approach violates the Brooks Act (40 U.S.C. § 759 (1976)) mandate that GSA ". . . coordinate and provide for the economic and efficient purchase, lease and maintenance of automated data processing equipment by Federal Agencies." (Underscoring provided by protester.)

The MTC provisions that FLI objects to reflect GSA's determination of its needs in procuring ADPE from the non-OEM market. Government procurement officials who are familiar with the conditions under which supplies, equipment or services have been used, and are to be used, are generally in the best position to know the Government's actual needs. Consequently, we will not question an agency's determination of what its minimum needs are, or what will satisfy those needs, unless there is a clear showing that the determination has no reasonable basis. Herley Industries, Inc., B-186947, September 30, 1977, 77-2 CPD 247; Jarrell-Ash Division of the Fisher Scientific Company, B-185582, January 12, 1977, 77-1 CPD 19; Johnson Controls, Inc., B-184416, January 2, 1976, 76-1 CPD 4. Also, though needs should be determined so as to maximize competition, we will not interpose our judgment for that of the agency unless the protester shows by clear and convincing evidence that the agency's judgement is in error and that a contract awarded on the basis of those needs would by unduly restricting competition be a violation of law. See, e.g., Joe R. Stafford, B-184827, November 25, 1975, 75-2 CPD 324.

FLI has objected to the MTC requirement that non-OEM offerors offer maintenance or certify its availability from the OEM for the system's life. FLI contends that competition would be enhanced if non-OEM vendors could compete for equipment contracts, without offering maintenance. FLI argues that for almost all of the equipment acquired through the MTC, there are OEM ADP schedules that provide for maintenance of Government equipment. FLI states that while these schedules are for maintenance of Government equipment, it has "never heard of a manufacturer refusing maintenance under the Schedule so long as the third party has authorized repair and maintenance." Consequently, the Government can procure its maintenance requirements separately.

In addition to our general legal standards regarding minimum needs, we have held that a determination to procure possibly divisible portions of a total requirement by means of a "package" approach, rather than by separate procurements, is within the discretion of the contracting agency and will not be disturbed by

our Office in the absence of a clear showing that it lacked a reasonable basis. See, e.g., Allen and Vickers, Inc; American Laundry Machinery, 54 Comp. Gen. 445 (1974), 74-2 CPD 303.

According to GSA, separate equipment and maintenance solicitations are undesirable for the following reasons. A separate maintenance solicitation could not be issued until the least cost ADPE proposal had been selected, since the Government would not know its exact maintenance needs until then. Then there might be no acceptable maintenance offers, and the Government would have selected ADPE, but would have no maintenance source.

While FLI might be correct in its argument that the Government usually would have no trouble procuring maintenance separately, it has not shown that the determination to procure maintenance and equipment together to ensure adequate maintenance is unreasonable or unduly restrictive of competition. In fact, if, as FLI asserts, OEM's rarely refuse maintenance under their schedules, we do not understand how the requirement that the third party obtain a certificate to that effect restricts competition.

FLI has objected to the MTC requirement of maintenance credit for equipment malfunction. If the equipment is inoperative, through no fault of the Government, for a continous period of 8 hours in a 24-hour period, then a credit is applied to the monthly rental payments. According to FLI, this escalates the interest rate that can be obtained from financing institutions when assigning contract rights, and thus escalates the price that must be charged to the Government. It is FLI's contention that often the Government's risk is not great enough to justify the price increase and that the Government should assess the alternatives. GSA feels that the provision is necessary to protect the Government from having to pay for services which it has not received.

Again, FLI has not shown that this provision is unreasonable or restrictive of competition. FLI's objections appear to be on the order of a disagreement over the business judgment of GSA.

FLI's final specific objection to the MTC is that the provision requiring the replacement of defective equipment at the contractor's cost may be inappropriate because the Government can bear the risk, and the equipment has a history of reliability. GSA's response is that the provision provides the Government needed protection over the life of the system, and that the vendor is protected from default based on equipment failure and the potential of an assessment of excess reprocurement costs.

It is our opinion that this objection also amounts to a disagreement over a question of business judgment. FLI certainly has not shown that GSA's determination is unreasonable.

Concerning FLI's general argument that the MTC is nonnegotiable, inhibits vendor/user communication, and thus violates the Brooks Act mandate quoted above, GSA maintains that the MTC was established for, and has generally achieved its goal of, fostering competition by permitting the third-party market to compete on brand name procurements. GSA argues that the provisions of the MTC are necessary to provide the Government with adequate protection in ADPE procurements with non-OEM vendors. GSA contends that user/vendor communication is not inhibited, since vendors are generally permitted to meet with the user agency for site inspection and other technical purposes. GSA has stated that ample opportunities have existed for FLI and other vendors to present objections and alternatives to the MTC. GSA's position is that the development and use of the MTC fall within the range of discretion granted to the Administrator of GSA by the Brooks Act.

In Comdisco, Inc., B-181956, February 13, 1975, 75-1 CPD 96, we stated that:

> "The Federal Property and Administrative Services Act, as amended, 63 Stat. 377, authorizes the Administrator of General Services 'to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service,' to 'prescribe policies and methods of procurement' and to 'procure and supply

> personal property and nonpersonal services for the use of executive agencies * * *." 40 U.S.C. 481. The Administrator's specific authority to coordinate and provide for the economic and efficient purchase, lease and maintenance of ADP equipment was added by the Brooks Act, supra, 40 U.S.C. 759. We have held that these provisions vest in GSA broad authority over Government procurement of ADP equipment, 47 Comp. Gen. 275 (1967); 48 id. 462 (1969); 51 id. 457 (1972), and that in light of this authority, GSA could develop and implement policies regarding the award of Schedule contracts so long as the policies are not contrary to law or otherwise detrimental to the Government's interest. See B-163971, May 21, 1969."

We then went on to hold that GSA's refusal to negotiate a Schedule contract with a third-party vendor was a proper exercise of this authority because the third-party market did not usually provide the full range of maintenance and repair services required by GSA. In the present case, GSA has insisted on the use of the MTC program in non-OEM procurements for the protection of legitimate Government interests similar to those we found acceptable in Comdisco. FLI has not shown how this is contrary to law or detrimental to the Government's interests.

Accordingly, the protest is denied.

for Shelton J. Axelson
Comptroller General
of the United States