

Protests of	) Date: September 4, 1990
	)
PITNEY BOWES, INC.	)
	) P.S. Protest Nos. 90-38,
Solicitation No. 359990-90-A-0084	) 90-39, 90-40, 90-41, 90-42,
<u>et al.</u>	) 90-43, 90-44 and 90-45

DECISION

Pitney Bowes timely protests the terms of eight solicitations issued by the Northeast Region for coin-operated photocopying services. It asserts that the requirement that the copier model be no more than three years old is unduly restrictive of competition, unreasonable, and not related to the Postal Service's actual minimum needs.

The solicitations were issued by various procurement offices<sup>1/</sup> in June, 1990, with offer due dates in July and August, 1990. Each solicitation contained the following provision at Section B.3 b.(2), Photocopier Specification:<sup>1/</sup>

- b. In addition, photocopies must:
  - 1. Be new or newly remanufactured. "If new or newly remanufactured, they must be inspected and tested to 'new machine' standards, and must not have been used at any other

<sup>1/</sup>While all eight solicitations are dealt with together for purposes of this decision, their individual facts are as follows:

<u>Solicitation No.</u>	<u>Issuing Office</u>	<u>Issuance Date</u>	<u>Protest No.</u>
359990-90-A-0084	New York P&MMSO	6/26/90	90-38
089990-90-A-0112	Windsor P&MMSC	6/26/90	90-39
089990-90-A-0120	Windsor P&MMSC	6/26/90	90-40
339990-90-A-0134	East Orange, NJ P&MMSO	6/18/90	90-41
339990-90-A-0135	East Orange, NJ P&MMSO	6/18/90	90-42
249990-90-A-0245	Woburn, MA P&MMSO	6/26/90	90-43
249990-90-A-0246	Woburn, MA P&MMSO	6/26/90	90-44
249990-90-A-0247	Woburn, MA P&MMSO	6/26/90	90-45

The abbreviation "P&MMSC" stands for Procurement & Materiel Management Service Center, and "P&MMSO" stands for Procurement & Materiel Management Service Office.

<sup>2/</sup>The solicitations use a new format. The previous format, which they replaced, did not contain restrictions on the age of the model copier offered.

time prior to delivery after the manufacturing or remanufacturing process."

2. Not be more than three years old at the time of installation. (See Clause B-5, Certificate of Conformance, in Part 2, Section H, General Clauses, of this solicitation.) NOTE: The determination of age on a photocopier machine will be the introduction year of the photocopier on the market. Any photocopier model (new or newly remanufactured) introduced on the market prior to 1987 will not be accepted for initial award. Subsequent coin-operated photocopier installations/replacements, throughout the life of the contract, must adhere to Item 1, and the three-year requirement.<sup>[4]</sup>

A pre-proposal conference was held for each of the solicitations, but the three-year requirement was not questioned at any conference. Pitney Bowes timely protested this provision prior to the offer due date on any of the solicitations.

Pitney Bowes objects to the fact that the solicitations require acceptable copier models to have been introduced within the past three years, rather than merely to be in current production. It contends that this requirement is without rational basis because copier models often remain in production for more than three years, particularly when those models meet with customer acceptance. Pitney Bowes reads the specification as allowing proposals based on recently introduced models which are no longer in production while prohibiting proposals based on older, but proven models. It claims that this limitation on competition is artificial and will result in less favorable commission revenues to the Postal Service.

Pitney Bowes claims that the contracting officers have not made and cannot make a prima facie showing that the requirement is reasonably related to the Postal Service's needs for current, reliable copiers. It requests that the specification be modified to delete the three-year model requirement and substitute a requirement that the model be in current production at the time of installation.

In a consolidated contracting officer's report on the eight protests, the Director, P&MMSC, (who supervises the activities of the each of the solicitation-issuing P&MMSO's) asserts the Postal Service's interest in obtaining photocopiers with "state-of-the-art technology" which can offer provide reliable service. He enclosed extensive surveys from the postal facilities at which the copiers would be located detailing the difficulties encountered with the present copiers.<sup>3/</sup> He states that, given the potential ten-year term of the contract, it is essential to require new models so that the copiers do not become obsolete during contract performance. He further states that the specification is not unduly restrictive because, in the one solicitation previously issued using

<sup>3/</sup>This portion of Solicitations -0134 and -0135 was revised by amendment to include the additional requirement that the offered copiers also "be in current production."

<sup>4/</sup>The surveys indicate that many of the present copiers are old and outdated and others are poorly maintained and serviced.

this specification, five offers in compliance with the specification were received, including one from Pitney Bowes, who received award of that contract.<sup>4/</sup> Responding to Pitney Bowes' assertion that use of the specification will reduce commissions and postal revenue, the contracting officer asserts that copier reliability is a more important consideration than revenue. The contracting officer concludes that the three-year-old model requirement is not unreasonable.

Pitney Bowes has submitted comments on the contracting officer's report. It argues that there is a discrepancy between the contracting officer's stated intention to procure copiers with state-of-the-art technology and the copier specifications, which call for copiers capable of performing only the most elementary functions, feats fully within the scope of technology that was available more than ten years ago. It explains that its Model 3800 copier fully meets the Postal Service's needs, but was introduced in 1983. As to this model, Pitney Bowes states:

Pitney Bowes remanufactures these copiers to new machine standards at its dedicated copier remanufacturing facility in Connecticut. As part of the remanufacturing process, Pitney Bowes makes certain system upgrades to bring the basic copier systems into conformance with current technology, and restores the exterior of the copier to "like new" condition.

It states that the Postal Service's experience with this model copier and its service department in other divisions has been outstanding, but that it will not be able to offer this model because of the three-year model restriction.

Pitney Bowes argues that the contracting officer has failed to justify the restriction adequately. It claims that the comments regarding past copier vendor performance in the Northeast Region are too vague to support the contracting officer's conclusions concerning the restriction and that it cannot be determined from the survey whether the problems experienced were due to poor equipment or poor service. It asserts that the possible ten-year contract term does not support the restriction because nothing in the three-year recent model requirement will insure that the copiers will provide reliable, efficient service at the end of the contract term.

Pitney Bowes also states that the three-year limitation is clearly unreasonable. It cites the case of Bowers Reporting Company, Comp. Gen. Dec. B-185712, August 10, 1976, 76-2 CPD & 144 as directly on point and supporting its position.<sup>4/</sup> Based on Bowers, Pitney Bowes claims that neither experience nor logic support the exclusion of its

<sup>5/</sup>The similar provision of that solicitation, No. 359991-90-A-0115, was the subject of a protest by Pitney-Bowes which it subsequently withdrew.

<sup>6/</sup>In Bowers, the Comptroller General held, based on 41 U.S.C. ' 253 and Federal Procurement Regulation 1-2.101, that an agency's exclusion of "tape alone" reporting services was not adequately justified by the agency's experience with such systems, especially given that they had been successfully used by other agencies, and that the deficiencies cited by the agency were not inherent in the technology, but were matters of responsibility.

successful remanufactured copiers in these solicitations.<sup>1/</sup>

Our standard of review concerning challenges against specifications is well settled:

[W]hen 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, January 17, 1983, 83-1 CPD & 43. Because procuring officials have the primary responsibility for drafting specifications, their determinations of the Postal Service's minimum needs will be upheld unless they are without reasonable basis. S.H. Demarest, P.S. Protest No. 84-1, February 9, 1984; Comprehensive Health Services, Inc., P.S. Protest No. 83-46, October 28, 1983.

Pitney Bowes asks us to find that there is no reasonable relationship between the model age and the technological capability and reliability of the copier. This we cannot do. We have reviewed the survey of the present copier locations, and find it to be persuasive evidence that, in at least a substantial number of cases, unsatisfactory performance was attributable to the age of the copier.<sup>1/</sup> While by no means unequivocal, the surveys provide sufficient evidence justifying the requirement for copiers of newer technological age.

Such a relationship is not illogical. If a model has been in production for, say, ten years, there is no way in which the Postal Service can assure that the copiers which will be provided are not ten years old. When looked at from this angle, the model date restriction is a reasonable manner of assuring that only copiers of recent technology will be provided to the Postal Service. Given the possible length of the contract, guarding against having old copiers furnished at the outset of the contract term is not clearly unreasonable.

Requiring merely that the copier be in current production does not adequately protect against the danger, if, as Pitney Bowes indicates, the industry practice is to change the copier's technology without changing the model number or designation. Without the restriction against which the protester complains, the Postal Service would have to

<sup>1/</sup>A prospective offeror has submitted comments indicating that the restriction is reasonable and that it is in the Postal Service's best interest to limit competition to the latest generation of equipment, utilizing state-of-the-art electronic design and logic.

<sup>2/</sup>A couple of examples which illustrate this problem follow. The Luquillo, PR post office reported that "[t]he model used is an old one and because of this it is frequently out of order." The Hackettstown, NJ post office stated that "[s]ervice has improved and machine is now repaired within a day or two but the machine is old and does not make a good copy." The New Windsor, NY branch complained that the "[m]achine makes bad copies. It's so old it cannot do any better." Finally, the Bronx, NY general post office opines that "[m]achine is constantly in disrepair. It is quite old and cannot handle the load."

accept unused ten-year-old copiers that may very well not meet current technological standards. While the copiers required under the solicitation may not fully utilize some of the technological improvements made in copier technology over the past years,<sup>9/</sup> it is not unreasonable for the contracting officer to ensure that the copiers installed reflect current technological improvements.

The Bowers case is not inconsistent with this conclusion. There, the General Accounting Office concluded that a contracting agency's resistance to a new technology was not adequately justified. The decision noted, however, that a reasonable decision to limit how services of a technical nature were to be supplied would not be overturned, and that "[s]uch limitations may properly be based on actual experience by the agency or others, engineering analysis, logic or similar rational bases." Bowers, supra, at p. 3, emphasis added.<sup>10/</sup>

That Pitney Bowes' practice is to remanufacture photocopiers to incorporate substantial changes, updating the machines to conform with current technology without reflecting the changes by redesignation of the machines' model number does not, of itself, make the restriction on model age unreasonable. That a particular offeror may be limited in what it can offer does not impel the conclusion that the specification is unduly restrictive, as long as adequate competition is received. See Warwick Communications, Inc., P.S. Protest No. 76-68, November 4, 1976. Indeed, Pitney Bowes acknowledges that it can offer other, more recent copiers, and has already received award on a solicitation with the restriction of which it here complains. It may well be able to take other steps to comply with the specification requirements while offering a particular model.

We have reviewed the arguments made by the protester, and it has not demonstrated on this record that the restriction, which may limit some otherwise acceptable copiers as the price for excluding a substantial number of unsatisfactory copiers, is unreasonable. The protests are denied.

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

**[checked against original JLS 6/18/93]**

<sup>9/</sup>However, there is nothing to prevent an offeror from proposing a copier in excess of our requirements.

<sup>10/</sup>The Postal Service's experience with the Pitney Bowes' Model 3800 does not refute this contention because, as Pitney Bowes admits, that copier is frequently remanufactured and brought up to current technology. Therefore, it is not an "old" copier in the same manner that the copiers from which the contracting officer wants to be protected are old; that is, it is not obsolete.