**DECISION**

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

**FILE:** B-219435 **DATE:** October 24, 1985

**MATTER OF:** Digital Equipment Corporation

**DIGEST:**

1. Protest that awardee's price proposal is unreasonably low and indicates either that the awardee does not understand the solicitation requirements or is "buying in," concerns an affirmative responsibility determination which GAO will not review except in circumstances not applicable here.

2. Protest that specifications restrict competition concerns an impropriety apparent on the face of the solicitation and is dismissed as untimely where not filed until after the closing date for receipt of proposals.

3. Protest that awardee's proposal should have been rejected because some offered items were not commercially available as required by the solicitation is denied where the awardee certified that the offered items were commercially available and the solicitation did not require that the products be listed in commercial catalogs.

4. Allegation that awardee should not have been exempted from the requirement that cost or pricing data be submitted is without merit where the protester fails to establish that the contracting officer abused his discretion in granting the exemption based on the existence of established market or commercial prices for the items.

Digital Equipment Corporation protests the award of a contract to AT&T Technology Inc. (AT&T), under request for proposals (RFP) No. MDA904-84-R-7137, issued by the National Security Agency (NSA) for computer systems. Digital challenges the award on several grounds. We dismiss the protest in part and deny it in part.

The RFP, issued on June 27, 1984, provided that an award would be made to the offeror that submitted the best overall proposal with appropriate consideration given to the listed evaluation factors. On October 29, 1984, the closing date for the receipt of initial proposals, NSA received seven offers, two of which--proposals submitted by Digital and AT&T--were included in the competitive range. NSA held discussions with both offerors and requested each to submit a best and final offer (BAFO). After evaluating the BAFOs, NSA determined that AT&T had submitted the best overall proposal and awarded a contract to that firm on June 21, 1985.

Digital first protests that the contract award to AT&T was improper because it believes AT&T's proposed cost must have been unreasonably low. Digital asserts that this indicates AT&T either did not understand the requirements of the RFP such that it would be able to perform as required, or intended to buy in to the procurement, i.e., submitted a below cost proposal with the expectation of recouping its losses either by means of change orders that would increase the contract price, or by receiving a follow-on contract.

AT&T's understanding of the requirements of the RFP, as reflected in its technically acceptable proposal, involves AT&T's responsibility, that is, its ability to perform as offered in its proposal. Roller Bearing Company of America, B-218414.2, May 14, 1985, 85-1 C.P.D. ¶ 542. Even in the absence of a specific affirmative responsibility determination, the contract award itself necessarily includes the contracting officer's determination that the awardee is a responsible firm. Kenilworth Trash Co., B-207314, May 18, 1982, 82-1 C.P.D. ¶ 480. Our Office will not object to such determinations unless the protester demonstrates that the solicitation contains definitive responsibility criteria that were not applied or that the determination was made fraudulently or in bad faith. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(5) (1985). Digital has established neither exception here.

The fact that AT&T's proposal may represent an attempt to buy in also provides no basis for objecting to the award. While the contracting officer is required to take appropriate precautions to ensure that any buy-in losses subsequently are not recovered through change orders or

otherwise, Federal Acquisition Regulation (FAR), 48 C.F.R. § 3.501-2(a) (1984), we consistently have recognized that this approach is not illegal. Roller Bearing Company of America, B-218414.2, supra; Decom Systems, Inc., B-215167, Sept. 24, 1984, 84-2 C.P.D. ¶ 333. Consequently, this protest basis is dismissed.

Digital next asserts that the RFP specifications restricted competition by requiring offerors to provide software of a type licensed by AT&T. Digital argues that this requirement placed competitors of AT&T at a cost disadvantage because royalty payments to AT&T had to be built into their cost proposals. This allegation is untimely. Under our Bid Protest Regulations, protests based on alleged solicitation improprieties, in order to be considered on the merits, must be filed prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.2(b)(1); Esterline Angus Instrument Corp., B-217479, Mar. 7, 1985, 85-1 C.P.D. ¶ 284. The software requirement was clear on the face of the RFP. Since the closing date for the receipt of proposals was October 29, 1984, and Digital did not file its protest until July 1, 1985, this protest basis is dismissed as untimely.

Digital also contends that AT&T's proposal should have been rejected because certain equipment items offered by AT&T were not commercially available by the October 29 initial closing date as required under the RFP. The contracting officer reports that he found AT&T complied with the requirement to supply commercially available items based on AT&T's proposed certification to that effect; AT&T catalogs; and a GSA contract covering the offered systems. Digital states that it has reviewed the catalogs AT&T submitted with its proposal, and that they in no way establish that the items proposed by AT&T met the commercial availability requirement as of October 29.

While a solicitation requirement for a commercial product is material and cannot be waived for any one offeror, see Davey Compressor Co., B-203781.2, May 10, 1982, 82-1 C.P.D. ¶ 444, the commercial availability of a product is a broad concept which, we have recognized, generally may be satisfied in different ways. See, e.g., Clausing Machine Tools, B-216113, May 13, 1985, 85-1 C.P.D. ¶ 533 (commercial product clause requiring manufacturer's current model is

satisfied by offer of current model to be modified to meet specifications). The determination whether a product is commercially available is largely within the discretion of the contracting officer, and we therefore will not disturb a determination that a commercial availability requirement has been met so long as there is evidence to support it. Wiltron Co., B-213135, Sept. 14, 1984, 84-2 C.P.D. ¶ 293.

Applying this standard here, we find that the contracting officer properly could find that AT&T adequately had satisfied the commercial availability requirement by, in effect, certifying the commercial availability in its proposal. Specifically, AT&T stated in its October 29 proposal that "the U.S. Government requirements will be satisfied by the commercially available family of 3B computers." In so stating, AT&T bound itself to furnish commercially available equipment. The RFP required nothing more of offerors under this requirement.

While we agree with Digital that the catalogs do not demonstrate that each piece of equipment offered was available by the closing date for the receipt of proposals, this fact is not controlling. Digital's position in this regard presumes that commercial availability had to be established by reference to product catalogs. This was not the case. Again, the RFP required no such means of proof. We have held, furthermore, that published announcements are not necessary to show that equipment is commercially available. Control Data Corp. and KET, Inc., 60 Comp. Gen. 548 (1981), 81-1 C.P.D. ¶ 531. Thus, contrary to Digital's position, the absence of certain AT&T equipment from commercial catalogs did not preclude the agency from relying on AT&T's proposal statements in concluding that AT&T's equipment was commercially available as of October 29, 1984. Control Data Corp. and KET, Inc., supra. We further note that nothing in the record indicates that the contracting officer was presented with any clear evidence showing that AT&T's equipment did not meet the commercial availability requirement.

Finally, Digital asserts that the contracting officer improperly exempted AT&T from the requirement to submit certified cost or pricing data. See FAR, 48 C.F.R. § 15-804.2. A price or cost analysis, based on cost or pricing data, generally is concerned with whether an offeror's prices are higher than warranted considering its

costs, and is used in negotiating reasonable prices. Digital alleges that AT&T's prices, which were several million dollars below Digital's, are too low, not too high; an agency need not require cost or pricing data for the purpose of determining whether offered prices are too low. Ebonex, Inc., B-213023, May 2, 1984, 84-1 C.P.D. ¶ 495. The record suggests that the contracting officer exempted AT&T from the cost or pricing data requirement on the basis of FAR, 48 C.F.R. § 15.804-3(a)(2), which permits exemption for commercial items whose prices are based on established market or catalog prices. Other than challenging the agency's action here, the protester has not established that the contracting officer abused his discretion in granting the exemption. Moreover, given the facts of this procurement, we fail to see how the protester was prejudiced by the exemption.

The protest is dismissed in part and denied in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel