The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aquila Technologies Group, Inc.

File: B-224373

Date: October 30, 1986

DIGESTS

1. General Accounting Office (GAO) will review a protester's complaint that an agency is required to obtain a delegation of procurement authority (DPA) from the General Services Administration under the Brooks Act, 40 U.S.C. § 759 (1982). The applicability of the Act and its implementing regulations presents questions concerning whether a contracting agency has complied with procurement statutes or regulations, which are reviewable by GAO under the Competition in Contracting Act of 1984, 31 U.S.C. § 3552 (Supp. III 1985).

2. A delegation of procurement authority is not required under the Brooks Act, 40 U.S.C. § 759, or implementing regulations, where the government is acquiring microcomputer-based audio-visual systems incorporating laser disk technology which are specially designed to meet the government's needs and where it has not been shown that the system is suitable for use in general purpose data processing applications.

3. Protester's proposal was properly rejected as unacceptable where the proposal merely repeated solicitation requirements and the government's evaluation of sample system submitted with the proposal disclosed that the proposed design contains serious deficiencies that cannot be corrected without extensive redesign.

DECISION

Aquila Technologies Group, Inc. protests the rejection of its proposal in connection with request for proposals (RFP) DAAB07-86-R-B048. The procurement, which is being conducted by the Army Communications-Electronics Command, is for a fixed-price contract to furnish electronic information delivery systems (EIDS), computer-based audio-visual equipment the Army characterizes as training devices to simulate combat experience for soldiers. Aquila also contends that

the Army failed to obtain a delegation of procurement authority (DPA) from the General Services Administration (GSA), which Aquila says was required under the Brooks Act, 40 U.S.C. § 759 (1982). As explained below, we deny the protest.

Threshold Issues

At the outset, we consider objections by the Army to our consideration of Aquila's complaint that the agency lacks procurement authority. According to the Army, this portion of Aquila's protest is untimely. The agency also says the question of obtaining a DPA is unsuitable for resolution by our Office in view of the decision of the Court of Appeals for the Federal Circuit in Electronic Data Systems Federal Corporation v. General Services Administration Board of Contract Appeals, 792 F.2d 1569 (Fed. Cir. 1986).

The Army points out that Aquila did not file its protest until after it learned that its proposal had been rejected. The agency states that it informed the offerors in a preproposal conference that it did not consider the acquisition one for Automatic Data Processing Equipment (ADPE) and that therefore Aquila knew or should have known prior to the due date for initial proposals that a DPA, which is required for ADPE acquisitions, had not been obtained. Aquila, noting that the Army announced its requirement in the Commerce Business Daily by listing it as an FSC Group 70 item, that is, as ADPE, says it was entitled to rely on the announcement and insists it did not learn that the Army was not treating the procurement as an ADPE procurement until just before it filed its protest. Aquila asserts that the protest is timely under our Bid Protest Regulations, which provide for consideration of protests filed within 10 working days of the date the protester first knows or should have known of its basis for protest. 4 C.F.R. § 21.2(a)(2) (1986).

The record of the preproposal conference does not show, as the Army argues, that it indicated during that conference that it had not obtained a DPA. In view of this and considering the protester's insistence that it did not know before proposals were due that the Army had not obtained a DPA, we consider the issue timely raised.

In the Electronic Data Systems (EDS) case, the court decided that the jurisdiction of the General Services Administration Board of Contract Appeals (GSBCA) to decide protests under the Competition in Contracting Act of 1984 (CICA), 40 U.S.C. 759(h) (Supp. III 1985), extends only to bid protests involving procurements actually conducted under the Brooks Act, and

that disputes between agencies as to whether a procurement involves ADPE and therefore should be conducted under the Brooks Act are to be resolved by the Office of Management and Budget (OMB). The Army contends that under the EDS case application of the Brooks Act is a matter that should be resolved by OMB because it involves a dispute between itself and GSA.[1/] The Army also questions whether the need for a DPA under the Brooks Act raises a protestable issue, because the Act was not intended to create individual rights, but only to benefit the government. Thus, the Army asserts, Aquila would not have standing to pursue its DPA arguments in court and should not be considered an interested party for purposes of raising the issue with our Office.

We disagree. In prior cases arising under CICA, our Office has reviewed questions concerning the necessity for obtaining a DPA. For example, in Plus Pendetur Corp., et al., 65 Comp. Gen. 258 (1986), 86-1 CPD ¶ 107, request for reconsideration denied, B-220087.5, Sept. 18, 1986, 86-2 CPD ¶ ___, we held that the Navy was required to obtain a DPA in acquiring a local area network because the network was being acquired as Automatic Data Processing (ADP) peripheral equipment. Absent a DPA, we concluded, the Navy was without authority to conduct the procurement.

We recognize that there is language in the EDS decision indicating that the court, which had before it an OMB opinion that the Brooks Act did not apply to the procurement before it, viewed that case as an inter-agency dispute that could be resolved by OMB.[2/] That decision, however, has no bearing on the resolution of this protest. Here, neither the Army nor GSA, as far as we know, has asked OMB to resolve the matter. Moreover, the issue was raised by Aquila in a protest filed with our Office, and CICA gives our Office the authority to decide protests involving contentions that a contracting agency has not complied with procurement statutes

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[1/] At our request, GSA's Information Resources Management Service submitted its views in this case. It expressed the opinion that a DPA was required.

[2/] Our jurisdiction does not depend upon whether a procurement is conducted under the Brooks Act, but rather, extends generally to all procurements by federal agencies. See 31 U.S.C. § 3553(a) (Supp. III 1985).

or regulations. 31 U.S.C. § 3552 (Supp. III 1985).[3/] Whether the procurement should have been conducted under the Brooks Act is clearly a matter concerning whether the contracting agency complied with applicable procurement statutes or regulations. Under the circumstances, we can see no reason not to consider the issue.

Notwithstanding the Army's argument that Aquila lacks standing, a protest may be filed with our Office by any interested party, that is, by a party who is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a); ADB-ALNACO, Inc., 64 Comp. Gen. 577 (1985), 85-1 CPD 633; PolyCon Corp., B-218304, B-218305, May 17, 1985, 85-1 CPD ¶ 567, request for reconsideration dismissed, B-218304.2, B-218305.2, June 24, 1985, 85-1 CPD ¶ 714. Aquila, as a disappointed offeror, is an interested party within the meaning of that term.

Requirement for a DPA

The Army argues that a DPA was not required because: (1) the equipment being acquired has been specially modified and is not general purpose ADPE subject to the Brooks Act, (2) the procurement is for a training system rather than ADPE, and (3) the procurement is subject to 10 U.S.C. § 2315 (1982), popularly known as the Warner Amendment. Since, for the reasons set forth below, we agree with the Army that the equipment is not general purpose ADPE, we need not consider the remainder of the Army's arguments.

The record shows that the heart of the system consists of a microcomputer designed to automatically process video and audio data, as well as more traditional forms of data. Specifically, the system consists of a microcomputer housed with a laser disk player which is to be used to store data. In addition, the system is required to support floppy and

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[3/] Sections 823 and 824 of the recently enacted Paperwork Reduction Reauthorization Act of 1986, H.R.J. Res. 738, 99th Cong., 2d Sess., has amended Section 111(e) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 754(e)) to overrule the holding in the EDS case, and provide that in a protest either our Office or the GSBCA rather than OMB should determine whether a particular procurement falls under the Brooks Act.

hard disk storage media (types of media commonly used in microcomputer systems), is required to use an operating system (MS-DOS) employed throughout the microcomputer industry, and must be capable of running a variety of widely used microcomputer software, including text editing, database, and applications development languages.

Nevertheless, the Army contends that the equipment being acquired is not subject to the Brooks Act because it is not general purpose commercially available equipment. It rests its contention on several factors it says indicate the equipment is specially designed as an audio-visual aid.

Equipment that is specially designed or modified so that it cannot be used as general purpose ADP has been traditionally viewed as excluded from the Brooks Act, which is limited in its coverage to ADPE "suitable for efficient and effective use by Federal agencies." 40 U.S.C. § 759(b)(1); see Digital Equipment Corp., B-181336, Sept. 13, 1974, 74-2 CPD ¶ 167, in which we concluded that an Air Force procurement of flight simulators, including cockpits, motion systems and ancillary equipment incorporating, among other things, data processing equipment, was not subject to procurement as ADPE because it was specially designed for a specific application.

In implementing this limitation, the Federal Information Resources Management Regulation (FIRMR), 41 C.F.R. § 201-2.001 (1986), defines ADPE for purposes of the Act as specifically exempting under subparagraph (b):

> "(1) ADPE systems and components specifically designed (as opposed to configured) and produced to perform computational, data manipulation, or control functions, but which have no general purpose applicability;
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> "(2) ADPE that is modified at the time of production to the extent that: (i) It no longer has a commercial ADP market; or (ii) It cannot be used to process a variety of applications; or (iii) It can be used only as an integral part of a non-ADP system."

The Army contends:

> -- The system is designed to operate as a training system and, for that reason, is not intended to be used as a general purpose computer.

-- The system is specifically designed to be capable of delivering instructional material, and is not off-the-shelf commercially available equipment.

-- The system was specifically designed to Army specifications using software imbedded in the video disk system and as such is exempt from the FIRMR.

We agree with the Army that design features which extend the state-of-the-art to create new products may result in a system that falls outside the scope of the FIRMR. Here, we think it is significant that the requirements for formatting the laser disk focus on the audio-visual characteristics of the system. In normal use, the system, after an initial "boot" process in which the computer programs are loaded, transmits video data directly from the video disk to the display monitor. The computer controls this process by controlling the video disk player and by itself sending data to the video controller to over-write the displayed image. Since the direct disk player/display system link is preserved, the computer, to load software from the video disk, must interpret a data stream principally designed to meet audio-visual rather than ADP requirements. Put another way, the design of the computer-to-laser link does not optimize the general purpose utility of the machine, a fact that limits its suitability for use in general purpose ADP applications. Thus, we cannot find on this record that the Army was required to obtain a DPA in order to procure it.

Aquila's Proposal

Aquila complains that the Army acted improperly by rejecting its proposal. The RFP required offerors to submit a sample system for evaluation as well as technical manuals and technical and price proposals. In rejecting Aquila's proposal, the Army advised the protester that it had concluded that the sample system, its technical manuals, and its technical proposal were unacceptable. The rejection letter lists a number of deficiencies on which the Army based its determination. Aquila challenges each claimed deficiency, and contends that each either did not exist or was minor and would have been correctable had meaningful discussions been held. Accordingly, Aquila says, its proposal should not have been eliminated from the competitive range.

In addressing Aquila's complaints, we note that, because the production contract is to be awarded, the requirements are

fairly specific. The RFP states, and offerors were advised at a preproposal conference, that the sample systems, which are referred to as "bid samples," were expected to meet and would be evaluated against the solicitation as though they were production samples. Moreover, the RFP makes it clear that the Army intended to evaluate proposals by examining the suitability of the proposed equipment for use and that offerors were expected to establish through their proposals, including the sample, that their equipment was suitable without major changes affecting system design.

Our review of the record in this case confirms the agency's conclusion that Aquila's proposal contains significant deficiencies. The proposal consisted largely of a narrative restating the RFP requirements and descriptive literature of various potential subcomponent suppliers. Moreover, as indicated in working papers prepared by the Army's evaluators, the sample system was delivered in a disassembled form, with software ostensibly on disks that were found to be blank and without assembly or start-up instructions. When the Army did manage to get the equipment to operate, it was found to overheat. Moreover, it appears that the Army was never able to get the equipment to perform as required at least in part because the equipment is not capable of doing so.

To illustrate, we need address only a few of the deficiencies the Army found.

The RFP required that the system be able to display a still video frame accompanied by at least 10 seconds of audio; in turn, the equipment would permit audio to be recorded on the laser disk using no more than five laser disk frames. According to Aquila, it exceeded this requirement because its equipment can furnish up to 15 seconds of audio per video frame and it is being prevented from offering what it terms a superior solution to the Army's needs. As the Army notes, however, Aquila's protest does not address the Army's restrictions on where audio must be stored. Aquila's design does not permit audio data to be stored on the laser disk, necessitating substantial redesign before the RFP requirements could be met.

Further, Aquila's proposal would have to be substantially revised in order for the firm to meet the Army's video display requirements. The RFP requires a minimum video graphics resolution of 640 by 400 pixels (points); graphics must be capable of being overlaid on 40 and 80 characters per line. Based on examination of Aquila's sample, the Army concluded that the system only supports a 256 by 200 pixel display and cannot display an 80-character line of text.

Aquila has not explained how the requirement is met. We assume, therefore, that Aquila cannot meet the requirement and that the computer-video portion of its system would have to be completely redesigned to be acceptable.

The solicitation also stated that "The microcomputer shall use a microprocessor with a 16-bit data bus . . . ." According to the Army, a data bus is a group of paths (wires) along which data is simultaneously transferred between building blocks of a microcomputer. It is undisputed that, when the Army inspected Aquila's sample, it found that Aquila's proposed equipment employs an 8-bit data bus supporting a NEC v.20 microprocessor. The microprocessor has a 16-bit internal data structure, which Aquila in its protest characterizes as an internal 16-bit data bus. According to Aquila, the RFP did not preclude use of its proposed microprocessor design because it does not exclude the use of such processors.

We disagree. The Army specifically used the term "bus," which, in common microcomputer usage clearly refers to that portion of a microcomputer which, as described by the Army, involves the external connection of the microprocessor to other system components. In ordinary usage, the term does not refer to internal microprocessor architecture.

Moreover, the Army's reference to a 16-bit bus cannot be given the meaning Aquila ascribes to it because Aquila's interpretation makes the requirement meaningless. The solicitation calls for an MS-DOS operating system, which even in the absence of the disputed clause would require the use of a microprocessor employing, at minimum, the external 8-bit/internal 16-bit architecture. Thus, the provision for a 16-bit data bus is only meaningful under the Army's interpretation.

Since we think the RFP requires a 16-bit external data bus, Aquila's proposal was unacceptable. Although Aquila asserts that it could substitute a NEC v.30 microprocessor, a change Aquila attempts to characterize as a simple substitution, we agree with the Army that it is not. A completely different bus design would have to be substituted, a process that would have to include the replacement of a variety of other components and the design of a new circuit layout. What would be required, in short, is a substantial redesign of the microprocessor portion of the Aquila proposal, or substitution of an entirely different computer system.

A proposal may be rejected without conducting discussions if it does not meet the government's requirements as stated in the RFP and is not reasonably susceptible of being made

acceptable through discussions. Texas Medical Instruments, B-206405, Aug. 10, 1982, 82-2 CPD ¶ 122; Self-Powered Lighting, Ltd., 59 Comp. Gen. 298, 303 (1980), 80-1 CPD ¶ 195. Agencies are not required to include firms in the competitive range if their proposals would have to be substantially rewritten, Joseph L. DeClerk & Associates, B-220142, Nov. 19, 1985, 85-2 CPD ¶ 567, or to consider proposals that merely parrot back the government's stated requirements without responding to RFP provisions that require offerors to explain their products in detail. Roach Mfg. Co., B-208574, May 23, 1983, 83-1 CPD ¶ 547.

Based on the above, we think that the Army's conclusion that Aquila's proposal does not conform to the RFP and cannot be readily revised to do so was reasonable. In view of this result, we need not reach Aquila's other contentions.

The protest is denied.

Harry R. Van Cleve
General Counsel