

9/11/89



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Data-Team, Inc.

File: B-233676

Date: April 5, 1989

DIGEST

Protest that specification for copiers unduly restricts competition is sustained when agency does not establish that requirement that copiers use dry toner only is necessary to meet the government's needs.

DECISION

Data-Team, Inc., protests that invitation for bids (IFB) No. F04609-88-B0053, issued by the Department of the Air Force for copier machines, supplies and materials, is unduly restrictive of competition because it specifies that copiers must use dry toner only and thereby excludes copiers using liquid toner from consideration. Data-Team asserts it could bid lower prices for liquid-toner copiers because they are less expensive to acquire, to operate and to maintain than dry-toner copiers.

We sustain the protest.

The Air Force is soliciting bids for paper, supplies and reproduction machines to provide copy service at George Air Force Base, California, a Tactical Air Command base. According to the Air Force, the using activity has a specific mission requirement to switch quickly to a wartime posture in the event of a "go-to-war" mobilization, which requires that copiers be able to be moved quickly and easily. The Air Force states that the liquid-toner copiers that Data-Team supplied under an existing contract require extra care to move and, ultimately, an absolutely level surface in order to prevent leakage. The Air Force asserts that the documented leakage of existing wet-toner copiers, the potential leakage during mobilization, and the poor repair service record of existing copiers adversely affect mission capability and support its decision to specify dry-toner copiers.

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Data-Team argues that the liquid-toner copier it would supply can be moved quickly and easily by either draining the toner from its reservoir, which takes 30-60 seconds, so that the copier can be carried without risk of spillage, or by removing the toner reservoir and moving it separately from the copier. Data-Team also asserts that spillage is a concern for a dry-toner copier, whose powdered toner can easily spill out of the machine if moved improperly. Furthermore, Data-Team states many dry-toner copiers also use a liquid substance called fuser oil or silicone oil which can spill out of its reservoir if not handled properly.

Data-Team notes that other Air Force bases which are elements of the Strategic Air Command (SAC) have agreed to accept liquid-toner copiers after receiving protests of their solicitations which were restricted to dry-toner copiers. According to Data-Team, the General Services Administration, the Air Force Air Training Command and the Tennessee Valley Authority have also removed "dry toner" restrictions from their solicitations.

Data-Team states that it performed the prior contract with discontinued machines permitted by the terms of the prior contract, and problems the Air Force experienced with those machines could be attributed to usage, repair and perhaps the age of the machine, rather than the kind of toner used by the copier. Data-Team notes that this IFB requires new copiers, and states it would supply state-of-the-art copiers from Savin Corporation, which have been reported by Buyers Laboratory, Inc., an independent testing company, to have low downtime and utilize toner and dispersant cartridges which are very easy to install.

The Competition in Contracting Act of 1984 requires agencies to develop specifications in such a manner as is necessary to obtain full and open competition and to include restrictive provisions only to the extent necessary to satisfy agency needs. 10 U.S.C. § 2305(a)(1)(B) (Supp. IV 1986). Where a solicitation provision is challenged as restrictive, the initial burden is on the procuring agency to establish prima facie support for its belief that the challenged provision is necessary to satisfy its needs. Dock Express Contractors, Inc., B-223966, Dec. 22, 1986, 86-2 CPD ¶ 695. In our review of the issues, we examine the adequacy of the agency's position not simply with regard to the reasonableness of the rationale asserted but also the analysis given in support of these reasons, Cleaver Brooks, B-213000, June 29, 1984, 84-2 CPD ¶ 1, to assure that the agency's explanation will withstand logical scrutiny.

Fleetwood Electronics, Inc., B-216947.2, June 11, 1985, 85-1 CPD ¶ 664. When and if this prima facie support is established, the burden shifts to the protester to rebut the agency's position and show that the allegedly restrictive provision is unreasonable. Morse Boulger, Inc., 66 Comp. Gen. 174 (1986), 86-2 CPD 715.

Here, though the Air Force has made a prima facie showing that the "dry toner only" requirement is related to its need to relocate copiers quickly without leakage in the event of a "go-to-war" mobilization, Data-Team has shown that the requirement is unreasonable. While the Air Force reports that it has had problems with leakage from copiers using liquid toner at George Air Force Base, Data-Team has demonstrated that the Air Force's limited experience with discontinued copiers is not sufficient to judge the capabilities of all liquid toner machines. The Air Force points to no review of technical data or industry reports rating various copiers in support of its position that only dry-toner copiers can be relocated quickly without leakage. Data-Team, however, has explained how a recent model of liquid-toner copiers can be moved quickly without risk of spillage, and has furnished an independent testing company's report that a new liquid-toner copier has toner and dispersant cartridges which are very easy to install. Also, the Air Force has not rebutted Data-Team's allegation that copiers using dry toner are subject to spillage if not properly handled and that some dry-toner copiers use a liquid substance.

Furthermore, Data-Team has listed a number of SAC bases which have removed "dry toner only" restrictions from their solicitations. Data-Team notes that because the SAC mission includes response to nuclear attack, its need to shift to a wartime posture is no less compelling than that claimed by George Air Force Base. Data-Team argues that if SAC officials could conclude there was no need to exclude liquid-toner copiers, George Air Force Base's determination that only dry-toner copiers will meet its needs is not entitled to special deference by our Office by virtue of military necessity.

In these circumstances, we do not believe that the Air Force's exclusion of liquid-toner copiers from the specification has been adequately justified. While we recognize that the Air Force may have a need for copiers which can be quickly and easily moved without leakage of toner, it has not shown that it could not structure the solicitation to accomplish this purpose without eliminating all liquid-toner copiers from the competition.

Accordingly, we sustain Data-Team's protest. By letter of today to the Secretary of the Air Force, we are recommending that the Air Force amend the IFB to provide specifications that permit full and open competition and accurately represent the agency's minimum needs. In addition, we find that Data-Team is entitled to the costs of filing and pursuing its protest, including attorneys' fees. Southern Technologies, Inc., B-224328, Jan. 9, 1987, 87-1 CPD ¶ 42. Data-Team should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e) (1988). However, the protester is not entitled to the recovery of its bid preparation costs, since it was not required to submit a proposal to challenge the "dry toner only" restriction. See Malco Plastics, B-219886, Dec. 23, 1985, 85-2 CPD ¶ 701.

for 
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