



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Test Systems Associates, Inc.

**File:** B-244007.2

**Date:** October 24, 1991

Albert J. Bauer for the protester,  
Millard F. Pippin, Department of the Air Force, for the  
agency.

Aldo A. Benejam, Esq., and Andrew T. Pogany, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### DIGEST

Protest against the proposed award of a sole-source, follow-on contract is sustained where agency relies on the authority of 10 U.S.C. § 2304(d)(1)(B) (1988) to award the contract, but agency's written justification and approval (J&A) is not reasonably based; the J&A provides no support for the agency's conclusion that a competitive award to a source other than the incumbent would likely result in either substantial duplication of cost to the government that would not be recovered through competition, or would cause delays in fulfilling the agency's needs.

### DECISION

Test System Associates, Inc. (TSAI) protests the proposed award of a follow-on contract on a sole-source basis to the incumbent, Access Research Corporation (ARC), under request for proposals (RFP) No. F41608-91-R-44874, issued by the Department of the Air Force for independent validation and verification (IV&V) of hardware and software for the EF/F/FB-111 Avionics Intermediate Shop Replacement (AIS-R) System.<sup>1/</sup>

We sustain the protest.

<sup>1/</sup> The proposed contract is to provide IV&V services for hardware, software, support equipment and data being acquired by the Air Force from Westinghouse Electric Corporation under contract No. F41608-83-C-0111.

## BACKGROUND

The Air Force synopsisized a notice of sole-source negotiations with ARC in the Commerce Business Daily (CBD) on April 5, 1991. The synopsis stated that the solicitation would be issued to ARC on approximately April 23, and referenced note 22. This note stated that the government intended to solicit and negotiate with only one source but invited interested persons to identify their interest and capability so that the government could consider a competitive procurement for the required services.

TSAI responded to the CBD announcement in a letter telefaxed to the agency on April 23. In its letter, TSAI stated that it was a potential supplier of the required services; that the firm had more than 5 years of experience related to the AIS-R program; and that TSAI had provided IV&V services for the Department of Defense in connection with other programs. TSAI also suggested to the agency that it should satisfy the requirement through a competitive procurement and requested a copy of the solicitation. On April 23, the agency informed the protester that the agency would furnish the RFP to TSAI when it became available and that the firm would then be allowed to compete for the contract.<sup>2/</sup>

Despite the agency's assurances, TSAI filed a protest in our Office on May 13, challenging the proposed sole-source award to ARC. The agency subsequently issued the RFP on May 30, with an extended closing date of July 8. The RFP was issued as a sole-source solicitation, contemplating a follow-on contract to ARC's current IV&V contract which expired on September 30. The RFP contemplates a time and materials contract for 1 base year commencing October 1, and 1 option year. On June 17, the agency requested that we dismiss TSAI's protest, stating that it had provided a copy of the RFP to TSAI, thereby giving the protester an opportunity to compete. We then summarily dismissed TSAI's protest as academic.

Following receipt of the RFP, TSAI protested to the agency in a letter dated June 17, alleging that the solicitation was ambiguous and contained numerous improprieties that restricted

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<sup>2/</sup> On that same day, the agency finalized a written justification and approval (J&A) for use of other than competitive procedures, as required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (1988 & Supp. I 1989). The J&A concluded that a sole-source award to ARC was justified under 10 U.S.C. § 2304(c)(1) (1988), which authorizes the use of other than competitive procedures when the services required are available from only one responsible source or a limited number of responsible sources.

the procurement to the incumbent. The agency denied TSAI's protest in a letter dated June 18, explaining that since the solicitation contemplated award of a sole-source, follow-on contract, all terms in the RFP concerning ARC or ARC's facilities or personnel, of which TSAI complained, accurately reflected the government's minimum requirements.

This protest to our Office followed, challenging various provisions of the RFP as inadequate and unduly restrictive of competition, and as limiting the competition to one firm. TSAI essentially alleges that, as currently written, the RFP precludes TSAI from adequately preparing a proposal that fully responds to the RFP. In response, the agency justifies the allegedly restrictive provisions in the RFP solely on the basis that the solicitation is reasonably and properly intended to result in a sole-source award. While the agency also states that offers from other sources may be considered, it is clear that the challenged provisions reflect the agency's decision to procure the services on a noncompetitive basis. We therefore must examine the propriety of the agency's sole-source approach.

#### DISCUSSION

Because the overriding mandate of CICA is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), this Office will closely scrutinize sole-source procurements conducted under the exception to that mandate authorized by 10 U.S.C. § 2304(c)(1). Berkshire Computer Prods., B-240327, Oct. 31, 1990, 91-1 CPD ¶ 464. In invoking 10 U.S.C. § 2304(c)(1), the Air Force relied on 10 U.S.C. § 2304(d)(1)(B), which permits the procurement of follow-on goods or services on a noncompetitive basis from the original source where the agency determines that it is likely that: 1) award to other than the incumbent would result in substantial duplication of cost to the government which is not expected to be recovered through competition; or 2) where a competitive award would result in unacceptable delays in fulfilling the agency's needs.<sup>3/</sup>

When an agency uses noncompetitive procedures, it must execute a written J&A, which must include sufficient facts and rationale to justify the use of the specific authority cited, see FAR § 6.303-2, including a description of efforts made to ensure that offers are solicited from as many sources as practicable; a determination that the anticipated cost will be

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<sup>3/</sup> Federal Acquisition Regulation (FAR) § 6.302-1(a)(2)(iii), which implements 10 U.S.C. § 2304(d)(1)(B), contains virtually identical terms.

fair and reasonable; a description of any market survey conducted or a statement of the reasons a market survey was not conducted; and a statement of any actions the agency may take to remove any barriers to competition in the future. 10 U.S.C. § 2304(f)(3); see TMS Bldg. Maint., 65 Comp. Gen. 222 (1986), 86-1 CPD ¶ 68. We will not object to a reasonably-justified sole-source award, Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299. The propriety of the agency's proposed decision to award a follow-on contract to ARC on a sole-source basis, therefore, rests on whether it is reasonably based.

#### The Air Force's J&A

Following detailed narratives describing various aspects of the procurement under the headings "Nature of the Action," and "Description of Items," the J&A focuses on those characteristics of ARC which purport to demonstrate why that firm "is the only responsible source who can satisfy the Air Force's continuing requirements for IV&V engineering services . . . ." This section of the J&A consists of eight paragraphs replete with affirmations attesting to ARC's allegedly unique qualifications to perform the required services. The crux of this section, however, is ARC's development and maintenance of unique data bases related to the AIS-R program since ARC was awarded the initial contract for the IV&V services in 1984.<sup>4/</sup>

ARC's alleged "uniqueness" notwithstanding, the agency concedes that since the data bases are not proprietary, they could be duplicated and made available to another contractor. Relying on 10 U.S.C. § 2304(d)(1)(B), however, the agency states that awarding to another contractor would result in substantial duplication of costs to the government which could not be recovered through competition. The agency further argues that awarding the contract to another firm would delay its requirement for timely IV&V services.

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<sup>4/</sup> For example, the J&A states that ARC has developed and validated F/FB-111 AIS-R IV&V assessment guidelines, and developed/maintained unique data bases for tracking program documentation, and software trouble reports; that ARC has developed data bases for tracking and providing status of all contract "Data Requirements List" items and all deliverables under Westinghouse's contract; and that ARC has developed tracking capabilities for revisions and modifications to hardware, software and spare parts.

## Duplication Of Cost To The Government

The J&A states that the "Program Management Office estimates that duplication of costs would exceed \$6,302,000." The J&A further states that the estimate is based upon "previous years expenditures to ARC." In a supplemental submission requested by our Office, the agency reiterates the \$6.3 million figure, stating simply that it represents all payments for services made to ARC under the firm's IV&V contracts during the past 7 years.

The agency further states that there also would be additional costs in connection with duplication of the data bases. The agency explains that Westinghouse has filed two claims for substantial amounts against the government in connection with its contract, and that ARC, under a contract distinct from the IV&V contract at issue here, provides expert and consultant services to the Air Force in support of the government's position relative to the Westinghouse claims. The contracting officer states that since the current ARC data bases are used to support both the AIS-R IV&V contract and ARC's expert and consultant services contract, establishing an IV&V contractor other than ARC would result in substantial duplication of cost associated with creating and maintaining duplicate data bases until the Westinghouse contract expires. The contracting officer further states that in addition to the \$6.3 million figure, the costs of maintaining a duplicate data base by a new IV&V contractor is estimated at \$100,000 per year.<sup>5/</sup> TSAI vigorously contests the agency's cost estimates.

The agency's generalized statement in its J&A that duplication of costs would exceed \$6.3 million if award were made to a contractor other than ARC is untenable. Except for the agency's conclusory statements, and despite requests from our Office that the \$6.3 million estimate be justified, the record clearly shows that the figure is simply the total previous

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<sup>5/</sup> In its supplemental submission to our Office, the contracting officer states that:

"\$100K per year duplication costs were estimated as only the salary costs per year for two programmers and two data entry personnel to transcribe the raw information provided by a new IV&V contractor into the existing ARC data base and minimal computer rental time. . . . the \$100K figure is a minimum . . . actual costs would be considerably more."

payments for services rendered during ARC's incumbency,<sup>6/</sup> There is no evidence in the record to show what, if any, duplication of costs would occur if the requirement were competed, and the agency's estimate by itself, without any supporting documentation, provides no basis for us to conclude that such costs would be incurred. While we recognize the possibility that there could be some cost duplication with respect to a new contractor's "learning curve" period, along with an amount in excess of \$100,000 for creating and maintaining the data base, it is not at all apparent what the total amount likely will be or why that amount should be viewed as substantial. What is clear is that there is no evidence at all to support the agency's assertion that the total of such costs should approach anything like the total amount paid to the incumbent for providing services for the past 7 years. In short, the Air Force has provided no evidence substantiating its assertions that a competitive award to a source other than ARC would likely result in substantial duplication of cost to the government.

Further, even if substantial cost duplication were to occur, the agency has provided no evidence in support of its argument that such costs might not be recovered through competition. The agency has procured the IV&V services from ARC on a sole-source basis for the past 7 years, with no indication that it intended to ever compete the requirement;<sup>7/</sup> the agency has thus never obtained competitive proposals for the IV&V services. Further, there is no evidence that the agency has ever conducted a market survey in connection with procuring the IV&V services from commercial sources on a competitive basis.<sup>8/</sup> Since the Air Force has not provided any

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<sup>6/</sup> The agency's \$6.3 million figure represents approximately \$900,285 in annual payments to ARC for IV&V services over 7 years. The agency estimates the instant procurement at \$1.3 million annually.

<sup>7/</sup> Regarding the agency's efforts to increase future competition, the J&A concludes that "[t]he barriers to a competitive procurement cannot be lifted until the present contract with Westinghouse is complete. . . . This is expected to be complete by July 1993. Until that time, the continuity that is presently provided by ARC must be maintained."

<sup>8/</sup> The J&A's statement purporting to justify why the agency did not conduct a market survey states in full that "[s]ufficient data required is not now totally available to allow a market survey to be conducted. NATO sources were considered, but no foreign sources expressed interest." In light of the fact that ARC has been the incumbent for the last  
(continued...)

data supporting its position, we find that the Air Force's conclusion that any duplicative costs would not be recovered through competition, is not supported by the record.

#### Unacceptable Delays

The agency further argues that awarding the contract to a firm other than ARC would delay its requirement for timely IV&V services. Much of the J&A's rationale for the sole-source award, however, reflects the agency's satisfaction with ARC's performance, not with any possible delays as a result of a competitive award to another firm. For example, the J&A states in relevant part:

"The [Air Force] cannot delay its requirement to have timely IV&V. The effort to bring a different contractor into the program would have a substantial negative effect, both on [Westinghouse] and the Air Force. ARC has been very successful in the processing and validating data that has been received from Westinghouse. Much of this data must be approved by the [Air Force] before Westinghouse can proceed with a specific task. Westinghouse has filed two (2) claims against the government . . . Any appreciable slow down or stoppage by the [Air Force] would give Westinghouse justification for additional claims and/or charges or reason for contract slippage of deliveries."

The J&A contains no information concerning either the circumstances under which any unacceptable delays might result from competing the requirement or the nature of the "substantial negative effect" on Westinghouse or the Air Force.

Although the J&A does not specifically address the basis for the Air Force's delay concerns, the contracting officer in response to the protest estimates that it would take approximately 6 months to bring a new contractor "up-to-speed" with the AIS-R contract. As such, the only apparent delays concerning the IV&V services contract specifically mentioned

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8/ (...continued)

7 years, the Air Force has had a duty to take practicable steps to avoid a noncompetitive follow-on contract to ARC. See AVCO Corp., Sys. Div., B-216015, Feb. 27, 1985, 85-1 CPD ¶ 245, at 5-6. In our view, the Air Force has improperly failed during the last 7 years to make any attempts to develop or acquire the required data to conduct a market survey for the IV&V services. See Hydra Rig Cryogenics Inc., B-234029, May 11, 1989, 89-1 CPD ¶ 442.

by the contracting officer is that period of time presumably attributable to a new contractor's familiarizing itself with the required IV&V tasks. The record shows that TSAI is an experienced contractor which states it has the the "knowledge to eliminate the learning curve" period. The agency does not explain, and the record does not show, how such short-term learning process, required generally of a new contractor, would have a "substantial negative effect" on the AIS-R program.

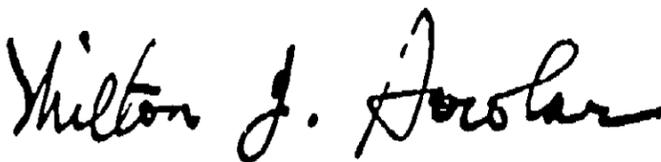
#### CONCLUSION

The Air Force has not provided any evidence in support of its conclusion that a competitive award to a contractor other than ARC is likely to result in substantial duplication of cost to the government that is not expected to be recovered through competition. Nor has the agency provided any evidence in support of its assertion that award to any other source would result in unacceptable delays in fulfilling its requirement. Since the agency has provided insufficient evidence to justify its decision to award the contract to ARC on a sole-source basis, we sustain the protest.

#### RECOMMENDATION

We recommend that the Air Force draft a solicitation that allows full and open competition for the required services, and that the agency satisfy its need for IV&V services through a competitive procurement in which TSAI, ARC and any other potential offerors are afforded an opportunity to compete. We further find that the agency should reimburse TSAI for its costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1) (1991). TSAI should submit its claim directly to the agency.

The protest is sustained.

*for*   
Comptroller General  
of the United States