**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Digicomp Research Corporation

File: B-262139

Date: December 1, 1995

Dean M. Dilley, Esq., Patton Boggs, for the protester.
George Kinsey, Esq., Federal Aviation Administration, for the agency.
John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against refusal of the Federal Aviation Administration (FAA) to allow protester to compete under solicitation for award of a contract for standard terminal automation system is dismissed as untimely since protest was filed more than 10 working days after February 22, 1995, announcement in the Commerce Business Daily, which placed protester on constructive notice that it would not be permitted to compete if it did not certify that it met qualification criteria by March 3.

DECISION

Digicomp Research Corporation protests the refusal of the Federal Aviation Administration (FAA) to allow Digicomp to compete under a solicitation for the standard terminal automation replacement system (STARS), which is to replace existing air traffic control systems at approximately 200 FAA and Department of Defense (DOD) operational terminal facilities.

We dismiss the protest.

The precursor to STARS was the Advanced Automation System (AAS) program, which was envisioned as an upgrade of the 1970s era air traffic control technology. The agency had awarded a production contract for AAS in July 1988 and, following performance difficulties, that contract was partially terminated in 1993. The FAA reports that STARS is a one-time acquisition to "make up for lost time" by procuring some of the terminated portions of AAS using a "limited competition" acquisition strategy.

The FAA published a series of notices in the Commerce Business Daily (CBD) concerning STARS. The first notice, on September 6, 1994, announced a market survey to obtain information on the capabilities and availability of nondevelopmental terminal automation systems for air traffic control sites. The

second CBD notice, on December 13, 1994, announced a meeting to provide information to potential sources on the planned approach for the STARS acquisition and announced that the agency planned to release a draft request for proposals (RFP) during the third quarter of 1995 and a formal RFP during the fourth quarter of 1995.

The third CBD notice, published on February 22, 1995, stated that FAA "has limited the competition for the [STARS] to vendors who have developed and fielded operational terminal automated air traffic control systems somewhere in the world." The notice also stated "vendors will be prequalified through qualification criteria published in this announcement" and that the intent of the prequalification process is "to assure FAA that qualifying vendors are truly capable of successfully performing the STARS acquisition." In addition, the notice stated "[o]nce the prequalification criteria have been finalized, vendors will be required to certify in writing that they meet the criteria" and that "[a]s a means to assure fairness to potential STARS offerors that meet the prequalification criteria, any offeror found not to have met prequalification criteria will be disqualified from continuing in the STARS competition." Essentially, the proposed prequalification criteria were (1) previous deployment of an air traffic control system which is operational and is being used to separate aircraft; and (2) capability of performing software engineering activities such as requirements analysis, design, implementation, integration, test, distribution, installation, enhancement, correction, upgrade or maintenance of software. Finally, the notice required submission of responses to the STARS prequalification criteria no later than March 3.

The fourth CBD announcement, published March 21, repeated the prequalification criteria, and again stated that vendors were required to certify in writing that they met the stated criteria and that any offeror found not to have met the criteria would be disqualified from continuing in the STARS competition. This announcement also extended the deadline for submission of the required certification to March 31.

Eleven vendors, not including Digicomp, submitted minimum qualification packages on or before March 31. Digicomp first contacted the FAA by telephone on April 5, and again by facsimile on April 7, asking if the agency was still accepting minimum qualification packages. By letter dated April 28, the FAA responded to Digicomp as follows:

> "[i]n fairness to those companies that timely submitted the materials requested in the March 21, 1995 STARS minimum qualification criteria, it has been determined that it would be improper to accept minimum qualifications from Digicomp after the required March 31, 1995 submission date. The STARS Program Office wishes to remind Digicomp that there still exist some opportunit[ies] for teaming arrangements with any vendor that has met the STARS minimum

> qualifications. A list of these vendors will be published via the CBD in the near future."

In a May 25 letter, Digicomp explained that it had missed the CBD announcement of the STARS minimum qualification process because its copy of the March 21 CBD, which Digicomp reviews in electronic format, was "corrupted," and it was April 7 before the firm received a new set.[1] Digicomp also asked the FAA to "reconsider Digicomp as a potential vendor for the STARS program" and explained that it had recently successfully deployed a system that qualifies it for the STARS program. Digicomp listed an Air Force contract under which it stated that the government had accepted the firm's system and listed features of that system.

On June 7, the agency finalized a justification for other than full and open competition (JOTFOC) to justify limiting the STARS competition to vendors that had been qualified through the STARS qualification process. The JOTFOC stated that the STARS minimum qualification process was being conducted under the authority provided the FAA by 49 U.S.C.A. § 40110(b)(2)(E) (West Supp. 1995), "in lieu of the prequalification process promulgated by 41 U.S.C. § 253c and FAR [Federal Acquisition Regulation Subpart] 9.2." The JOTFOC stated that the existing terminal radar approach control facilities are obsolete and in need of replacement and that a July 6, 1989, GAO report, entitled "Air Traffic Control: Computer Capacity Shortfalls May Impair Flight Safety," GAO/IMTEC-89-63, criticized the FAA for failing to promptly address these problems. The JOTFOC stated that, as a result of the time and resources consumed by the AAS contract, the FAA had a mandate to field a system as soon as possible and had an urgent need to undertake a limited acquisition approach to STARS. The JOTFOC stated that the agency would accomplish this goal by limiting the acquisition to offerors that had fielded an operational automated air traffic control system with basic functionality and had met other minimum qualification criteria.

A fifth CBD announcement, published July 11, 1995, stated

> "The [FAA] has completed the process of selecting eligible vendors who through the STARS minimum qualification process, have proven the capability to successfully fulfill the agency's minimum needs. The

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[1]Digicomp does not explain why it was apparently unaware of the three previous CBD announcements, including the February 22 notice which stated that FAA was limiting the STARS competition to vendors who had previously developed and fielded operational terminal automated air traffic control systems, that vendors were to be prequalified through qualification criteria published in the announcement, and that any offeror found not to have met prequalification criteria would be disqualified from continuing in the STARS competition.

> STARS minimum qualification process was conducted under the limited competition authority provided the FAA by 49 U.S.C.[A] § 40110(b)(2)(E), in lieu of the prequalification process promulgated by 41 U.S.C. § 253c and FAR Subpart 9.2."

The announcement also listed seven vendors considered eligible to participate in operational capability demonstrations, submit proposals, and compete for award. Digicomp was not listed.

After additional correspondence between Digicomp and the FAA, in a July 17 letter, Digicomp argued that the FAA could not refuse to review an offer submitted by Digicomp simply because it was not prequalified. Digicomp cited 41 U.S.C. § 253c(c)(4) (1988), which essentially states that a potential offeror may not be denied an opportunity to submit and have considered a proposal in response to an RFP solely because it has not been prequalified, and requested that the FAA confirm it would provide Digicomp with the solicitation and consider a proposal submitted by the firm. In its July 21 response, the FAA referenced the statement in the July 11 CBD announcement to the effect that the STARS minimum qualification process was conducted under the limited competition authority provided by 49 U.S.C.A. § 40110(b)(2)(E), "in lieu of the prequalification process promulgated by 41 U.S.C. § 253c." The letter also stated that Digicomp's questions concerning 41 U.S.C. § 253c "are no longer relevant to the STARS acquisition process," and that Digicomp is not an eligible STARS vendor and may not compete for the STARS contract.

On July 25, Digicomp protested to this Office challenging the determination in the FAA's July 21 letter that Digicomp would not be considered for award under the STARS acquisition. Essentially, Digicomp's position is that the FAA's refusal to consider an offer from Digicomp violates 41 U.S.C. § 253c(c)(4), which provides

> "A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement, if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract."

Digicomp states that, although the FAA is relying on the conclusion of its prequalification process as a legal basis for rejecting in advance offers from firms that are not prequalified, this is precisely what 41 U.S.C. § 253c(c)(4) is intended to prevent. Digicomp argues that 49 U.S.C.A. § 40110(b)(2)(E) does not supersede the prequalification limitations imposed by 41 U.S.C. § 253c since, according to Digicomp, the FAA's authority to use noncompetitive procedures is subject to

41 U.S.C. § 253c, which provides that a civilian agency may not refuse to consider offers from potential offerors solely because they were not prequalified.

Digicomp acknowledges that an agency is not required to delay a procurement in order to provide a potential offeror an opportunity to become approved; nonetheless, the protester argues that there is no evidence that such a delay would occur in this case. According to Digicomp, when it filed its protest, the RFP had not yet been released and award of a contract was not expected for many months. In addition, Digicomp maintains that the accelerated timetable employed by the FAA in the prequalification process shows that the agency can make its prequalification decisions very quickly.

In response to the protest, as explained above, the FAA maintains that it is conducting a limited competition among offerors that meet minimum qualifications "under the limited competition authority provided to the FAA by 49 U.S.C.[A.] § 40110(b)(2)(E)." It is the FAA's position that 41 U.S.C. § 253c does not apply here. In relevant part, 49 U.S.C.A. § 40110(b)(2) reads as follow:

> "the Administrator of the [FAA] . . . may--
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> (E) use procedures other than competitive procedures only when the property or services needed by the Administrator of the [FAA] are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the Administrator."

The FAA first argues that, as a matter of law, the FAA's "limited competition" authority set forth in 49 U.S.C.A. § 40110(b)(2)(E) "takes precedence" over the prequalification authority set forth in 41 U.S.C. § 253c and cited by Digicomp. According to the agency, the language of 49 U.S.C.A. § 40110(b)(2)(E), which applies only to FAA, should control over 41 U.S.C. § 253c, which applies to all civilian agencies, since "[i]t is a fundamental tenet of statutory construction that specific language takes precedence over general language."[2] The FAA also argues that Digicomp's position would render meaningless the "limited competition" authority of 49 U.S.C.A. § 40110(b)(2)(E) and that Digicomp's interpretation of the limited competition authority granted the FAA would subvert "the deference accorded [the FAA] in the administration of its own statutes."

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[2]The FAA also argues: "Given that the 'limited' competition authority was created to address the specific situation of 'infrequent' purchases of 'critical' items, even on a sole-source basis, it must be read as an exception to the general, government-wide, 'prequalification' requirements."

FAA also argues that 41 U.S.C. § 253c does not apply here because the minimum qualification criteria spelled out in the CBD do not amount to a "qualification requirement" as defined by and governed by that statute. Also, according to the FAA, there are no plans for recurring purchases, or a series of solicitations or contracts, and it is not appropriate to apply prequalification requirements to the one-time purchase of the STARS under a limited competition.

Contrary to the position taken by the FAA, it appears to us that the only purpose of 49 U.S.C.A. § 40110(b)(2)(E) was to grant to the FAA the same authority as the Department of Defense (DOD), the Departments of the Army, Navy, Air Force, the National Aeronautics and Space Administration (NASA) and the Coast Guard under 10 U.S.C. § 2304(c)(1)(1994). In this respect, as set forth above, 49 U.S.C.A. § 40110(b)(2)(E) is virtually identical to 10 U.S.C. § 2304(c)(1) (1994), which grants to DOD, the Army, Navy, Air Force, NASA and the Coast Guard the authority to

> ". . . use procedures other than competitive procedures only when-
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> (1) the property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency."

This conclusion--that the only purpose of 49 U.S.C.A. § 40110(b)(2)(E) was to grant to the FAA the same authority as contained in 10 U.S.C. § 2304(c)(1)--is supported by the legislative history of 49 U.S.C.A. § 40110(b)(2)(E). In this respect, previous to the enactment of 49 U.S.C.A. § 40110(b)(2)(E), 49 U.S.C. app. § 1344(g) stated that "[t]he Administrator shall have the same authority as the Administrator would have under section 2304(c)(1) of title 10, United States Code, if the Federal Aviation Administration were listed as an agency under section 2303(a) of title 10, United States Code." Subsequently, 49 U.S.C.A. § 40110(b)(2)(E) was enacted as part of Pub. L. No. 103-272. In a report of the Committee on the Judiciary to accompany H.R. 1758, H.R. Rep. No. 180, 103rd Cong., 1st Sess. 268, the Committee explained: "Subsection [40110](b)(2)(E) is substituted for 49 [U.S.C.] App. 1344(g) to eliminate the cross-references to other laws and for clarity and is based on the text of 10 [U.S.C.] 2304(c)(1)." Thus, we view the FAA's authority to limit competition to a limited number of sources under 49 U.S.C.A. § 40110(b)(2)(E) as the same as that granted to DOD, the Army, Navy, Air Force, NASA and the Coast Guard by 10 U.S.C. § 2304(c)(1).

Since the purpose of 49 U.S.C.A. § 40110(b)(2)(E) was to grant to the FAA the same authority as contained in 10 U.S.C. § 2304(c)(1), the FAA would have authority to ignore 41 U.S.C. § 253c only if the agencies subject to 10 U.S.C. § 2304(c)(1)--DOD, the Army, Navy, Air Force, NASA and the Coast Guard--also have the authority to ignore the virtually identical prequalification provisions set forth at 10 U.S.C. § 2319

that apply to those agencies. This is not the case; the provisions of 10 U.S.C. § 2319 apply to DOD, the Army, Navy, Air Force, NASA and the Coast Guard even when those agencies invoke the authority of 10 U.S.C. § 2304(c)(1) to conduct limited competitions. See Service & Sales Inc., B-247673, June 29, 1992, 92-1 CPD ¶ 545; Kitco Inc., B-241868, Mar. 1, 1991, 91-1 CPD ¶ 238; Marine Elec. Sys., B-253630, Sept. 15, 1993, 93-2 CPD ¶ 175. Moreover, nothing on the face of 49 U.S.C.A. § 40110(b)(2)(E) indicates an intention to permit the FAA to ignore the requirements of 41 U.S.C. § 253c concerning prequalification requirements.[3]

While we view the FAA's interpretation of 49 U.S.C.A. § 40110(b)(2)(E) to be incorrect, we will not consider whether the FAA's refusal to consider an offer from Digicomp was permissible because Digicomp's protest is untimely. The February 22 CBD announcement stated that minimum qualification certifications were due on March 3 and any offeror not meeting the minimum criteria "will be disqualified from continuing in the STARS competition." Although Digicomp apparently did not read this announcement, publication of an announcement in the CBD places prospective competitors on constructive notice of the contents of that announcement. See L&L Oil Co., Inc., B-246560, Mar. 9, 1992, 92-1 CPD ¶ 270. Thus, the February 22 announcement placed Digicomp constructively on notice that it would not be permitted to compete for a STARS contract award if it did not file the appropriate certification. Digicomp's first written submission to the FAA concerning the qualification process was its April 7 facsimile in which it submitted "a synopsis of Digicomp's qualification criteria" and stated that a more detailed package would be submitted "provided FAA is accepting qualification data beyond March 31, 1995."

Under the applicable Bid Protest Regulations, protests not based upon alleged improprieties in a solicitation must be filed with this Office or the contracting agency no later than 10 working days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1995).

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[3]The only difference between 49 U.S.C.A. § 40110(b)(2)(E) and the provision at 41 U.S.C. § 253(c)(1), which also applies to the FAA, is that the new provision permits the FAA to "use procedures other than competitive procedures" when needed property or services "are available from only one responsible source or from a limited number of responsible sources," while 41 U.S.C. § 253(c)(1) permits the use of "other than competitive procedures" only when the needed property or services "are available from only one responsible source." In other words, the only apparent change in FAA's authority to use other than competitive procedures is that the FAA now has authority, in appropriate circumstances, to limit competition to multiple responsible sources from which the needed property and services are available, while previously the FAA had no explicit authority to conduct a limited competition among multiple responsible sources, but could only limit competition to a single responsible source.

Obviously, the protest filed here in July does not meet this requirement. Moreover, even if the April 7 facsimile could be considered a protest to the agency--a point Digicomp does not assert--the protest would still be untimely since April 7 is 28 working days after February 22, the date of the CBD announcement which gave Digicomp constructive notice of its basis for protest.[4]

Digicomp argues that nothing in the CBD notices provided any indication that "the FAA would refuse to consider offers from non-prequalified firms." This contention is contradicted by the record; as explained above, both the February 22 and March 21 CBD announcements stated that offerors not meeting the qualification criteria "will be disqualified from continuing in the STARS competition."[5]

Since the protest is untimely, we do not consider Digicomp's allegation that the FAA should permit Digicomp to compete because doing so would not delay the award.

The protest is dismissed.

Comptroller General
of the United States

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[4]Digicomp's protest also is untimely if timeliness is calculated based on the fourth CBD announcement of March 21, which again stated that any offeror not meeting the minimum criteria would be disqualified from continuing in the STARS competition.

[5]Moreover, Digicomp did not file a timely protest even after it was given actual notice that it would not be permitted to compete for a STARS contract. The FAA's April 28 letter stated: "it would be improper to accept minimum qualifications from Digicomp after the required March 31, 1995 submission date," and "there may still exist some opportunity for teaming arrangements with any vendor that has met the STARS minimum qualifications. A list of these vendors will be published via the CBD in the near future." We think this letter was sufficient to place a reasonable prospective offeror on notice that it would not be permitted to compete for a STARS award as a prime contractor. Nonetheless, Digicomp did not protest with this Office or with the FAA within 10 working days of receipt of the April 28 letter.