

01386

T. Sasso  
Proc I

**DECISION**



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

**FILE:** B-187126

**DATE:** December 17, 1976

**MATTER OF:** Tele-Dynamics Division of Ambac Industries, Inc.

**DIGEST:**

1. Where protester objects to agency's determination of minimum needs but does not challenge technical conclusions justifying needs, agency's determination will not be questioned since it has not been shown to be without reasonable basis.
2. Protester objects to brand name or equal procurement as, in effect, sole source in view of technical compatibility requirement which can only be met by brand name offeror because of proprietary nature of data which brand name offeror, and therefore Government, will not release. Since agency was precluded from releasing proprietary data and protester could not have benefited from sole-source procurement, no legal objection can be made to agency reliance on GSA delegation of brand name or equal procurement authority.

By letter dated August 2, 1976, Tele-Dynamics Division of Ambac Industries, Inc. (Tele-Dynamics), protested the proposed award of a contract for the lease of 550 automatic data processing (ADP) modems (a modem is an electronic device which changes digital computer or terminal signals to analog signals that can be transmitted via telephone lines) to any other offeror under request for proposals (RFP) No. IRS-76-36 issued on May 11, 1976, by the Department of the Treasury, Internal Revenue Service (IRS). The RFP, issued on a brand name or equal basis, specified model 4800B-1 of Penril Data Communications Corp. (Penril), the incumbent contractor, currently leasing modems to the IRS.

Pursuant to the provisions of Federal Procurement Regulations (FPR) § 1-1.307-4(b) (1964 ed. amend. 85), the RFP included, inter alia, the following salient characteristic: "The modem must be capable of being on line compatible with the Penril 4800B-1. This compatibility is to include passing data traffic, equalization and remote testing."

B-187126

Tele-Dynamics contends that it is impossible for any vendor but Penril to fulfill this requirement because only Penril has access to the technical information necessary to insure on-line compatibility and, thus, the procurement in effect is "sole source." Tele-Dynamics asks that either: (1) the RFP be canceled and a new RFP issued which adequately defines " \* \* \* the specifications and necessary functions that would insure on line compatibility"; (2) the IRS " \* \* \* supply potential \* \* \* [offerors] with a Penril 4800B-1 for the purpose of establishing such compatibility"; or (3) the IRS " \* \* \* change the requirements such that a generally accepted standard such as [the] Bell 208 [modem] \* \* \* be specified for this requirement."

With regard to Tele-Dynamics' first and second points above, the IRS reports that the technical information necessary to insure on-line compatibility is proprietary to Penril and could not be released without Penril's permission, which Penril has refused to give. Since the IRS currently leases, but does not own, Penril model 4800B-1 modems, it reports that it cannot release such modems to potential offerors for purposes of reverse engineering as Tele-Dynamics in effect requests.

With regard to the third point above, Tele-Dynamics is in effect questioning the procuring activity's determination of minimum needs insofar as on-line compatibility with the Penril 4800B-1 is concerned. An internal IRS memorandum dated July 13, 1976, by the Program Manager, Telecommunications Management Program, justifies the on-line compatibility requirement as essential to the Government's minimum needs from both the cost and technical standpoint. Quoting in pertinent part from the memorandum:

"Should a non-compatible modem be introduced into the system, the effect is the same as over laying two separate teleprocessing systems in the same geographic area which perform the same functions. It is an operational requirement that all modems on any given multi-point circuit be on-line compatible.

"To install non-compatible modems on the multi-point lines radiating from a given service center, multi-point line #1 could be our present Penril modem, multi-point line #2 could be a non-compatible modem and so on. To accomplish this, new circuits would have to be installed at additional expense.

1-14711C

"In addition, expansion is planned for the system to grow at the rate of approximately 60 new sites per year. By having non-compatible modems in the system, this growth will require periodic re-alignment of the data circuits to place the proper modem on the proper circuit throughout this expansion period.

"Should a non-compatible modem be installed on the system, a technician will have to be dispatched to all locations affected in the initial re-alignment to install the non-compatible modem as well as any Penril modems currently on lease that might be affected by the re-alignment.

"The one-time conversion costs of installing a non-compatible modem system will be well in excess of \$100,000. The increase in circuit charges required by the installation of non-compatible modems is estimated to increase by \$13,000 per month. Additional communications circuits will require that additional polling devices be added to the computers with an increase in rental for all ten systems of approximately \$4,000 per month. \* \* \* [The total annual estimated recurring cost is \$213,720.]

"From an operational standpoint, system availability is of prime concern. To install a non-compatible modem on the system will necessitate some amount of system non-availability while circuit re-alignments are taking place and technicians are dispatched to field locations to install modems.

"TDS will have to coordinate a large number of software changes to the system. These software changes are remote terminal address changes required by the re-alignment of the circuits. In some situations, the site will not be operational until the second day.

B-187126

"In the event of the selection of a non-compatible modem, three different vendors become involved (the telephone company, the manufacturer of the non-compatible modem and Penril) and scheduling becomes difficult at best. These vendors are not employees of IRS but are working under contract to perform services for IRS. Recent experience with communications carriers has resulted in a small number of occasions where circuits were engineered incorrectly resulting in outages that extend for several days. Vendors have delivered defective equipment and have had poor coordination of field personnel.

"The net result of these problems is loss of access to the system with a number of adverse impacts. During system down-time, staff is not utilized, cases are not processed on a timely basis, and the overall result is that service to the taxpayer suffers. Extended outages have even more of an impact-case processing can come to a halt; extensive overtime must be utilized to reduce the backlog, etc.

"Major re-alignments will have serious impacts on operations and are to be avoided if at all possible.

\* \* \* \* \*

"\* \* \* The Bell 208 is not compatible with the modems now in service on the system, and by installing any non-compatible modem, IRS would incur additional expenses as described previously.

"In conclusion, for the reasons stated above, we are of the opinion from both a cost and technical standpoint that it would be in the best interests of IRS to obtain modems which are compatible with those currently in service."

Though Tele-Dynamics challenges the cost figures advanced in the IRS memorandum on the theory that competitive bidding could lower the overall cost of the modems even assuming substantial conversion costs, the firm does not challenge the technical conclusions reached by the memorandum.

Our Office has long recognized the broad discretion offered procuring activities in drafting specifications reflective of their

B-187126

minimum needs. Digital Equipment Corporation, B-183614, January 14, 1976, 76-1 CPD 21. Consequently, we will not disturb a procuring activity's determination of minimum needs unless it is clearly shown to be without a reasonable basis. Microcom Corporation, B-186057, November 8, 1976.

Even if we assume for the sake of argument that competitive bidding might lower the overall cost of the modems, Tele-Dynamics has given us no reason to question the procuring activity's technical justification for including on-line compatibility with the Penril 4800B-1 as a salient characteristic. In view of this, we cannot agree with Tele-Dynamics that the IRS should redefine its minimum needs by eliminating on-line compatibility with the Penril 4800B-1 as a salient characteristic.

With regard to Tele-Dynamics' contention that the instant procurement is essentially "sole-source" (in view of the on-line compatibility requirement), as noted above, it is the position of the IRS that the proprietary nature of the technical data requested precluded dissemination to potential offerors. Though we agree with Tele-Dynamics that dissemination of this data to potential offerors would have been desirable from the standpoint of encouraging competition, under the circumstances present here, it is apparent that the IRS did not have this option. Moreover, we have held that where the legitimate needs of the Government can only be satisfied by a single source, the law does not require that these needs be compromised in order to obtain competition. Manufacturing Data Systems Incorporated, B-180608, June 28, 1974, 74-1 CPD 348.

It is unclear whether Tele-Dynamics is suggesting that in view of the circumstances the instant procurement should have been conducted on a "sole-source" basis. If Tele-Dynamics is suggesting this, we cannot perceive in what manner it could have benefited from a sole-source procurement since the Penril 4800B-1 modem would have been specified. In any event, the record contains a "Determination and Findings" by the contracting officer justifying sole-source procurement of the Penril modem because no other known modem was compatible therewith which was forwarded to the General Services Administration (GSA) in the IRS request for a delegation of procurement authority (DPA) for this ADP procurement. After reviewing the request for a DPA, GSA granted same "for the competitive acquisition on a brand name or equal basis for the 550 modems."

B-187126

Thus, the IRS was relying on GSA's authorization in proceeding with the procurement on a "brand name or equal" basis. Cf. PRC Computer Center, Inc., 55 Comp. Gen. 60 (1975), 75-2 CPD 33. Further, it is conceivable that offerors other than Penril could have submitted proposals by purchasing the necessary proprietary data or the modems themselves from Penril. Indeed, we note that numerous suppliers, other than Penril, were solicited by the IRS, and under the circumstances, we cannot legally object to the conduct of this procurement.

Accordingly the protest is denied.

*Thelton Foster*

For The Comptroller General  
of the United States