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

FILE: B-217542 **DATE:** April 26, 1985

MATTER OF: Software City

DIGEST:

1. Definitive responsibility criterion contained in solicitation, which required that each offeror of software obtain a letter from the manufacturer of the product offered guaranteeing the supply of the product for the term of the contract, is not unduly restrictive of competition since GSA's needs required guaranteed supply, as well as benefits derived from dealing with authorized offeror/vendor, such as warranties, manufacturer upgrades, replacement of damaged parts and trade-in allowances.

2. The propriety of a manufacturer's decision to limit the availability of its product is essentially a matter which cannot be adjudicated by this Office.

Software City (Software) protests as unduly restrictive of competition a provision contained in requests for proposals (RFP) No. GSC-KESA-G-00021-N-1-10-85 issued by the General Services Administration (GSA) for the purchase and maintenance of end-user computers (normally microcomputers) and software. This RFP, part of GSA's multiple-award schedule program, permitted firms to submit offers for software only.

The protest is denied in part and dismissed in part.

The provision which Software found objectionable is located in clause K-22 of the solicitation and requires that a firm offering software, if other than the manufacturer, submit a letter of commitment from the manufacturer of the product offered which will assure the offeror of a source of supply for the duration of the contract period. The provision also provides that dealer agreements are not acceptable in lieu of the letter.

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Software argues that this provision restricts competition in that it allows manufacturers to control the degree of competition for their products with GSA. Software states that in order to maintain higher profit margins, many companies are limiting their letters of commitment to only one offeror. Apparently, Software is unable to meet the requirement at issue.

The requirement that offerors furnish a letter from the manufacturer of a particular product guaranteeing a supply of that product for a specified period of time relates to the offeror's responsibility since it demonstrates the offeror's ability to perform. See Services & Sales, Inc., B-210137, May 16, 1983, 83-1 C.P.D. ¶ 514. Where that requirement states a specific and objective standard to measure an offeror's ability to perform, the requirement is deemed to be a definitive responsibility criterion. Such criteria, of necessity, limit the class of offerors to those meeting a particular standard. See Watch Security, Inc., B-209149, Oct. 20, 1982, 82-2 C.P.D. ¶ 353. Section 9-104.2 of the Federal Acquisition Regulation, entitled "Special Standards," provides for the development of these standards where the procuring activity or agency deems it necessary. 48 C.F.R. § 9-104.2 (1984). Our Office has held that an agency may include definitive responsibility criteria in a solicitation so long as the criteria used reflect the agency's legitimate needs. See Haughton Elevator Division, Reliance Electric Co., 55 Comp. Gen. 1051 (1976), 76-1 C.P.D. ¶ 294. Thus, it is clear that an agency may reasonably restrict competition through use of definitive responsibility criteria so long as the definitive responsibility criteria are needed to meet the agency's minimum requirements. See Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 C.P.D. ¶ 48.

Generally, when a solicitation requirement has been challenged as unduly restrictive of competition, the initial burden is on the procuring activity to establish prima facie support for its contention that the restriction is needed to meet its minimum needs. Once this prima facie support is established, the burden then shifts to the protester to show that the requirement is clearly unreasonable. Rolm Corp., B-214052, Sept. 11, 1984, 84-2 C.P.D. ¶ 280; Logistical Support Inc., B-208763, Apr. 22, 1983, 83-1 C.P.D. ¶ 436. With respect to the contracting agency's initial burden, our Office has recognized that the agency has primary responsibility for determining its needs and drafting requirements which reflect those needs. Romar Consultants, Inc.,

B-206489, Oct. 15, 1982, 82-2 C.P.D. ¶ 339. Moreover, the fact that only one offeror can comply with such a requirement does not indicate that the competitive procurement regulations have been violated, provided that the requirement is reasonable and necessary. Gerber Scientific Instrument Co., B-197265, Apr. 8, 1980, 80-1 C.P.D. ¶ 263.

Here, the record establishes a prima facie case that the requirement is necessary to meet the agency's minimum needs. The letter of commitment from the manufacturer is required by GSA to insure, while the item is on the schedule, a continuous supply of the product from an offeror who is authorized to sell the product to the government. The record further indicates that if a product is not obtained through such an authorized offeror, GSA bears the risk that the offeror will not be able to furnish the product, and that GSA may have performance problems and lose certain manufacturer benefits derived from purchasing the product through such an offeror, such as warranties, manufacturer upgrades, replacement of damaged parts and trade-in allowance. The manufacturer is under no obligation to furnish these benefits to the government if the products are not sold through an offeror who is authorized to sell the product to the government since there is no privity of contract between the manufacturer and the government. In short, GSA's primary justification for this requirement is to ensure a reliable supply of software for the duration of the contract and to thus avoid unsatisfactory performance and default.

While Software contends that this requirement is restrictive because it can be difficult for potential offerors to obtain the necessary commitment from manufacturers, Software has not shown that this restriction is unreasonable. Software's concern does not detract from the agency's legitimate need to be certain that an authorized product will be available for the duration of the schedule contract.

With regard to Software's contention that manufacturers are restricting competition by limiting the number of letters of commitment that they issue resulting in the government paying higher prices, we have held that the propriety of a manufacturer's decision to limit the availability of its product is essentially a matter which cannot be adjudicated by this Office. See C3, Inc., B-211930, Dec. 30, 1983, 84-1 C.P.D. 44. In any event, GSA reports that it received multiple letters of commitment from several manufacturers. Also, GSA advised that the government is under no obligation to make an award if it believes that it is not receiving a fair price.

In view of the above, it is our view that the requirement was reasonably necessary to meet GSA's minimum needs and the mere fact that the protester was unable to provide assurances that the products it offered would be available throughout the period of the contract does not make this requirement unreasonable.

for Seymour Efros
Harry R. Van Cleve
General Counsel