



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Starr Systems
File: B-237955.2
Date: April 24, 1990

Thomas F. Richardson, Esq., Chambless, Higdon & Carson, for the protester.
Millard F. Pippin, Office of the Assistant Secretary of the Air Force, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation requirement that offerors complete original equipment manufacturer's (OEM's) maintenance training prior to preaward survey is unobjectionable where OEM, the only source of acceptable spare parts, will make parts available only to firms with training and there would be risk of delay in contract performance if training was not completed prior to award.
2. Fact that original equipment manufacturer (OEM), the only source of necessary spare parts, is in position to influence competition by imposing restrictions upon spare parts availability does not render procurement defective where (1) the restrictions appear reasonable and have not been applied to prevent any particular firm from purchasing the parts and (2) the only alternative procurement method would be a sole-source award to the OEM, but record does not support conclusion that OEM is only acceptable source. Ability to obtain parts is matter of firm's ability to develop business relationship with OEM, a matter outside the General Accounting Office's purview.

DECISION

Starr Systems protests a training requirement in request for proposals (RFP) No. F09650-89-R-0196, issued by the Department of the Air Force for maintenance of TEMPEST-certified microcomputers and peripheral equipment. Starr complains that the provision is restrictive of competition.

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We deny the protest.

Zenith Data Systems manufactured the TEMPEST equipment (which is designed to meet certain security standards for processing classified information) and had been providing maintenance as well. In order to enhance competition, the Air Force decided to allow entities other than Zenith to provide the maintenance, which also encompasses acquisition of Zenith-approved spare parts. As originally issued, the RFP required that the successful contractor be trained in TEMPEST equipment repair and have 1 year of repair experience with the equipment. However, following release of the solicitation, Zenith indicated that its equipment training was a prerequisite for authorization to purchase its spare parts. The Air Force then amended the solicitation to require that the successful contractor, either directly or through a subcontractor, be Zenith-certified to maintain TEMPEST equipment, prior to the preaward survey.

It is undisputed that Zenith spare parts are necessary to meet the agency's maintenance needs, i.e., to assure that the equipment operates in a safe, effective, and dependable manner without compromising security standards critical to processing classified information. The Air Force explains that because Zenith is the original equipment manufacturer and the agency does not have any manufacturing data, data rights to replacement parts, or access to maintenance manuals, Zenith is the only source for spare parts and maintenance training for the equipment here. Further, the Air Force determined that it would not be feasible for it to buy repair parts directly from Zenith and provide them as government-furnished material, because of a lack of sufficient TEMPEST-trained government personnel and storage facilities. It apparently was in light of this need for Zenith parts that led the Air Force to agree to include the training requirement in the RFP.

Starr nevertheless contends that it already has sufficient experience with the repair of TEMPEST equipment to qualify for award, and that the training requirement therefore is unnecessary and restrictive of competition, and serves only to allow Zenith to control the competition. Starr complains in this regard that Zenith has shown an unwillingness to negotiate in good faith by refusing to specify the exact terms and conditions it will impose as a prerequisite to agreeing to make the necessary spare parts available for purchase by the successful contractor.

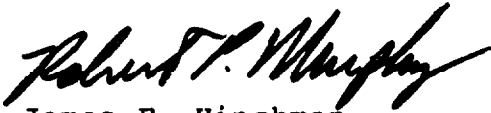
We find the training requirement legally unobjectionable. The training requirement was included in the RFP, not because the Air Force considered Zenith training the only acceptable means of assuring proper performance but, as indicated above, because Zenith considered its own training necessary to the proper servicing of Zenith equipment and would not make its spare parts available for purchase to firms without it. The requirement was included in the RFP only to put prospective offerors on notice of a Zenith requirement that would have to be met in order for a firm to obtain the parts necessary to perform. The Air Force's legitimate requirement for Zenith spare parts is not rendered improper by the fact that Starr and other firms may not be able to obtain them. See generally Target Financial Corp., B-228131, Nov. 23, 1987, 87-2 CPD ¶ 506.

While Zenith does appear to be in a position to impose conditions on offerors, and thereby to affect the competition, its position results solely from its status as the sole available source of the spare parts, and not from any favoritism or other improper action by the agency. As the government has no contractual relationship with Zenith under which it can compel the firm to make its spare parts available, the only alternative to conducting this procurement competitively, subject to conditions insisted upon by Zenith, would be to make a sole-source award to Zenith on the basis that it is the only firm capable of furnishing the necessary parts. Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(1) (1988). Starr does not advocate this alternative and, moreover, there is no basis for concluding that only Zenith is a viable source. While offerors will be required to comply with the training requirement and other conditions, Zenith has not indiscriminately refused to make parts available to any particular firm, and there is no indication that any conditions imposed are unreasonable. For example, the training requirement appears to reflect Zenith's legitimate interest in assuring that its equipment is maintained properly, in accordance with its standards, and Zenith has made the training available on an on-going basis since 1986. In addition, the Air Force has sought and received assurances from Zenith that it will negotiate with prospective offerors in good faith over spare parts availability.

Essentially, we think the situation here relates to Starr's and other firms' abilities to develop a business relationship with a supplier; that is, it is Starr's responsibility to negotiate a parts purchase agreement with Zenith, the success of which effort the government cannot guarantee. This generally is a matter between private parties and is

not for consideration under our bid protest function. See Electro-Methods, Inc., B-215841, Mar. 11, 1985, 85-1 CPD ¶ 293; C3, Inc., B-211900, Dec. 30, 1983, 83-2 CPD ¶ 44. Any uncertainty as to the ultimate availability of spare parts amounts to a business risk that, under the circumstances here, all offerors must accept. See Sentinel Electronics, Inc., B-221914.2 et al., Aug. 7, 1986, 86-2 CPD ¶ 166.

Starr argues that the Zenith training should not be required until after award, so that only the successful offeror will have to incur the expense of the training. However, the solicitation contemplated that performance would begin immediately after award, and an unacceptable risk of delay in performance could result if the contractor lacked the necessary training at the time of award.


James F. Hinchman
General Counsel