



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Systems Application & Technologies, Inc.

File: B-270672

Date: April 8, 1996

Timothy J. Adams for the protester.

Daniel A. Laguaite, Esq., Department of the Navy, for the agency.

Jeanne W. Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that experience requirements for contractor's personnel are unduly restrictive of competition and can only be met by incumbent personnel is denied where agency establishes that specific experience is necessary to meet its minimum needs.
 2. Contracting agency is not required to acquire and furnish to successful offeror commercial software purchased by incumbent contractor and modified to produce contract reporting requirements where agency asserts that it did not pay for development of the software, and thus has no rights to it, and protester has not shown otherwise.
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DECISION

Systems Application & Technologies, Inc. (SA-TECH) protests requirements under request for proposals (RFP) No. N00421-94-R-0132, issued by the Naval Air Warfare Center-Aircraft Division, Patuxent River, Maryland, for modification management support services for its Naval Aviation Maintenance Office (NAMO).¹ SA-TECH principally challenges the RFP's personnel experience requirements as unduly

¹NAMO supports the naval air community in matters of aircraft modification, including providing centralized management for naval air modification kits.

restrictive of competition, and also argues that the agency should provide certain computer software to the successful offeror.²

We deny the protest.

The RFP contemplates the award of a cost-plus-fixed-fee contract for a base period, with 4 option years, to the lowest-cost, technically acceptable offeror. The required services consist of 11 tasks which can be summarized as: assembling modification kits; tracking funding obligations for kit assembly tasks; evaluating commercial versus Navy kit assembly costs; warehousing assembled kits and transporting them to appropriate installation sites; tracking the field inventory of kits; and tracking compliance with the technical directives which provide the field activities with the requirement and instructions for the installation of the kits.

EXPERIENCE REQUIREMENTS

Five key labor categories are listed in the RFP, the experience requirements for four of which--senior logistician, logistician, junior logistician, and data management analyst--SA-TECH maintains are restrictive of competition. Specifically, SA-TECH objects to the requirement that these key personnel have "Naval Air" experience with the modification kits; for example, for the senior logistician the RFP requires at least 6 years experience with "Naval Air Technical Directive Kit Management Procedures" and the "Naval Air Technical Directive Status Accounting System." SA-TECH maintains that these requirements can only be met by personnel who have worked, or are currently working, on the NAMO program, and that they are unnecessary for successful performance. According to SA-TECH, the concepts of aircraft/ship/weapon system modification are fairly simple, and the systems and processes are generally the same. SA-TECH states that it has personnel on other Navy contracts currently performing tasks functionally identical to this effort, who nevertheless would not have the required experience in "Naval Air" systems and procedures. SA-TECH states that it has been unable to locate personnel who can meet the qualifications, and that another firm has obtained exclusive contingency hire agreements with the majority of the incumbent personnel, so those persons are not available to SA-TECH.

²In its original protest, SA-TECH also argued that Federal Acquisition Regulation § 52.222-42 required the Navy to provide wage rate and fringe benefit information for all labor categories expected to be employed under the contract, and that neither the RFP nor subsequent amendments provided that information. The Navy refuted this allegation in its report, but SA-TECH failed to address it again in its comments. We thus consider the issue abandoned and will not consider it. Coulter Corp. et al., B-258713; B-258714, Feb. 13, 1995, 95-1 CPD ¶ 70.

The determination of a contracting agency's minimum needs and the best method for accommodating them are matters primarily within the agency's discretion. Tucson Mobilephone, Inc., B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79, aff'd, B-250389.2, June 21, 1993, 93-1 CPD ¶ 472. This discretion extends to determining whether key personnel need to have experience with work of the specific nature to be performed under the solicitation. See, e.g., Marine Transport Lines, Inc., B-224480.5, July 27, 1987, 87-2 CPD ¶ 91. Further, where a requirement relates to human safety or national defense, as here, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness. Tucson Mobilephone, Inc., supra; Marine Transport Lines, Inc., supra. Where a protester challenges such requirements as unduly restrictive, we will review the record to determine whether the restrictions imposed are reasonably related to the agency's minimum needs. Id.

The experience requirements are unobjectionable. The Navy states that NAMO's work is only a part of the manned aircraft modification effort; different organizations or levels are involved in recommending an aircraft modification, designing, approving, and funding the modification, assembling the required kit, warehousing, issuing and tracking the kit through the system, and installing it. NAMO's work must be coordinated with these organizations in the Naval Air community, and this is accomplished through the use of Naval Air standardized systems and procedures. The Navy maintains that the effort of the key individuals requires analysis, reporting, or support for other organizations or organizational levels, and that they must perform using Naval Air systems and procedures so that their efforts can be integrated into the larger Naval Air aircraft modification system. In order to do this properly from the outset, the Navy determined, these individuals must be experienced with those systems and procedures. While, as SA-TECH alleges, some of the NAMO functions are basic warehousing and inventory management, these functions are performed, not by the key personnel, but by warehouse workers for whom "Naval Air" experience is not required.

The Navy's explanation for the requirements generally establishes that familiarity with Naval Air systems and procedures will facilitate successful performance, and the RFP's position descriptions confirm that the key personnel in question will in fact be involved in the Naval Air processes. For example, the senior logistician is to serve as "the primary point of contact for obtaining Naval aviation modifications task progress and milestone tracking," while the logistician and junior logistician are to "appl[y] Naval Aviation Modification experience to perform functions such as kit installation support, Technical Directive review, configuration management support, Technical Directive kit quality assurance, kit requisition status, kit reclamation status and kit incorporation status," and also will provide "technical analysis, recommendations, and reports concerning modification management support for assigned Naval Aviation Weapon systems/subsystems." SA-TECH has not shown that the work required does not involve substantial integration with other Naval Air

elements; that the specific experience requirements will not further that aspect of performance; or that Naval Air procedures are generic in the sense that experience with any Navy or other military activity will suffice (as SA-TECH asserts). We thus conclude that the experience requirements are reasonable.

The fact that SA-TECH has had difficulty finding personnel who can meet the Navy's qualifications, while unfortunate, is not a basis for challenging requirements such as these, which are reasonably related to the agency's needs. See Industrial Maintenance Servs., Inc., B-261671 et al., Oct. 3, 1995, 95-2 CPD ¶ 157. The agency is not required to compromise its needs for the purpose of maximizing competition. Harbor Branch Oceanographic Inst., Inc., B-243417, July 17, 1991, 91-2 CPD ¶ 67.³

SOFTWARE

SA-TECH argues that the agency should provide the successful offeror with software (which includes formats for the reports, listings, and graphics required to be submitted under the contract) allegedly developed by the incumbent contractor at government expense. It claims that, otherwise, any offeror which obtains the software may gain an unfair competitive advantage. However, while the Navy confirms that an incumbent contractor purchased commercial software and modified it to generate reports required under the contract, it states that the software was not developed as a contract requirement, and that the government did not pay for the software development. The Navy concludes that it could not acquire the software and provide it to the successful offeror because it has no rights in the software. In support of its position that the government owns the rights to the software, SA-TECH cites Defense Federal Acquisition Regulation Supplement § 252.227-7013(c)(2), "Rights in Technical Data and Computer Software (Oct. 1988)," a provision included in the incumbent contract which stated that the government shall have unlimited rights in "(ii) Computer software required to be

³In any case, the Navy disputes SA-TECH's argument that only incumbent personnel could be found technically acceptable, and offers a long list of personnel with types of non-NAMO naval aviation modification or maintenance experience that it maintains would satisfy the experience requirements. The Navy explains that these other qualified personnel are available because, although it has centralized the management of Naval Air modification kits, fewer than 20 percent of the kits are produced by NAMO; the remainder are produced at Navy depots or private contractor facilities. The Navy states that it received three proposals by the closing date, some of which propose individuals other than incumbent personnel. Although one offer was based almost exclusively on incumbent personnel, the agency further notes, some of those personnel were also offered by another offeror.

originated or developed under a Government contract, or generated as a necessary part of performing a contract."

We find no basis for questioning the agency's position. The incumbent contract did not contain any provision requiring the contractor to develop the reporting software in question, and it is the agency's position (and the terms of the incumbent contract do not suggest otherwise) that the software was not necessary to perform the contract. SA-TECH has furnished no evidence (besides its assertions) that the software in fact was developed under the circumstances contemplated by the provision. Thus, even if SA-TECH is correct that the software may give another offeror a competitive advantage, this would not be an improper advantage, since it would not result from preferential treatment of an offeror or other unfair action by the government. Skyland Scientific Servs., Inc., B-229700, Feb. 9, 1988, 88-1 CPD ¶ 129; Halifax Eng'g, Inc., B-219178.2, Sept. 30, 1985, 85-2 CPD ¶ 559.

BAD FAITH

SA-TECH claims that the Navy has engineered this procurement so that only the firm which offers the incumbent personnel and obtains the reporting software will be technically acceptable. The Navy generally denies SA-TECH's charges, and specifically denies that it had any knowledge of contracting arrangements made by incumbent employees, or that it has been involved in any offeror's decision as to what personnel to hire. SA-TECH offers nothing in support of its allegation but its report of undocumented conversations with incumbent personnel and its own speculation. Absent some independent supporting information, there is no basis to conclude that the agency acted with the intent of hurting the protester, the showing that must be made in order to establish bad faith. QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94.

The protest is denied.

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