

February 15, 1994

P.S. Protest No. 93-29

TIMEKEEPING SYSTEMS, INC.

Solicitation No. 102590-93-A-0135

DIGEST

Protest against the terms of a solicitation is denied where substitution of a product description for a specification would not enhance competition, and protester has not met its burden of proof that specification is unduly restrictive or that procurement is biased against it and in favor of another.

DECISION

TimeKeeping Systems, Inc., (TKS) timely protests the terms of solicitation 102590-93-A-0135 for data collection devices and data transfer stations. The solicitation, issued September 24, 1993, by the Procurement office at Postal Service headquarters, sought initial and optional quantities of the two items and optional extended warranties on the items for four years.

A ten-page "Statement of Work for Procurement of Collection Box Scanners" (SOW) and a seventeen-page appendix entitled "Specification for Hardware, Software Protocol, and Design Requirement for Data Collection Devices utilizing Touch Memory" dated September 23, 1993, (Appendix A) describe the data collection device¹ in considerable detail. Paragraph 1 of the SOW provides a general description of the device:

The collection devices shall be battery operated, lightweight, durable and easy to use. The devices shall collect the required data by reading a "Touch Memory" device. The "Touch Memory" chip is a button-shaped, water-

¹ Except where the context clearly reflects otherwise (e.g., when reference is made to "the Touch Memory device"), the term "device" refers to the data collection device throughout this decision.

resistant, stainless steel encased memory chip which will be installed inside the [mail] collection box, at a collection point, or carried by postal personnel. The data recorded by the collection device shall be transferred, through a data transfer station, to the U.S. Postal Service's PC-based Decision Support Information System (DSIS) for data analysis and report generation by a DSIS resident collection box scanner application program.

The required Touch Memory devices, which were developed by Dallas Semiconductor, are being purchased separately from this solicitation.² The SOW requires the data collection device's firmware to meet the Touch Memory protocols set out in Appendix A, and specifically, to "be compatible with Dallas Semiconductor's NEWPCSA, RD_ROM, RD_RAM, RC_CLOCK, WR_RAM and WR_CLOCK software." SOW 3.2. (The latter programs are sometimes referred to as Touch Memory utilities.)

The specification contains various standards for the device. The device "shall weigh no more than 8 ounces." SOW 3.1.1.2. It "shall be durable and be capable of withstanding . . . a minimum of ten, four foot drops onto a concrete surface, in any orientation, and remain operational." SOW 3.1.1.3. It "shall be capable of operating in an environment with 0 to 100% humidity, condensing," and "shall meet the following temperature requirements: Operating -20° to +125° F[;] Storage -40° to +140° F." SOW 3.1.1.4.

TKS submitted several questions concerning the solicitation to the contracting officer on October 12 to which the Postal Service replied on October 18. TKS wrote again on October 19, setting out a further list of questions. TKS's initial questions and some of its second set of questions were also answered in solicitation amendment A02 of October 25. TKS's protest followed.

The protest includes the following contentions:

-- The use of a statement of work for this requirement is improper. Procurement Manual (PM) 2.3.2 c.1. provides that "[w]henver standard or modified commercial products will meet Postal Service requirements, product descriptions must be used instead of specifications." Commercially available collection devices will meet the Postal Service's needs, and a product description should be used to obtain them.

-- The statement of work is too restrictive. "The software compatibility requirement of . . . 3.2 is so narrowly defined that only one possible hardware design can meet it exactly. The software utility referred to in S.O.W. 3.2 . . . are intended to read touch buttons. They are not intended to communicate with a data collection device. Their use to evaluate compatibility of data collecting devices is inappropriate and . . . excludes[s] TKS and other offerors from this procurement. . . . The downloading method required by the specification is slow and inefficient. . . . TKS believes that Postal Service engineering intends to use the downloading protocol specification to eliminate all offerors except one"

-- The downloading method required by the specification is slow and inefficient.

² "Touch Memory" is a trademark of Dallas Semiconductor.

TKS's downloading system is more efficient, and will save more than the cost of the device over its useful life. TKS's method also allows additional specified benefits.

-- The hardware "recommendation" of section 2 of the specification³ is "so narrowly defined that only the . . . configuration defined [there] can meet it." It is inappropriate for section 3.1.7 B., Additional Features, of Appendix A to suggest additional features which may be added to the basic features of the data collection device firmware.

-- Various elements of the solicitation are biased toward another offeror, Systems Integrators, Inc., (SI) and against TKS. The Postal Service knew that TKS's device exceeded the eight ounce weight limit; section 3.2's requirement for compatibility with the Dallas Software utility programs was intended to exclude TKS; and the requirement for a one-year warranty eliminates the advantage of TKS's standard one-year warranty over SI's standard 90-day warranty.⁴

-- There has been a pattern of discrimination against TKS and in favor of SI. Specifically, information furnished the Postal Service by TKS under a promise of confidentiality was transmitted to a TKS customer/competitor by postal engineers, damaging TKS's commercial relationship.⁵ TKS was discouraged from beta testing its product with the Postal Service (except for two limited tests "already in process"); TKS does not believe SI has been similarly limited. A previous procurement of similar equipment (solicitation 102590-93-A-0134) was improperly awarded to SI. TKS separately protested that award.⁶

³ Reference to section 2.0 of Appendix A, which includes an illustration of a typical data collection device, is apparently intended. As the solicitation was amended by Amendment A02, the hardware specifications of the appendix are "given only as a sample to demonstrate hardware functionality." See footnote 7, *infra*.

⁴ TKS also complained that the specification used the term "cradle" to describe the data transfer station, contending that only SI so used the term. This contention was subsequently dropped.

⁵ The record reflects that TKS had been marketing a third party's data collection device, but decided to develop its own device, which it discussed with the Postal Service's Engineering Research and Development (ERD) personnel, under an oral request for confidentiality. Despite that request, ERD personnel subsequently discussed TKS's device with the third party, prematurely disclosing TKS's plans to its potential competitor.

⁶ Solicitation -134 sought the purchase of 543 data collection devices and 196 data transfer stations for use in the New York City area. Although the requirement had been the subject of a request for a noncompetitive purchase from Systems Integrators, Purchasing decided to acquire the requirement competitively using simplified purchasing (PM 4.2), which generally is available for purchases of \$100,000 or less, although it may be used for appropriate larger purchases with higher level approval. Under simplified purchasing, "quotations must be solicited from a sufficient number of qualified sources (normally at least three) to ensure that the price is fair and reasonable." PM 4.2.1 d.2.

A written request for quotations (RFQ) was issued August 11, to TKS, SI, and TEK Communications Services (TEK). Quotations were due August 16. Delivery was sought within sixty days after contract

-- The answers provided to TKS's questions of October 12 are "vague and evasive," except when they are "clearly to TKS's disadvantage," showing the Postal Service's bias against TKS. TKS specifically objects to the answer to its question concerning meeting the temperature requirement,⁷ contending that "[t]he

award. The three firms submitted quotations, which were the subject of telephonic discussions which included requests for best and final offers. TEK quoted the lowest price, but was not considered for award because "the software to make [its] system operational for use on Postal Service collection boxes was not fully functional at the time [quotations] were solicited." SI's \$240,00 price was approximately \$4,600 lower than TKS's. A purchase order was issued to SI on August 26.

TKS's protest, P.S. Protest No. 93-28, concerning the award to SI raised several objections to the process, including the initial attempt to solicit the requirement noncompetitively, the failure to advise offerors that the simplified purchasing process was being used, the use of simplified purchasing for a purchase in excess of the \$100,000 threshold, the failure to notify TKS in the contracting officer's telephone call that it was within the competitive range or that the telephone call constituted discussions, the failure in the course of discussions to afford TKS or TEK an opportunity to revise their proposals or to request best and final offers, and the consideration of additional items offered by SI in considering it for award while not considering additional benefits offered by TKS. TKS asserts that TEK was never considered seriously for the requirement, and was included only to meet the requirement to solicit three sources. TKS assumes that SI's initial offer was higher than TKS's, and that only SI was offered the opportunity to revise its price.

Protest 93-28 was summarily dismissed (PM 4.5.7 p.) on November 5 because it was received more than fifteen working days after the award of the contract which it challenged. PM 4.5.4 d. In response to TKS's subsequent inquiry whether the issues raised by the protest would be incorporated into this protest, TKS was advised that "the contentions made in protest 93-28 and the contracting officer's rebuttal will be a part of the record in protest 93-29 in connection with the contention in protest 93-29 that there has been 'a pattern of favoritism' with regard to solicitations [-0134 and -0135]."

⁷ The question and answer appear in Amendment A02 as follows:

31. *Question.* A number of the Dallas chips indicated in the specification are not currently available in industrial temperature range. This causes a conflict with the temperature range required by the SOW Sec. 3.1.1.14. It is not possible to perform the testing required, or guarantee the specified temperature range without industrial temperature parts. Also, Dallas has indicated to us that these parts may not be available in time to meet the delivery schedule (depending, of course, on the actual date of contract award). How will the solicitation be modified to reflect this?

Answer. Appendix A is modified as follows:

Change appendix A, Sec. 1.2, Variations to Specification, as follows:

"1.2 Variations to specification- All software protocols must be strictly adhered to.

The hardware specifications (i.e., chip sets, integrated circuits) are given only as a sample to demonstrate hardware functionality.

temperature requirements of the solicitation cannot currently be met by any serious offeror."

-- The solicitation fails to address adequately the issue of the durability of the data collection devices. TKS's experience is that user abuse of the devices is a serious problem. The Postal Service's durability requirements do not reflect "real-world" conditions.

The protester requests appropriate revisions of the solicitation, removal from the procurement of the individuals responsible for the bias against TKS, review of the solicitation, the evaluation of offers and award of the contract by individuals not involved in the creation of the specification and the solicitation, and the continuing supervision of the award process by the General Counsel.

The contracting officer's statement responds to the various contentions of the protest.

-- The use of a specification, rather than a product description, was intended to provide uniformity and encourage competition. Touch Memory is fairly new, and there is no standard industry protocol for it. The Postal Service's research indicated that individual vendors' approaches incorporated their own proprietary protocols for data storage. While different vendors' devices were similar, they would not work with each other or with the USPS software application. "This meant that once a vendor's device was selected, the USPS would become dependent upon that vendor's proprietary protocol for this program and any future procurements." To allow competition, the Postal Service adopted Dallas Semiconductor's "public domain" Touch Memory protocols, which were available to all vendors, and which all vendors appeared to be able to incorporate into their products.

-- The Postal Service believes that the software compatibility requirement of the SOW is extremely relevant to its needs because it will allow the Postal Service to develop its application software while allowing devices from different manufacturers to be used. "[M]arket research has identified at least three other vendors that can meet the requirements of the SOW."⁸

-- The Postal Service does not believe that TKS's downloading protocol offers useful benefits given the limited amount of data intended to be downloaded in each transaction. The additional features of its system which TKS has identified would not be used in this application. The choices in this regard are appropriately made by the contracting officer, and may be overturned only for a clear abuse of discretion, citing *Georgia Power Company*, P.S. Protest No. 90-01, February 14,

Note: All integrated circuit chips referenced are Dallas Semiconductor part numbers. The use of these specific 'chips' in the data collection device is not a requirement."

⁸ Attached to the contracting officer's statement is descriptive literature from four vendors (including SI) which describes data collection devices which are said to meet the SOW's requirements as to weight, durability, and temperature range.

1990.

-- The specification does not require the use of a specific configuration, and various manufacturers have demonstrated their ability to meet it. The protester has provided no authority for its contention that it is improper for a specification to make reference to additional features.

-- The specification was not designed around one vendor's products. Product specification sheets from several vendors demonstrate their ability to provide conforming products. That other vendors may not be able to meet them does not render the requirement restrictive if it reflects the Postal Service's legitimate needs. With respect to the protester's specific points, the requirements for an eight-ounce weight and for software compatibility with the Dallas Semiconductor protocol and utilities were established before TKS demonstrated its device to the Postal Service and the Postal Service first became aware of its features.⁹ A one-year warranty is common in postal procurements for items of this sort, and does not materially harm TKS.

-- There has been no pattern of discrimination against TKS. The discussions with its customer/competitor occurred in the course of the Postal Service's investigation of the market; while there have been some local purchases of similar equipment, there has been no "beta product testing" with any vendor. Because the Postal Service is developing its own software, it sees no need to test TKS's software. The protest concerning the earlier solicitation was properly dismissed as untimely, but none of its allegations have merit, and it is not relevant to this procurement.

-- The answers to TKS's questions were not intended to be vague or evasive, but to clarify the issues raised. Some of TKS's questions were not answered because they appeared to be program related and not relevant to the solicitation. The Postal Service's temperature requirements are realistically based on temperatures which can be expected to be encountered in use throughout the fifty states and the limitations of the lithium battery power source. They were not intended to be restrictive, and various vendors' product literature demonstrates that they can be met.

-- Durability is a criterion recognized by the solicitation; the ten four-foot drop requirement is a minimum; a device's ability to withstand more will be considered in the evaluation of offers. The selection and weighting of evaluation criteria are within the contracting officer's discretion, citing *Service America Corp.*, P.S. Protest No. 91-56, October 30, 1991.

TKS and several interested parties supplied comments on the contracting officer's statement as follows:

TKS:

⁹ The contracting officer's statement identifies that as occurring on August 23. Her subsequent comments, discussed below, correct that date to July 15.

- The data collection devices and transfer stations are clearly commercial products which PM 2.3.2 c.1 requires be purchased by use of a product description. The contention that a specification will enhance competition is immaterial.
- The Postal Service need not become dependent on any one vendor's protocols for future procurements. Applications which communicate with more than one type of device are possible, and have been demonstrated in the related area in connection with the use of these devices for guard patrol.
- The Dallas Semiconductor protocol is hardware specific because it is dependent on the use of a specific Dallas clock chip connected to the device's touch port. Such a design cannot be a standard which multiple vendors can meet. That other manufacturers can meet the software compatibility requirements of the SOW by adopting the Dallas Semiconductor design does not justify the exclusion of other designs.
- The contracting officer's assertion that TKS's downloading protocol will provide no benefit to the Postal Service is inconsistent with the SOW's requirement that the device have 64Kb of memory, enough for 5000 records. If that amount of memory is not required, the specification should be revised.
- That a specification should not include recommendations or possibilities is a "common sense concept," consistent with the derivation of the term "specification."
- While TKS does not contend that the eight-ounce weight requirement does not reflect the Postal Service's legitimate needs, it fails to understand how the figure was arrived at instead of some other figure.
- The Postal Service was aware of TKS's protocol as early as July 15, not later. TKS was initially told that compatibility only with NEWPC was required; the Postal Service added references to Touch Memory utilities to SOW 3.2 after it learned of TKS's difficulties with them.
- The contracting officer's contention that a one-year warranty is consistent with the Postal Service's requirements in similar procurements does not support the restriction here.
- The prompt disclosure to TKS's customer/competitor of its plans to develop its own data collection device, in the face of TKS's explicit request for confidentiality, is evidence of bias or bad faith sufficient to meet the heavy burden of proof needed to refute the presumption that contracting personnel have acted in good faith.
- Contrary to the contracting officer's statement, at least some of the other vendor's products have been evaluated in connection with this procurement, although TKS's offers to provide units for evaluation have been declined. Once the Postal Service indicated that it intended to use its own software, TKS no longer asked that its software be considered.

-- The points which TKS has raised with respect to procurement -0134 are germane to this protest and should be considered in connection with TKS's assertions of bias here.

-- The answers to various of TKS's questions were, in fact, unclear or incomplete, and several of TKS's questions relevant to elements of the solicitation, such as the cost of technical support and whether the Postal Service would be providing any maintenance on the units, were not answered.

-- While various vendors have stated that their offered devices can meet the solicitation's temperature requirements, they cannot guarantee that those temperatures can be met because, to the best of TKS's knowledge, all the devices incorporate a Dallas Semiconductor chip which the manufacturer does not guarantee to function below -20° F. The Postal Service should not have relied on the vendors' statements, but should have investigated the matter to confirm the problem presented by the use of the noncompliant chip.

-- The statement of work continues to understate the need for an adequately durable device. TKS's experience with similar devices in testing applications has shown the likelihood for abuse by users.¹⁰ Contrary to the contracting officer's assertions, TKS is raising this issue not because its device is more durable than others, but because it believes that the Postal Service does not understand the potential abuse to which the units may be subjected.

System Integrators, Inc., an interested party:

-- At the time the solicitation was released, SI's products were not compatible with the Dallas Software protocol. The requirement for such compatibility was not due to bias in favor of SI's product.

-- SI, like TKS, was "discouraged" from field testing its product, and discontinued pilot programs at the Postal Service's request.

-- At least three other vendors in addition to SI can meet the eight-ounce weight requirement, which does not bias the specification to SI.

-- The postal personnel working on this project "have always acted in a professional, fair, and unbiased manner." SI was not provided with any information which would bias the procurement.

Brooklyn Computer Systems, Inc., (BCS) an interested party:

-- While BCS has its own proprietary downloading software, it also supports the Dallas Semiconductor communication specifications. Use of any one vendor's

¹⁰ As the contracting officer's response makes clear, TKS's comments in this regard relate to devices using a bar code scanning technology, not the Touch Memory technology involved in this solicitation.

proprietary downloading method would restrict competition far more than any of the practices complained of in the protest.

-- While Dallas Semiconductor has made its firmware available to firms producing Touch Memory readers, its most recently revised versions were not available in time for this solicitation, so BCS developed its own firmware to meet the specification.

-- BCS's device can meet the durability requirements of the solicitation; it incorporates features to withstand abuse in low temperatures over time.

TEK Communications Services Incorporated, an interested party:

-- The Postal Service specification is somewhat narrow, and implementing it requires "that some of superior design characteristics had to be circumvented." In other situations, TEK supplies its devices with "device drivers" written to communicate with specific items of hardware. Had the Postal Service chosen this approach, it could have migrated more easily to better follow-on hardware solutions.

-- The solicitation "could possibly be construed" to be biased to one offeror, but TEK hopes that is not the case; TEK has achieved full compliance with the SOW.

-- TEK's questions on the solicitation were answered objectively and professionally.

-- TEK assumes the Postal Service has correctly stated its durability requirements; TEK's unit meets and exceeds them.

The contracting officer replied to the various comments as follows:

-- A product description was not adequate to describe the Postal Service's requirements, which include the reasonable restrictions imposed by the SOW. While the vendors' commercial literature which the contracting officer has offered demonstrates that the various products can meet the required weight, shock, and temperature requirements, the literature does not address the software protocols used by the commercial units.

-- The protester's contentions concerning the use of individual protocols do not take into account the impact of such an approach on a national program. While the selection of a common technology did involve some level of dependency on one supplier, its advantages outweighed those of other available technologies.

-- The Postal Service believes that compatible devices can be furnished without the use of specific Dallas Semiconductor chips by the use of "emulation."

-- The Touch Memory utilities were included in SOW 3.2 "to ensure compatibility of the devices with the protocol and the application program" because preliminary investigation indicated that some manufacturers were revising those programs. Lack of standardization could impair the effectiveness of the overall program.

-- The Postal Service is not prepared to sacrifice competition and compatibility for faster downloading scores; in this regard, the SOW's RAM memory requirement has been based on available designs and possible future needs and uses.

-- The eight-ounce weight requirement was set prior to the July 15 meeting with TKS; in any event, TKS's unit was not in production, and could have been modified to meet the weight requirement. Similarly, the Postal Service did not know the details of TKS's protocol, chip set, or design when it adopted the requirement for Touch Memory utilities.

-- The Postal Service did not have a "clear understanding" of the relationship between TKS and its customer/competitor, and did not intentionally disclose TKS's business information to it. The Postal Service's actions are not evidence of malicious intent.

-- The Postal Service believes that the technology of these devices is less susceptible to damage and "certain levels of abuse" than the devices to which TKS refers, and believes that instances of the sorts of abuse TKS identifies are the exception, rather than the norm.

TKS held a telephonic protest conference with this office and submitted post-conference comments which reiterated its previous comments and made the following additional points:

-- Bias toward SI is shown by an article in the January, 1994, *Automatic I.D. News* which describes the involvement of a Jacksonville, FL, postal official with representatives of SI in developing what the article describes as "a reader wand designed for the Postal Service."¹¹ Bias is further shown by the difference in treatment of SI and TKS with respect to tests (TKS was asked to conduct no tests at all, while SI was asked to discontinue tests only after several had been completed); by the fact that the Postal Service purchased devices from vendors other than TKS, but declined to evaluate TKS's device; and by the fact that the Postal Service developed its software using SI's device.

-- The minimum durability requirement is inconsistent with the intended minimum five-year useful life; it is unrealistic to expect the device to be dropped only four times over five years.

-- The Postal Service has not met its burden of demonstrating *prima facie* support for its restrictive specification.

-- The contracting officer's assertions justifying restrictions on the downloading protocol are inconsistent with the practical alternative of device drivers, as TEK has

¹¹ The article also describes the Postal Service's adoption of the Dallas Semiconductor Touch Memory devices, and asserts that twenty-five cities "bought the system before it came to the attention of USPS headquarters."

suggested, and overlook the advantages of allowing the use of device drivers provided by individual vendors in connection with a common software protocol.¹²

-- The contracting officer's comments acknowledge that the Touch Memory utilities are not used to communicate with the data collection device, but with the Touch Memory device. TKS's device is compatible with the utilities only if a minor change is made in their code, so that there is a 20 millisecond pause before communication begins. TKS inquired about the suitability of such a change in its October 12 questions. The October 18 reply to its question stated that the data collection device "must be compatible with the specified programs." The answer in Amendment A02 stated that the offeror should describe, in its proposal, the deviation required, and that the Postal Service would evaluate the deviation. TKS took these answers to mean that incompatible devices would not be considered for award, and that the decisions in that regard would be applied to TKS's disadvantage. The contracting officer's comment confirms TKS's impression that the requirement is unreasonable and intended only to exclude TKS.

¹² TKS likens the situation to the one in which various printer drivers may be used in connection with a personal computer.

DISCUSSION

TKS's protest raises a number of points which we have organized into the following three issues:

A purchase description, rather than a specification, should have been used for this solicitation.

The specification is too restrictive and fails to address the Postal Service's actual needs.

The solicitation and the Postal Service's previous actions demonstrate its bias against TKS and in favor of others.

We address these issues seriatim.

PM 2.3.1 distinguishes between specifications, statements of work, and product descriptions.¹³ PM 2.3.2 c.1. expresses a mandatory preference for the use of product descriptions over specifications. The mandatory preference applies only when its predicate has been satisfied; that is, when the Postal Service's requirements can be met by a standard or modified commercial product. The contracting officer's position is that the Postal Service's requirements cannot be met by existing standard commercial products because those products incorporate proprietary firmware protocols which will lock the Postal Service into those protocols for future procurements. Future compatibility is a legitimate need which a contracting agency may take into account in establishing its requirements, and mere disagreement with in that regard is insufficient to overturn the agency's determination.¹⁴

The contracting officer has necessarily established that the Postal Service's needs could

¹³ Specifications "describe the technical requirements of an end product . . . usually includ[ing] qualitative and quantitative design and performance requirements"; statements of work "describe the work to be performed, rather than the end product" although they may include specifications; and product descriptions include "a common generic description of the item" which is "not as qualitative or quantitative as a specification, and usually describe the end product in terms of performance or standard commercial name"

The "Statement of Work for Procurement of Collection Box Scanners" in the solicitation clearly is a specification, rather than a statement of work, despite its title, since it describes the end products which the solicitation seeks, rather than describing the work to be done in the course of the contract.

While we find no impediment, *per se*, to the inclusion of suggested additions or enhancements in a specification, we have noted the futility of such inclusions in cases in which such enhancements will not be evaluated. *Action Enterprises, Inc., and American Vending, Inc.*, P.S. Protest Nos. 87-14, 87-15, March 13, 1987.

¹⁴ The identification of an alternate approach to meet the need for compatibility (*i.e.*, the provision of multiple suitable device drivers) is insufficient to establish unreasonableness. The proliferation of multiple drivers necessary to conform individual vendors' products to the Postal Service standard could present a separate burden which the Postal Service might well wish to avoid.

not be met by the use of a product description which described commercial products with modifications.¹⁵ In this case, the contracting officer has identified four brand-name products, other than the protester's product, which, according to their descriptive literature, meet the weight, durability, and temperature requirements of the solicitation; the units appear to require modification only with respect to compatibility with the Dallas Software protocols. A product description for the data collection device could be limited to those four devices, or could incorporate as salient characteristics and required modifications all of the provisions of the specification of which the protester complains.¹⁶ Thus, while it appears likely that a product description could be written describing existing brand-name items and the modifications to them which are required, we decline to direct the use of such a description because it appears unlikely that its use would enhance competition.

The protester also contends that the specification is too restrictive.

Where a protester alleges that a solicitation is unduly restrictive, it is incumbent upon the procuring agency to establish *prima facie* support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Once the Postal Service establishes *prima facie* support for the allegedly restrictive requirements, the protester must present an extremely high level of proof to show that those restrictions are clearly unreasonable.

The determination of what constitutes the Postal Service's minimum needs is properly to be made by the requiring activity, and is not subject to being overturned in the absence of a clear showing that the determination lacks a reasonable basis. If a specification is otherwise reasonable, the fact that one or more potential offerors may be precluded from participating in the solicitation does not render its terms restrictive if they reflect the legitimate needs of the procuring activity.

This office will not substitute its judgment for that of the technical personnel absent "fraud, prejudice, or arbitrary and capricious action."

Memorex Telex Corporation, P.S. Protest No. 92-73, January 8, 1993. (Citations and internal quotations omitted.)

TKS complains that the specification establishes an excessively rigorous software

¹⁵ A product description provides a generic identification of the item, known acceptable brand-name products, their manufacturers or distributors, and a description of any modifications required to the brand-name items. PM 2.3.2 c.2. When there are fewer than three acceptable brand-name products, the product description must identify the brand-name items' "essential characteristics" and allow the substitution of equal items meeting those characteristics. PM 2.3.2 c.4. However, when there are at least three acceptable brand-name products, "the solicitation may provide that only proposals for those products will be considered." PM 2.3.2 c.3.

¹⁶ The reasonableness of those requirements is addressed *infra*.

compatibility requirement, employs an inefficient downloading protocol, and imposes restrictive hardware, weight, and temperature requirements. On the other hand, it complains that the requirements for device durability are not sufficiently stringent. The contracting officer has offered justifications for each of the requirements which are sufficient to establish *prima facie* support for them. The protester's further comments have been insufficient to establish that the requirements are clearly unreasonable.¹⁷

The protester's final issue, its allegations of bias against it and in favor of another vendor is measured, as the protester recognizes, by an extremely high burden of proof. A recent decision of this office, *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993, quoted the discussion of the burden by the Court of Federal Claims, as follows:

In the absence of clear evidence to the contrary, however, it must be presumed that the government acted in good faith Since good faith is presumed, the plaintiff bears an extremely heavy burden of proving the contrary, and the government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff. The difficult burden of proof for a plaintiff attempting to show 'government bad faith' has been outlined as follows:

[i]t requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing. In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some *specific intent to injure the plaintiff*. Thus, in *Gadsden v. United States*, 78 F.Supp. 126, 127, 111 Ct.Cl. 487, 489-90 (1948), the court compared bad faith to actions which are 'motivated alone by malice'. . . . Similarly, the court in *Struck Constr. Co. v. United States*, 96 Ct.Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was 'designedly oppressive.'

A-Transport Northwest Co., Inc., 27 Fed.Cl. 206, 220 (November 25, 1992), quoting *Kalvar Corp. v. United States*, 211 Ct.Cl. 192, 198-99, 543 F.2d 1298, 1301-02 (1976), *cert. denied*, 434 U.S. 830 (1977) (some citations omitted; emphasis in original).

The same standard applies where the contention is that the agency favored one source to the exclusion of all others. *Honeywell Information Systems, Inc.--Reconsideration*, Comp. Gen Dec. B-193177.2, 81-1 CPD 26, January 19, 1981.

Here, none of the evidence on which TKS relies irrefragably, that is, in a manner which is

¹⁷ The contracting officer asserts, and we must accept, that the hardware "recommendation" may be met by other chips by emulation. TKS has stated it does not contest the legitimacy of the eight-ounce requirement, instead challenging how that figure was arrived at. The temperature requirements do not appear inconsistent with the temperatures in which the devices might be used or stored. The protester's contention that a more durable device is necessary improperly invades an area of the contracting officer's discretion.

impossible to deny or refute, demonstrates bias against TKS or in favor of any other vendor.¹⁸

The protest is denied.

William J. Jones
Senior Counsel
Contract Protests and Policies

¹⁸ Specifically, the contracting officer has established that the specification requirements to which TKS objects were established prior to, and without knowledge of, the capabilities of TKS's prototype device; the establishment of a one-year warranty does not adversely impact TKS; such differences in treatment as may have occurred with respect to the testing of SI's and TKS's devices appear consistent with factors other than favoritism (for example, SI's device was available prior to TKS's); and the answers to TKS's questions appear to be a reasonable effort to respond to its concerns even if they are not fully satisfactory to TKS. The most troubling point which the protester raises in this regard, the disclosure of confidential information to its business customer and competitor, while regrettable, appears to be an unfortunate misunderstanding rather than a deliberate effort to injure TKS.

The Postal Service's conduct with respect to solicitation -0134 does not bolster the protester's contentions. The conversion of a proposed noncompetitive procurement to a competitive one does not show favoritism to the original source; TKS's complaints about the manner in which the discussions which followed its offer are rebutted by the contracting officer's contemporaneous notes (which state, for example, that TKS was given the opportunity to revise its price, but declined); and the award to SI on the basis of its lower price was consistent with the simplified purchasing process which was used.