



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: L.A. Systems, Inc.

File: B-276349

Date: June 9, 1997

Joseph A. Artabane, Esq., and Joseph G. Billings, Esq., Riley & Artabane, P.C., for the protester.

Jerry T. James for Severn Companies, Inc., an intervenor.

Robert R. Goff, Esq., Defense Information Systems Agency, for the agency.

Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly issued delivery order for robotics tape library system that failed to meet stated requirements is denied where the requirements were relaxed but the record establishes that there is no reasonable possibility that the protester was prejudiced by the relaxation.

DECISION

L.A. Systems, Inc. protests the issuance of delivery order No. DCA200-97-F-1265 to Severn Companies, Inc., against General Services Administration (GSA), Federal Supply Schedule (FSS) contract as the result of a request for pricing (RFPr) issued by the Defense Information Systems Agency (DISA), Defense Information Technology Contracting Organization (DITCO), for a robotics tape library system to be used at the Defense MegaCenter Sacramento. L.A. asserts that Severn's system does not satisfy several salient characteristics set forth in the RFPr.

We deny the protest.

The RFPr, as amended, requested pricing for items available on GSA schedules, existing indefinite delivery, indefinite quantity (ID/IQ) contracts, or other agency contracts to which DITCO is an authorized ordering activity. The RFPr listed several salient characteristics with respect to the robotics/tape cartridge capacity, tape drives, and host connectivity. The specifications required, among other things, that the tape cartridge provide access to any tape transport for any tape cartridge in the system; that it read and write in 36-track format and read 18 track format; and that the system consist of 4 control units and 16 cartridge drives. The RFPr provided that this requirement could be met by upgrading either the existing StorageTek or International Business Machines (IBM) equipment, but not both. The

tape library system was also required to be able to direct datasets to any of the supported device or media types without job control language (JCL) changes. Award was to be made on the basis of "best value procedures."

Nine price quotations were received from seven vendors. After technical review, discussions were held with all vendors except L.A. because it was determined that only L.A.'s quoted system was responsive to the salient characteristics. The discussion responses were evaluated by the DITCO evaluators and an independent third party evaluator, and the agency determined that Severn's alternate quotation #1 offered a technically superior solution at the lowest price. Severn proposed a mix of IBM 3490 Enhanced Technology Drives (36 track) and IBM 3590 Magstar Technology Drives (128 track). On February 18, 1997, DITCO issued a delivery order to Severn under Seven's GSA FSS, which, while designated a "best value decision," was actually a low price-driven determination.

On February 27, L.A. filed this protest with our Office contending that DISA had accepted nonconforming equipment. The agency maintains that it accepted the best solution based on the lowest overall cost and that the Severn solution met or exceeded agency requirements.¹

¹DISA maintains that our consideration of Severn's protest is precluded by 10 U.S.C. § 2304c(d) (1994), which provides that "[a] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." We have recently concluded that this provision does not preclude protests such as this one concerning the placement of orders against GSA FSS contracts. Severn Co., Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ ____ at 2-3 n.1. DISA also contends that L.A. is not an interested party because it is not next in line for award. However, this protest raises the question of whether the agency improperly waived requirements without notifying all offerors and giving them an opportunity to offer on the relaxed requirements. Since an appropriate remedy could be that the protester be given an opportunity to compete under the relaxed specifications, we believe L.A. has a sufficient interest in the outcome to be considered an interested party notwithstanding the existence of intervening offerors. Meridian Management Corp.: Consolidated Eng'g Servs., Inc., B-271557 et al., July 29, 1996, 96-2 CPD ¶ 64 at 4.

DISA also takes the position that the specifications at issue were not mandatory because the amended RFPr no longer contained the phrase "minimum mandatory requirements" used in the original RFPr. This argument is without merit because the RFPr specifically provided vendors with a list of "salient characteristics," which constitutes a statement of the agency's minimum needs for purposes of placing an order under an FSS contract. MII Lundia, Inc., B-214715, Jan. 3, 1985, 85-1 CPD ¶ 14 at 4.

L.A. maintains that four of the listed salient characteristics are not satisfied by the Severn proposed solution, and that by issuing the delivery order to Severn, DISA relaxed these specifications for Severn but not for L.A. L.A. maintains that Severn's use of the IBM magstar cartridge prevents compliance with the following specifications: "access to any tape transport for any tape cartridge in the system," requirement that the tape drives read and write in 36 track format and read 18 track format, requirement for 16 cartridge drives transport and 4 control units, and requirement that the system be able to direct datasets to any of the supported device or medial types without JCL changes. L.A. asserts that if Severn's materially nonconforming equipment was viewed as satisfying DISA's needs, L.A. should have been permitted to revise its offer to satisfy the relaxed specifications. L.A. claims that it was prejudiced by DISA's actions because if L.A. had been informed that it need not fully comply with the specifications, it could have offered a different system at a lower price.

DISA contends the specifications were not improperly relaxed since this was an FSS buy, and the agency issued the delivery order to the vendor meeting the agency's functional requirements and offering the overall best value to the government. DISA maintains that it acted properly in accepting Severn's solution because it provided the lowest price and offered newer state-of-the-art equipment. However, as discussed below, it is clear that at a minimum, Severn's solution did not meet the specifically stated requirement for 4 control units and 16 cartridge drive transports.²

The record shows that Severn's proposed system consisted of 12 IBM 3490 transports and 2 IBM magstar transports for a total of 14 transports, rather than the 16 transports required by the RFPr. The Severn system also provided for only 2 control units rather than the 4 required units. The agency recognizes that the Severn solution does not meet its stated requirement for transports and control units but maintains that with the mix of technology proposed by Severn the minimum tape cartridge capacity requirement and minimum tape exchanges per hour requirement are exceeded. However, it is clear that Severn's proposed system was noncompliant with the express technical requirements of the RFPr.

That does not mean that the protest must be sustained. While the general rule is that a request for quotations (RFQ) (which is similar to the type of solicitation used here) leading to the issuance of a delivery order under an FSS contract must accurately describe the agency's minimum needs and provide for a fair and

²We also question whether the Severn solution satisfies the RFPr requirement that the system "must be able to direct dataset to any of the supported device or medial types without JCL changes." It appears from the record that the dual technology system proposed by Severn requires extensive system software changes in order to comply with this requirement.

equitable competition, Haworth, Inc.; Knoll North America, Inc., 73 Comp. Gen. 283, 286-287 (1994), 94-2 CPD ¶ 98 at 5-6, an agency, in appropriate circumstance, may order items that deviate from the specifications set forth in the solicitation. See Spacesaver, B-224339, Aug. 22, 1986, 86-2 CPD ¶ 219; see also Mobile Telesystems, Inc., B-255213, Feb. 15, 1994, 94-1 CPD ¶ 110 at 3 (involving a Commerce Business Daily synopsis). This is so because an RFQ-type solicitation does not seek offers that are subject to acceptance by the government; rather, it solicits information from which the agency can determine what equipment meets its needs at the best available price. Spacesaver, supra at 2. In other words, the information is used to enable the government to place a delivery order with an FSS contractor pursuant to the rules governing FSS purchases. See Federal Acquisition Regulation (FAR) Subpart 8.4.

Since those rules require selection of the "best value item at the lowest overall cost," FAR § 8.404(b)(2) (FAC 90-45), an agency's failure to accurately describe its actual needs in an RFQ-type solicitation could lead to its placing an order for other than the lowest overall cost best value item. In such circumstances, placing an order for items that deviate from the stated requirements is improper. Haworth, Inc.; Knoll North America, Inc., supra. On the other hand, where the order for deviating items in fact represents a best value purchase at the lowest overall cost, the fact that the ordered items deviate in some way from the requirements set forth in the solicitation is not a basis to sustain the protest since the order will comply with FSS rules and no prejudice will have accrued to the protester (whose FSS contract, under such circumstances, will not include the items in question). Spacesaver, supra.

Here, the record does not evidence a reasonable possibility that FSS rules were violated or that L.A. was prejudiced by the agency's acceptance of Severn's proposal. L.A. maintains that had DISA stated its requirements differently (*i.e.*, in the manner which was used to view Severn's system as compliant), L.A. could have offered, at a lower price, the Storagetek Redwood subsystem which it also asserts provides better technology than the Severn system. This position is untenable because the solicitation called for offers based on FSS and existing ID/IQ contracts and the Storagetek Redwood system is not offered under L.A.'s FSS contract. L.A. claims that if DISA modifies the specifications to allow use of the Redwood system, it could process a modification requesting that GSA add the Redwood system to L.A.'s FSS contract or would team with StorageTek to avail itself of StorageTek's FSS contract and offer the system on a spot basis for less than the Severn system. The possibility of competitive prejudice, however, may not be established on the basis of speculation. L.A. lacks the present capability to provide the Redwood system under its FSS contract, and the assertion, after disclosure of prices, that L.A. might have teamed with StorageTek to provide the Redwood system on a spot basis at a lower price (*i.e.*, at a reduction from StorageTek's extant FSS price) is too

speculative and self serving to warrant sustaining the protest. See DynCorp,

B-233727.2, June 9, 1989, 89-1 CPD ¶ 543 at 12.

Under the present circumstances, issuance of a delivery order to Severn is unobjectionable because there is no reasonable basis to conclude that L.A. could have offered a different system at a lower cost even if L.A. had been informed that DISA did not require compliance with all of the listed salient characteristics.

Accordingly, the protest is denied.

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