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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sony Corporation of America

File: B-224373.2

Date: March 10, 1987

DIGEST

1. Under request for proposals (RFP) for computer-based audiovisual training equipment, protester fails to show that provision calling for commercially available, off-the-shelf "equipment" has more than one reasonable interpretation and therefore is ambiguous, since only reasonable interpretation of the broad term "equipment" is that it includes any product which functions as required in the RFP; the protester's interpretation of the term as restricted to existing "systems," and excluding products consisting of "components" brought together to meet RFP requirements, is not reasonable.

2. Protester's contention that it was misled into assuming a restrictive interpretation of request for proposals (RFP) provision calling for commercially available, off-the-shelf "equipment," and therefore offered a higher priced product, is without merit where RFP provision on its face does not support protester's interpretation and there is no evidence in the record that the contracting agency led the protester to believe the restrictive interpretation applied.

3. There is no basis to object to award to lowest priced, technically acceptable offeror as provided in request for proposals where there is no support in the record for protester's contention that contracting agency gave awardee more favorable treatment than protester in the course of the procurement.

4. Protester's contention that contract modification proposed by awardee is outside the scope of the contract is premature where contracting agency has not yet decided whether proposed change will be made.

DECISION

Sony Corporation of America protests the award of a contract to the Canadian Commercial Corporation (CCC) and its subcontractor, Matrox Electronic Systems Limited, under request for

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proposals (RFP) No. DAAB07-86-R-B048, issued by the Army for electronic information delivery systems (EIDS), computer-based audiovisual equipment to be used as training devices for soldiers. Sony's principal contentions are that the RFP requires offerors to propose a commercially available, off-the-shelf "system," a requirement which the Matrox product does not satisfy, and that Sony and Matrox were not treated equally in negotiations under the RFP. We deny the protest.

The RFP, issued on January 15, 1986, called for a fixed-price contract for 1985 EIDS, with options for an additional 47,900 units, to be awarded to the lowest priced, technically acceptable offeror. A preproposal conference was held on February 21. Initial proposals were received from three offerors by the May 2 due date; only two were included in the competitive range, Sony and Matrox, a Canadian firm participating in the procurement as a subcontractor to the CCC, pursuant to Department of Defense (DOD) Federal Acquisition Regulation (FAR) Supplement, 48 C.F.R. part 225.71 (1985).1/ Discussions then were held with both Sony and Matrox, followed by submission of best and final offers on August 14.

The Army found the best and final offers technically acceptable except for restrictive language in both regarding data rights. In order to clarify the data rights requirements, the Army conducted another round of discussions with Sony and Matrox limited to that issue. Both offerors then submitted second best and final offers on September 25, with changes only to the data rights provisions. On November 4, the Army made award to Matrox as the lowest priced, technically acceptable offeror.

Requirement for commercially available, off-the-shelf equipment

Section L.10 of the RFP provides:

> "OFFERS FOR COMMERCIALLY AVAILABLE, OFF-THE-SHELF EQUIPMENT ARE REQUIRED. The Government may accept specially engineered changes to offered equipment, if such changes enable the

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1/ The third offeror filed a protest with our Office challenging the Army's determination that it was technically unacceptable and the lack of a delegation of procurement authority for the procurement; we denied the protest. Aquila Technologies Group, Inc., B-224373, Oct. 30, 1986, 86-2 CPD ¶ 500.

> offered equipment to meet the specified requirements of this solicitation. Equipment which must be developed to meet the requirement will be considered unacceptable."

Sony argues that the use of the term "equipment" in this provision indicates that offerors were required to propose a complete commercially available, off-the-shelf "system," not just component parts individually meeting the commercial availability, off-the-shelf requirement. Sony states that while it offered such a "system," Matrox did not, and its proposal thus did not satisfy section L.10.2/ Sony concludes that in fact it is the only offeror eligible for award. Further, even assuming that it reasonably can be interpreted to call for either a "system" or components, Sony argues, section L.10 is ambiguous and a recompetition is required since Sony's proposal was based on the more restrictive interpretation, which significantly increased its price.

Sony also states that although its interpretation of section L.10 was made clear to the Army throughout the competition, the Army did not advise Sony that its interpretation was erroneous, and prevented Sony from making substitutions in its product which would have allowed Sony to lower its price.

We find Sony's arguments to be without merit. As a preliminary matter, we do not agree with Sony's contention that section L.10 on its face limits offers to commercially available, off-the-shelf "systems." Sony relies on the Army's use of the term "equipment" in section L.10 as support for its restrictive interpretation. In our view, "equipment" is a broad term which refers to the components comprising the EIDS, whether or not already produced and marketed as a "system." While an existing EIDS system such as Sony's would satisfy section L.10, we see no basis to interpret section L.10, as Sony suggests, as restricting offerors to proposing such a "system," rather than commercially available, off-the-shelf components integrated to function as an EIDS.

2/ In its initial protest submission, Sony also argued that the Matrox "equipment" was not "commercially available." The Army refuted this contention in its report on the protest. Sony did not respond to the Army position in its conference comments; instead, Sony recast its argument to focus on whether the Matrox product qualified as a "system," and ironically complained that the agency report failed to respond to its revamped argument. As a result, we consider Sony to have abandoned its original contention. The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

Further, for section L.10 to be ambiguous, as Sony contends, there must be more than one reasonable interpretation of the provision; since we do not find Sony's restrictive interpretation of the provision to be reasonable, we see no basis on which to conclude that the provision is ambiguous. Wild Heerbrugg Instruments, Inc., B-210092, Sept. 2, 1983, 83-2 CPD ¶ 295.

Sony also argues that it was led by the Army to believe that only a commercially available, off-the-shelf "system" would be acceptable under section L.10. As support for this position, Sony relies on a view graph presentation and a series of questions and answers from the preproposal conference which, according to Sony, indicate that the potential offerors and the Army understood the RFP to require such a "system."

We see no basis for Sony's interpretation of the proceedings at the preproposal conference. In our view, the Army's presentation and the questions and answers at most reflect the Army's desire for an integrated product to avoid the problems associated with acquiring components separately; there is no indication that a product composed of integrated commercially available, off-the-shelf components, rather than an existing "system" such as Sony's, was unacceptable. For example, of the ten questions (out of a total of 281) raised at the preproposal conference on which Sony relies, Sony characterizes question and answer no. 129 as "most important"; they read as follows:

> "Q. When vendors propose commercial, off the shelf products, and the vendor can provide a lower price by bidding a system or a partial system made up by commercial, off the shelf products, why won't the Army permit a systems bid for commercial off the shelf equipment, if this provides the lowest overall cost to the Army?
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> "A. We are buying a system. The solicitation may have SLIN's in it but they are only SLIN's because this is the way the Army does business. We have to feed our computers, we have to feed our people who are buying the new supplies. The prices have to be broken down. I don't see where by us SLINning it in the solicitation, you are saying that we are not buying a system. I don't know why a unit price of a system for $1,000 for five components, why shouldn't the five components cost $200 piece or some ratio thereof. There is a system cost to the contractor and he is just

> rolling it over and breaking it down into sub line items, parts of a system. I don't see the difference why it should cost us any more. But of course it is a competitive procurement, and if you do charge us more, you've got to compete with someone who is charging us less. You are saying the whole is greater than the sum of its parts. I don't understand it mathematically, because this is how we have broken down things in the past in a solicitation. We are buying this system but if we happen to put 20 SLIN's down for that system, we are still buying the system." (Emphasis added.)

Sony states that the question reflects the potential offeror's desire to propose a product made up of components, and the Army's answer confirms that only an existing system would be acceptable. We disagree. Reading the question and answer together, we believe they relate to the requirement in the RFP for separate prices for each component of the EIDS, instead of a lump sum, or "systems bid," as the question phrases it.

Sony also contends that the cover letter submitted with its initial proposal advised the Army that Sony believed the RFP required a commercially available, off-the-shelf "system."[3/] In our view, the letter indicates only that the system Sony proposed consisted of integrated components that in its judgment would best meet the Army's needs.

Finally, Sony states that during discussions the Army denied Sony's request to substitute lower priced components in the system it offered. Sony does not indicate where its request is recorded in the transcript of discussions; instead, Sony

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3/ The excerpt Sony relies on provides:

> "An Integrated System
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> Traditionally, a practical solution to a new system requirement has been to configure a system from proven but separately designed components. Experience, however, has shown that trying to apply pre-conceived solutions to new functional requirements may result in failures. In contrast, the Sony View-E System is the result of planning for integration of a videodisc player and a microcomputer from the very outset of the design process."

submitted an affidavit from a Sony representative stating generally that such a request was made. Even assuming the request was made, there is no indication of the reason for the Army's refusal except for Sony's speculation that it was based on the Army's requirement for an existing "system." Similarly, Sony contends that the Army's refusal to accept an engineering change proposal clause offered by Sony demonstrates the Army's refusal to allow substitutions in Sony's "system." In fact, the transcript of discussions shows that the Army objected to the blanket nature of the proposed clause, which would have allowed the EIDS contractor to make engineering changes without the Army's prior approval as long as the product continued to meet the Army's specifications. There is no indication that the Army objected to Sony's proposed clause because of its purported requirement for a "system."

In our view, Sony has failed to show either that section L.10 was ambiguous or that it was misled by the Army into assuming that only a commercially available, off-the-shelf "system" was acceptable. Acccordingly, even assuming the Matrox product consisted of commercially available off-the-shelf components rather than a "system," Sony was not prejudiced by the Army's acceptance of the Matrox proposal, since Sony's assumption that such a "system" was required, which Sony states caused it to submit a higher priced proposal, was not due to any defect in the RFP or any misdirections by the Army in the course of the procurement.

Unequal treatment

Sony raises several areas in which it claims the Army gave Matrox favorable treatment which allowed it to offer a lower price than Sony. We do not agree.

(1) Color graphics and microcomputer bus

The RFP called for the EIDS to provide color graphics capability and a standard microcomputer bus. Sony states that it offered a color graphics adaptor and microcomputer bus which are IBM-compatible; Matrox did not offer IBM-compatible features. Sony contends that the Army should have notified it that IBM-compatibility, a feature which Sony says increased its price, was not required. We disagree.

Sony does not dispute that the Army's general requirements for color graphics and a microcomputer bus were clearly set out in the RFP. Further, Sony could not reasonably assume, and in fact does not contend, that the RFP specified IBM-compatible features; Sony simply chose to offer the higher-priced IBM-compatible features to meet the Army's general needs. Since there is no indication that the IBM-compatible

features so exceeded the Army's needs as to constitute a deficiency in Sony's proposal, we see no basis for concluding that the Army should have raised the issue with Sony during discussions. Compare Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd on reconsideration, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333 (offerors' unreasonably high proposed levels of efforts constituted deficiency which should have been raised by agency in discussions).

Sony also contends that the Army plans to modify the contract to require an IBM-compatible bus and color graphics capability and that such a modification would constitute a significant change in the scope of the contract requiring a recompetition. The Army states that it currently is considering informally a value engineering change proposal from Matrox regarding the substitution in the Matrox product of IBM-compatible components, in accordance with section H.122 of the contract, entitled "Current Technology Substitutions/ Additions." According to the Army, formal submission and consideration of the proposed change will not take place until the suspension of performance under the contract imposed as a result of Sony's protest is lifted. Since the Army has not yet decided whether to accept the change proposed by Matrox, Sony's challenge to such a change is premature and will not be considered. See D.D.S. Pac, B-216286, Apr. 12, 1985, 85-1 CPD ¶ 418.

(2) Contract data requirements lists

The RFP calls for offerors to furnish certain technical data, called contract data requirements lists (CDRLs). According to Sony, CDRLs had to be provided for items produced by the offeror as well as for peripheral items obtained from third-party suppliers, and Sony increased its price to reflect the cost of the third-party CDRLs. Sony states further that it was told by a third-party supplier who provided a quotation to Matrox for peripheral items, that it did not include CDRLs in the price it quoted to Matrox. Sony concludes that the cost of the CDRLs therefore was not included in the Matrox price proposal and, as a result, Matrox received "preferential treatment" by the Army.

We find this argument to be without merit. Whether the Matrox third-party supplier included the cost of the CDRLs in the price it quoted to Matrox does not establish whether the Matrox price proposal included such costs; in fact, Matrox disputes Sony's contention and states that its best and final offer did take into account the requirement for CDRLs. In any event, there is no indication, and Sony does not contend, that the Matrox proposal took exception to the CDRL requirement.

(3) Technical leveling

Sony speculates that the Army decided to reopen discussions because the first best and final offer submitted by Matrox was found technically unacceptable. Sony concludes that since Matrox ultimately was found technically acceptable, the Army must have made improper suggestions to Matrox during the second round of discussions to improve its proposal, which constituted technical leveling. See Federal Acquisition Regulation, 48 C.F.R. § 15.610(d)(1) (1986) (technical leveling means helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussions, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal).

There is no support in the record for Sony's contentions. The record shows that both Sony and Matrox were found technically acceptable based on their first best and final offers. The Army reopened discussions only because of restrictive language regarding data rights in both proposals, and the revisions in second best and final offers were limited to that issue.

(4) Progress payment rate

Sony contends that the Matrox initial proposal and first best and final offer were based on a 90 percent progress payment rate, which also was incorporated into the contract with Matrox, even though the correct payment rate is 80 percent. Both Matrox and the Army agree that 80 percent is the correct rate and state that the contract will be amended to so provide. Sony argues, however, that since Matrox based its price on the more favorable 90 percent rate, it was able to offer a lower price than Sony, which used the correct 80 percent rate.

Matrox disputes Sony's contention, stating that its best and final offers were based on the 80 percent rate. Even assuming Matrox used the incorrect higher rate, however, we fail to see any prejudice to Sony from the Matrox error. The RFP did not specify the progress payment rate and the contract with Matrox, while initially incorrect, will be amended to reflect the correct 80 percent rate. Thus, there is no evidence that the Army offered a more favorable progress payment rate to Matrox than it would have offered to Sony.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel