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Comptroller General
of the United States
Washington, D.C. 20548

# Decision

**Matter of:** Digital Systems Group, Inc.

**File:** B-257721; B-257721.2

**Date:** November 2, 1994

John W. Fowler, Jr., Esq., and Robert G. Fryling, Esq., Blank, Rome, Comisky & McCauley, for the protester.
L. Benjamin Young, Jr., Esq., Department of Agriculture, for the agency.
Paul E. Jordan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Agency may properly include requirements that offerors submit past experience and performance information in proposals submitted in response to letters of interest issued under Financial Management Software Systems mandatory Multiple Award Schedule (FMSS Schedule); these requirements do not conflict with FMSS Schedule's provision that orders placed under the Schedule must fall within the scope of the terms and conditions of applicable Schedule contract.

**DECISION**

Digital Systems Group, Inc. (DSG) protests the letter of interest (LOI) No. LOI-00-94-I-1052, issued by the Department of Agriculture for computer software and support services to be ordered under the Financial Management Software Systems mandatory Multiple Award Schedule (FMSS Schedule). DSG contends that various aspects of the Agriculture LOI violate applicable regulations and the terms and conditions of the FMSS Schedule contract. According to DSG, the LOI includes unduly restrictive requirements which improperly exclude the protester from competing for an award.

We deny the protest.

In 1987, the Office of Management and Budget requested the General Services Administration (GSA) to develop a multiple award schedule for commercially available accounting/financial management systems software packages to modernize and standardize the federal government's financial management systems. In developing the FMSS Schedule, GSA developed certain uniform requirements in five functional areas: general ledger, accounts payable/disbursements, receivables, budget execution/funds control, and cost

accumulation. These areas are known collectively as the "core financial system" and represent a minimum standard which must be met by any financial system design included on the FMSS Schedule. The FMSS Schedule is mandatory for all federal executive agencies, including the Department of Defense, for acquisition of commercial software for primary accounting systems and for the acquisition of services and support related to the implementation of such software. Federal Information Resources Management Regulation (FIRMR) §§ 201-24.107; 201-39.804-2.

Offerors seeking inclusion on the FMSS Schedule must submit a proposal to GSA which includes narrative responses addressing or describing: each functional requirement in the statement of work; the functional descriptions for any additional software proposed; and the offeror's training, documentation, maintenance, and services available under any resultant contract. Offerors must also provide detailed price lists and discounts for all products and services. To be considered for cost negotiations, an offeror's technical package must satisfy all mandatory requirements in the statement of work and it must pass a functional and/or performance demonstration. FMSS Schedule contracts are awarded to responsible vendors who are responsive to the FMSS solicitation and offer substantial discounts to the government.

Agriculture issued its LOI on April 8, 1994, on an unrestricted basis to all FMSS Schedule contractors. Section M of the LOI advised that technical proposals would be evaluated on three factors listed in descending order of importance: functional capabilities, technical service and general support capabilities, and overall project approach and corporate experience. Price proposals were to be evaluated on the basis of validity, realism, adequacy, and an assessment of the cost of implementation of the software solution. Award was to be made on the basis of the most advantageous alternative to the government including consideration of various price factors.

Section L.3.4.3 of the LOI explained the "Corporate Experience" factor. It required offerors to describe their company's history, emphasizing how the company's experience would benefit the agency including company background information and a general history of the proposed software package. Section L.3.4.3.1 stated that offerors shall provide "references from three to five sites at which its financial management software package has been installed and is being operated." To the extent possible, these references were to be large federal departments, especially those where the specific version of the proposed software was being used.

On May 17, 1994, DSG filed a protest with Agriculture challenging its decision not to set aside the LOI for small businesses and alleging that the requirement for references in section L.3.4.3.1 was unduly restrictive. According to DSG, this requirement and other unspecified provisions represented an alteration of the terms and conditions of the FMSS Schedule contract and thus violated that contract. By letter of June 3, Agriculture denied the protest. On June 24, DSG filed this protest with our Office challenging various provisions of the LOI.[1]

DSG argues that the LOI is unduly restrictive and excludes DSG from competing due to the inclusion of the reference requirements. DSG also argues that Agriculture has changed the terms and conditions of the FMSS Schedule contract in a number of ways including the type of contract called for and the delivery order term. Almost all of these alleged improprieties were untimely filed for the first time in DSG's protest to our Office.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specifically require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (1994); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. Where a protester initially files a timely protest, and later supplements it with new and independent grounds of protest, the later raised allegations must independently satisfy the timeliness requirements. Little Susitna Co., 65 Comp. Gen. 652 (1986), 86-1 CPD ¶ 560; G.H. Harlow Co., Inc.--Recon., B-245050.2; B-245051.4, Apr. 10, 1992, 92-1 CPD ¶ 357. Our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. Id.

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[1]While DSG incorporated by reference its agency-level protest, its protest here does not address the small business set-aside issue. To the extent DSG intended to seek our review of this matter, its protest is denied. In general, the appropriate time for determining whether a small business set-aside is warranted is at the time of the Schedule contract's formation, not at the time a user agency issues an LOI. Digital Sys. Group, Inc., B-256422; B-256521, June 3, 1994, 94-1 CPD ¶ 344. GSA determined not to set aside this Schedule contract for small businesses, and the FMSS Schedule contract does not otherwise provide for user agencies to make such a determination. Thus, Agriculture was not required to determine whether to set aside this procurement for small businesses.

Here, the closing time for receipt of proposals was on June 13, 1994. While DSG's agency-level protest, filed prior to that date, alleged that there were "numerous, specific deficiencies" in the LOI, it failed to identify them until after the closing date when it filed its protest with our Office. DSG argues that its identification of the reference requirement was intended only as one "example" of the LOI's deficiencies and that its protest here simply adds more examples. We disagree. A protest must include a detailed statement of the legal and factual grounds for the protest. Federal Acquisition Regulation (FAR) § 33.103(b)(3)(iii); 4 C.F.R. § 21.1(c)(4). Since DSG's agency-level protest did not identify any other grounds of protest, its attempt to delineate such additional allegations in the instant protest is untimely and not for consideration by our Office.[2]

DSG also argues that its protest of these issues should be considered under the significant issue exception to our timeliness regulations. 4 C.F.R. § 21.2(c). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Request for Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In order to prevent those rules from becoming meaningless, exceptions are strictly construed and rarely used. Id. The significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community which have not been considered on the merits by

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[2]We reach the same conclusion with regard to DSG's supplemental protest in which it challenged Agriculture's alleged improper use of delivery orders over an extended term based on the life of the offeror's proposed system. In its initial protest to our Office, DSG contended that the LOI delivery order term was too long. While maintaining that this issue was untimely, Agriculture noted that the length of its delivery order term was based on the life of the system. Thereupon, DSG argued that this LOI did not meet the Schedule requirements for delivery orders based on system life, and that it was unaware of this ground until it read Agriculture's agency report. In fact, this protest ground is essentially a restatement of the original, untimely ground, and thus not for consideration. See Golden Mfg. Co., Inc., B-255347, Feb. 24, 1994, 94-1 CPD ¶ 183. Moreover, from our review of the LOI's references to system life considerations, we believe that DSG should have been on notice of Agriculture's intent prior to the closing time. Thus, its protest on this ground would be untimely in any event. 4 C.F.R. § 21.2(a)(1).

this Office, Herman Miller, Inc., B-237550, Nov. 7, 1989, 89-2 CPD ¶ 445. Here, DSG has timely raised substantially the same allegations about other LOIs in protests currently pending before our Office, and the issues raised by these allegations will be considered in those protests.

DSG contends that inclusion of the reference requirement in Agriculture's LOI was improper for two reasons. First, the requirement represents an unauthorized change in the terms and conditions in DSG's FMSS Schedule contract. Second, because DSG cannot meet the requirement, the provision effectively excludes DSG from competing for a delivery order under the LOI.

Section H.11(a) of the Schedule contract (Ordering Considerations) provides that the "terms and conditions" of the FMSS Schedule contract are binding on contractors and government user agencies and that any orders placed under the Schedule "must, therefore, fall within the scope of the terms, conditions, and prices of the applicable FMSS services contract." Section H.12 (Agency Ordering Procedures) provides that agencies are responsible for distributing their LOIs to all FMSS Schedule contractors, and that agencies may "further delineate the standard FMSS functional requirements contained herein, and specify additional requirements that are not included in the current specifications."

Based on our decision in Digital Sys. Group, Inc., B-256422; B-256521, supra, the protester argues that a user agency may only add technical requirements to the specifications in its LOI, and cannot modify the terms and conditions of the FMSS Schedule contract in any way which has the effect of eliminating an FMSS Schedule contractor from the competition. It thus disputes the position of Agriculture and GSA that "nothing in either the procedures or contract terms contemplates full participation by all FMSS Schedule contractors in each LOI competition."

DSG's position is based on an overly restrictive reading of our decision and the FMSS contract's provisions. We stated in Digital "that all FMSS Schedule contractors are to be provided an opportunity to compete for the agency's requirements." This does not mean that every offeror will be successful in meeting those requirements. There is nothing in the FMSS Schedule contract that demands agencies tailor their requirements to ensure that all Schedule contractors will be able to meet them. Section H.12 of the Schedule does not specify that an agency's additional requirements are restricted solely to "technical" requirements, and we have concluded that the Schedule contract does not restrict user agencies to additions only

to the technical specifications. Digital Sys. Group--Recon., B-256422.2; B-256521.2, Oct. 28, 1994, 94-2 CPD ¶ ___.

Section H.12 provides that an "LOI will also contain information comparable to a competitive solicitation . . . [including] . . . Instructions to the Offeror for responding to the LOI, and Evaluation and Award factors."[3] See FIRMR § 201-39.804-4(c). Section H.12 also explains that agencies will determine awards of delivery orders based upon responsiveness, price, and other factors, and that award will not necessarily be made to the lowest-priced proposal. See FIRMR § 201-39.804-4(d) (award to the most advantageous alternative). The reference requirements in section L.3.4.3.1 are simply instructions to offerors concerning past performance and experience, which make up a portion of the third evaluation factor, overall project approach and corporate experience. The references are used by the agency to evaluate the extent of the contractor's experience with federal clients, implementation of environments similar to Agriculture's, customer satisfaction, and evidence of a long-term commitment to support the proposed software package in the areas of maintenance; upgrades; and ongoing training. Prior experience and past performance are reasonable evaluation matters, consideration of which is not contrary to the terms and conditions of the FMSS contract.

Use of prior experience and past performance evaluation criteria are also consistent with established procurement regulations, as required by section H.12. According to Federal Acquisition Regulation (FAR § 15.605), in addition to price or cost, quality "shall be addressed in every source selection" and may be expressed in terms of evaluation factors which include prior experience and past performance. See FIRMR § 201-39.1501-1 (referring to FAR § 15.605 along with other evaluation factors).[4]

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[3]LOIs also may include delivery or performance schedules, special provisions (regarding Inspection and Acceptance, Liquidated Damages, Invoicing and Payment information, etc.).

[4]The FMSS Schedule covers computer software and support services, i.e., information resources, thus, the contracting officials are to follow the policies and procedures in the FAR except in those areas where the FIRMR (41 C.F.R. Ch. 201) prescribes policies, procedures, provisions, or clauses. FAR § 39.001; FIRMR § 201-39.102(a). Section 201-39.804 sets forth the policies and procedures for the FMSS Schedule including use of evaluation factors in an LOI.

(continued...)

DSG also contends that it is inappropriate for Agriculture to require submission of this experience related information because it relates to its qualification to perform the contract and GSA necessarily found it responsible when it awarded the protester a contract. In general, an agency may use traditional responsibility factors such as experience; management and staff capabilities; and personnel qualifications as technical evaluation factors, where, as here, a comparative evaluation of those areas is to be made. Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38. A comparative evaluation means that competing proposals will be rated on a scale relative to each other, as opposed to a pass/fail basis. Id.

While it is true that GSA determined that all FMSS Schedule contractors were responsible, that determination was based on limited information: financial information (e.g., a balance sheet and profit and loss statement prepared by an independent accountant) and lists of contracts in force and the five largest jobs completed in the last 5 years (including location, branch of work, and contract amount). Further, GSA's determination simply went to whether the contractor was responsible to produce the core function software and perform the minimum required services. Here, Agriculture states that its financial system has been designated as "high risk" in the Federal Managers' Financial Integrity Act report for fiscal year 1993, and that it has a critical need to implement its new system by October 1, 1995. Thus, it needs past performance and experience references in order to evaluate an offeror's capability to meet the stated requirements. Agriculture could reasonably conclude that GSA's responsibility determination was insufficient for it to fully evaluate a contractor's technical capability to handle its requirements. In sum, the reference requirement is unobjectionable because it is consistent with the FMSS Schedule contract and it does not exceed the agency's needs.

As to DSG's contention that the reference requirement effectively eliminates DSG from competing under the contract, Agriculture points out that the reference provision is not mandatory. The LOI provision that "[f]ailure to satisfy the mandatory requirements will eliminate the proposal from further consideration," pertains to a proposal's meeting technical requirements. With respect to the reference requirements, section L.1 provides

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[4](...continued)

Since it does not otherwise specify those evaluation factors, the agency was free to rely on FAR § 15.605 for guidance.

that "[f]ailure of a proposal to show compliance with these instructions may be grounds for exclusion of the proposal from further consideration." (Emphasis supplied.) Section M.1.1 provides that Agriculture "reserves the right to consider as acceptable only those proposals . . . submitted according to the requirements set forth or referenced in this [LOI]." (Emphasis supplied.) The emphasized language does not require rejection of a proposal on a pass/fail basis, and the LOI makes it plain that proposals will be evaluated on a comparative basis. Failure to provide at least three references will likely result in a lower rating, but does not require that a proposal be found unacceptable.

Agriculture explains that the worst that could happen to an offeror failing to provide the requested information is that it would receive the lowest score or rating possible for these subfactors which, under the evaluation scheme, are the least important factors. Agriculture further states that an offeror could still receive award if it comparatively outperformed all other competitors under the first and second most important factors. While DSG argues that it could not meet the reference provision, we also note that the contract experience references in its FMSS Schedule contract indicate that it has performed contracts for federal agencies in the past. Since it could have submitted a proposal with some references and it would not have been rejected for failing to provide a minimum of three, we have no basis to conclude that this provision was unduly restrictive or otherwise improper.

The protest is denied.

Robert P. Murphy
Acting General Counsel