152833

Comptroller General
of the United States

Washington, D.C. 20548

152211

Decision

Matter of: Digital Systems Group, Inc.

File: B-257899

Date: November 15, 1994

John W. Fowler, Jr., Esq., and Robert G. Fryling, Esq., Blank, Rome, Comisky & McCauley, for the protester.
Paul W. Manning, Esq., and Peter J. Ritenburg, Esq., United States Information Agency, for the agency.
Paul E. Jordan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency requirements for submission of information, including past experience and performance information, and certification of software compatibility, are reasonable and not unduly restrictive of competition where requirements represent agency's minimum needs.

2. Agency letter of interest properly includes terms regarding contract type, method of performance, and others which are consistent with applicable Financial Management Software Systems Schedule contract terms and conditions.

DECISION

Digital Systems Group, Inc. (DSG) protests the letter of interest (LOI) No. IA1101-S4244505, issued by the United States Information Agency (USIA) 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 USIA's LOI improperly exclude the protester from the competition and violate applicable regulations, and the terms and conditions of the FMSS Schedule contract.

We deny the protest.

The FMSS Schedule is 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, the General Services Administration (GSA) developed certain uniform requirements in five functional areas, known collectively as the "core

financial system," which 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 who offer substantial discounts to the government.

USIA issued its LOI on May 12, 1994, to all FMSS Schedule contractors (hereinafter, "vendors"). The LOI advised vendors that their technical proposals were of greater importance than their price proposals. Among other matters, technical proposals were required to include sections which: described the functionality of each application module proposed; provided an overview description of other application modules presently available; detailed the functional and technical capabilities of the proposed software in accordance with a requirements list; summarized the vendor's project approach; and responded to a technical/management capabilities questionnaire. The closing date for receipt of proposals was June 29.

Technical proposals were to be evaluated on the following factors, listed in descending order of importance: functional capabilities, project approach, experience and future direction, and technical capabilities. Section L of the LOI also advised vendors that to be considered responsive, each proposal "shall comply with all mandatory requirements" in the LOI. Price was to be evaluated on the basis of costs for core software modules, modifications, additional software, labor, and training. Award was to be made to the responsible vendor whose offer conforming to the solicitation would be most advantageous to the government, price and other specified factors considered.

On June 24, DSG protested the LOI to USIA alleging that various provisions were unduly restrictive and violated the FMSS Schedule contract's terms and conditions. The agency did not respond to the protest by the June 29 closing date, whereupon DSG protested to our Office on July 14, raising essentially the same issues as in its agency-level protest.

DSG argues that various "nontechnical" requirements of the LOI are unduly restrictive. DSG observes that agency LOIs must be sent to all FMSS Schedule vendors and provide them with the opportunity to compete for the order. DSG also observes that the "terms and conditions" of the FMSS Schedule contract are binding on vendors and government user agencies, and any orders placed under the Schedule must be within the scope of those terms and conditions. Thus, in DSG's view, a user agency may only add technical requirements to the specifications in its LOI; it cannot modify the terms and conditions of the FMSS Schedule contract in any way which has the effect of eliminating an FMSS Schedule vendor from the competition. DSG's arguments are based on an overly restrictive reading of its FMSS Schedule contract.

In addition to requiring consistency in the terms and conditions of an LOI and the Schedule contract, section H.12 of the contract provides that agencies may "further delineate the standard FMSS functional requirements contained herein, and specify additional requirements that are not included in the current specifications." In this regard, section H.12 also provides that an LOI will contain information comparable to a competitive solicitation including delivery or performance schedules; special provisions (regarding inspection and acceptance, liquidated damages, invoicing and payment information, etc.); instructions to the vendor for responding to the LOI; and evaluation and award factors. See FIRMR § 201-39.804-4(c). Nothing in the Schedule contract restricts an agency to adding only technical requirements to an LOI. Digital Sys. Group, B-257721; B-257721.2, Nov. 2, 1994, 94-2 CPD ¶ ___; Digital Sys. Group--Recon., B-256422.2; B-256521.2, Oct. 28, 1994, 94-2 CPD ¶ ___.

An agency's statement of requirements, including LOI terms and conditions, is unobjectionable so long as the requirements are consistent with the FMSS Schedule contract and do not exceed the agency's needs. Digital Sys. Group, B-257721; B-257721.2, supra. While the Schedule contract essentially provides that all vendors are to be provided an opportunity to compete for the agency's requirements, it does not mean that every vendor will be successful in meeting those requirements. There is nothing in the FMSS Schedule contract which demands agencies tailor their requirements to ensure that all Schedule vendors will be

able to meet them. Id. Thus, our inquiry is limited to whether the LOI requirements are inconsistent with the terms and conditions of the FMSS Schedule contract, or exceed what is necessary to satisfy the agency's needs.

DSG argues that USIA's LOI improperly requires that any offeror have a 5-year performance period with its system; have performed at least five projects in the last 5 years involving the type of work and skills outlined in the LOI; provide an overview description of capabilities outside the USIA's currently defined requirements; certify that its system meets mandatory requirements without modification; provide fixed determinable prices for all requested schedules or be rejected; and provide a copy of its most recent annual financial statement. DSG does not identify any FMSS Schedule contract provision which these requirements violate. Rather, DSG argues only that its inability to meet the requirements makes them improper. In our view, the provisions challenged by DSG are consistent with the FMSS Schedule.

All of the items challenged by DSG are matters for evaluation by the agency and section H.12 of the FMSS Schedule specifically provides for agencies to include evaluation and award factors in the LOI comparable to a competitive solicitation. In this regard, section M of the LOI provides for evaluation of a vendor's technical and corporate capability, including knowledge of federal accounting; experience with federal clients; compliance with functional requirements; and future product direction. Here, the requirements for corporate experience and past performance information, current financial information, certification that the proposed software meets mandatory requirements, and an overview of additional capabilities are consistent with these evaluation factors. Such experience criteria are an appropriate aspect of a user agency's LOI. Digital Sys. Group, B-257721; B-257721.2, supra.

With regard to the experience factors, DSG argues that its responsibility has already been determined by GSA. However, as we recognized in Digital, the responsibility information submitted by vendors to GSA is limited. Nothing in the FMSS Schedule contract prohibits an agency from requiring a vendor to submit additional information concerning such responsibility type matters so long as the agency evaluates the information provided by the vendors on a comparative basis and not a pass/fail basis. Id.; Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38. Further, USIA states that these requirements are not classified as

"mandatory" under the LOI. Thus, if a vendor were to provide evidence of less than 5 years of experience or less than five projects, that vendor would not be disqualified; it would simply be evaluated in comparison to other vendors. Similarly, with regard to the additional software capabilities "overview," the LOI clearly states that the information will be used to evaluate the growth potential of the vendor's proposed solution. There is no indication that a lack of such potential would eliminate a vendor from the competition. These requirements are all consistent with the Schedule.

With regard to pricing, the LOI cautions that "offers which do not include fixed determinable prices for all requested schedules cannot be evaluated and may lead to rejection of the proposal." We find no conflict between this provision and the terms of the FMSS Schedule contract. The Schedule contract provides for firm, fixed-price delivery orders based on contract pricing for software purchase and maintenance, training, and documentation; and on labor rates for technical assistance. The agency's LOI request for fixed prices for software, maintenance, and training; and labor rates for optional support work, are simply consistent with the FMSS plan.

In addition to finding that the requirements about which DSG complains are consistent with the FMSS Schedule contract, we find that they are not unduly restrictive. In preparing a solicitation for supplies or services, a contracting agency must include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. Acoustic Sys., B-256590, June 29, 1994, 94-1 CPD ¶ 393. The contracting agency, which is most familiar with its needs and how best to fulfill them, must make the determination as to what its minimum needs are in the first instance, and we will not question that determination unless it has no reasonable basis. Id.; Corbin Superior Composites, Inc., B-242394, Apr. 19, 1991, 91-1 CPD ¶ 389.

With regard to past performance and experience, the LOI requires vendors to complete a technical management capabilities questionnaire. It includes identification of five projects performed within the last 5 years that involved the types of work and skills outlined in the LOI. The agency reasonably considered that it needed to evaluate this information on a competitive basis in order to accurately assess the offeror qualifications. DSG has had experience in federal contracting as evidenced by its prior

---

[1]The LOI set forth three classifications of requirements: "mandatory," "highly desirable," and "desirable."

contract references in its FMSS Schedule contract, and this experience would have been evaluated on a comparative basis.

The LOI does require that certain identified aspects of the agency's requirements are "mandatory," i.e., must be met by the software without modification. DSG does not argue that compatibility with USIA's technical requirements is not a legitimate minimum need of the agency. Rather, it argues that this requirement is unduly restrictive because it essentially requires that any compatibility modifications be made prior to the award date and thus, favors incumbents. We disagree. USIA states that the system it seeks is new, thus, no vendors are incumbent. Regardless, absent evidence that an incumbent's advantage is due to preference or unfair government action, the government is not required to equalize offerors' competitive positions. Reach All, Inc., B-229772, Mar. 15, 1988, 88-1 CPD ¶ 267. Further, the fact that not every potential competitor is able to meet a requirement demonstrates no impropriety where, as here, the requirement reflects the agency's minimum needs. Id. Here, USIA states that two vendors replied to the LOI and neither took any exceptions to the requirements as stated.

With regard to the remaining aspects of the LOI challenged by DSG, we find no impropriety. The agency has a reasonable need for fixed prices and for current financial information. The former is essential for determining the most advantageous offer and the latter is needed in view of the limited, and arguably stale, information submitted by vendors when competing for inclusion on the Schedule. There also is nothing improper in USIA's request for a description of other application modules, which are available but not needed to satisfy the agency's currently defined requirements. An agency's desire to evaluate the potential for future expansion of its system is unobjectionable, and such an evaluation is not prohibited by the terms of the Schedule. In sum, submission of prices, financial information, and information on other products cannot be deemed unduly restrictive here, and none of these requirements would prevent DSG from competing. Accordingly, these allegations are without merit.

DSG next argues that USIA has improperly altered the terms of the FMSS Schedule contract in the following areas: contract type, delivery order term, pricing structure, requirement for non-FMSS Schedule products and services, additional terms and conditions, out-of-scope work, and

change in performance standards. We have reviewed these terms and find that none is inconsistent with the Schedule contract.[2]

For example, DSG argues that it is improper for USIA to seek a firm, fixed-price delivery order when the Schedule contract "requires" a fixed-price level of effort delivery order. DSG is incorrect. A level-of-effort contract is one in which the contractor provides a specified level-of-effort over a stated period of time, on work that can be stated only in general terms. Federal Acquisition Regulation (FAR) § 16.207-1. Such contracts are suitable for investigation or study in a specific research and development area with payment based on effort expended rather than on results achieved. FAR § 16.207-2. While the Schedule contract provides for two pricing arrangements, neither can properly be deemed a "level-of-effort."

Section H.12 provides that delivery/task orders will be issued either as firm, fixed-price delivery orders for software purchase, maintenance, training, and documentation, or, for technical assistance; delivery/task orders are to be issued for fixed labor categories with a maximum number of hours of work and/or a ceiling amount. As explained above, USIA's pricing scheme called for fixed-prices and labor rates which is consistent with the Schedule terms.

DSG also contends that it is improper for USIA to set the LOI term at 60 months when the FMSS Schedule term is set at 48 months. As observed by USIA, the FMSS contract does not set a 48-month limit and, in fact, anticipates that some agencies will have extended system-life requirements. Here, the LOI provides for a 1-year base period for installation of the software, training, and related tasks, and up to four 1-year options for maintenance, licenses, and technical support. We find nothing inconsistent between USIA's performance periods and the terms and conditions of the Schedule.

---

[2]DSG's complaint concerning "out-of-scope work" is essentially a restatement of its complaint about having to furnish information regarding additional software modules which are not necessary for this procurement. As explained above, this request for information is for evaluation of future applications and is consistent with the terms of the FMSS Schedule contract. While DSG also complains about the LOI's request that it provide software products and support services not specified in the Schedule, section H.12 clearly provides for agencies to "specify additional requirements that are not included in the current specifications."

DSG's remaining claims of inconsistency are equally without merit. For example, DSG complains that the LOI includes 11 contract clauses which are not part of the FMSS Schedule contract. However, DSG neither identifies anything in these clauses which it finds objectionable nor suggests any alternative provisions. In fact, nine of the clauses are solicitation provisions, all of which are included in DSG's FMSS contract.[3] The remaining clauses, FAR § 52.246-2 (inspection of supplies) and § 52.246-4 (inspection of services), while not specifically identified in the FMSS contract are certainly contemplated by it. Section H.12 specifically allows user agencies to include special contract provisions concerning inspection and acceptance. DSG has shown nothing improper about these provisions. In sum, the LOI requirements about which DSG complains are unobjectionable as they reflect actual agency needs and are consistent with the FMSS Schedule contract.

The protest is denied.

Robert P. Murphy
Acting General Counsel

[3]FAR §§ 52.215-5, 52.215-7, 52.215-8, 52.215-9, 52.215-10, 52.215-12, 52.215-13, 52.215-15, 52.215-16.