Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rel-Tek Systems & Design, Inc.

File: B-280463.3

Date: November 25, 1998

Stephen S. Kaye, Esq., J. Michael Cooper, Esq., and Tina R. Tyson, Esq., Bryan Cave, for the protester.
Richard J. Conway, Esq., J. Andrew Jackson, Esq., Edward W. Kirsch, Esq., and Steven A. Alerding, Esq., Dickstein Shapiro Morin & Oshinsky, for Oracle Corporation, an intervenor.
Jill A. Eggleston, Esq., and Terry G. Sloan, Esq., Defense Finance and Accounting Service, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award is improper where awardee's proposal failed to conform to material solicitation requirements regarding acceptance, warranty, and software performance.

DECISION

Rel-Tek Systems & Design, Inc. protests the award of a contract to Oracle Corporation under letter of interest (LOI) No. MDA-L-97-0005, issued by the Defense Finance and Accounting Service (DFAS) for accounting software and related services. Rel-Tek protests, among other things, that the award was improper because Oracle's proposal was ambiguous and failed to comply with material LOI requirements.

We sustain the protest.

The LOI was issued on March 25, 1997, under the General Services Administration (GSA) Multiple Award Schedule (MAS) for Financial Management Systems Software (FMSS) for the procurement of commercial off-the-shelf (COTS) software and services. The LOI required COTS software, software enhancements and modifications, system installation, training, technical support services,

documentation, and maintenance.[1] The LOI, as amended, included a detailed statement of work (SOW) which identified specifications to be met by each offeror's proposed software, as well as required contract terms, services, and deliverables. Award of a fixed-price requirements contract for a base year and four 1-year option periods was to be made to the offeror submitting the proposal determined to offer the "greatest value"--where technical merit was moderately more important than price. LOI Amendment No. 4, § L-1, § M-2.

Technical proposals were to be evaluated under two primary criteria: technical and functional operational capabilities; and ability to provide enhancements and to fully integrate the COTS system. Id. at § M-3. Cost proposals were to be evaluated for realism. Id. at § M-6.1.

Four proposals were submitted by the closing date for receipt of proposals. All four were included in the competitive range for written discussions; demonstration tests were conducted to validate each offeror's COTS software's level of performance and the need for enhancements to meet the SOW specifications. (One offeror withdrew from the competition prior to the second round of demonstration tests.) Final proposal revisions were submitted by the remaining three offerors, including Rel-Tek and Oracle, by March 13, 1998.

Clarification request letters were sent to all offerors on April 1. Among the many questions asked of Oracle were requests to clarify certain terms and assumptions in its March 13 final proposal revision submission, including perceived uncertainties in the Oracle proposal's license terms. Oracle's April 3 response to the agency's April 1 clarification request letter affirmed portions of its proposal, rephrased others, and noted, at 5, that Oracle believed that several categories of LOI requirements "would still need to be negotiated by the parties before executing a final contract," [deleted].

Although the other two offerors were found to have adequately responded to the agency's earlier request, the agency determined that additional "clarifications" were needed from Oracle to confirm the firm's compliance with the LOI requirements in the areas Oracle felt still needed to be negotiated, as well as other areas of its proposal. Accordingly, on May 1, DFAS issued, only to Oracle, another request for information; in this request, the agency informed Oracle that, although the firm identified LOI requirements it believed would need to be negotiated before award, the LOI terms were to remain unchanged. The agency also specifically asked Oracle to confirm if its software license and services agreement (SLSA), which was submitted as part of the firm's proposal, complied with the requirements of the LOI.

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[1]The LOI was issued in support of the Defense Procurement Payment System, Program Management Office, formed to standardize and modernize contractor and vendor payment, grant, and entitlement systems.

In its May 7 response to the agency request, Oracle stated as follows:

> [deleted] It has been Oracle's intent from the onset to negotiate mutually favorable acceptance and performance terms for the Government for the modification/customization required under the LOI. Oracle's SLSA is an extension of the LOI terms and conditions and requirements which, among other things, details licensing arrangements and warranties for the products and services anticipated under this project.

The evaluators remained concerned that this statement did not confirm Oracle's compliance with all material solicitation terms--for instance, [deleted]. The evaluators also remained concerned that the SLSA proposed by Oracle did not mirror the LOI requirements for license, warranty terms, and software performance, and thus was technically unacceptable. The matter was then forwarded for DFAS legal review, which concluded that the varying terms of the Oracle proposal did not render the proposal unacceptable. Subsequently, the contracting officer found the Oracle proposal acceptable.

Rel-Tek's technical proposal was rated [deleted] overall (with a total score of [deleted], compared to Oracle's technical proposal's overall score of [deleted], out of a possible [deleted] total points). Final Technical Evaluation Report, Executive Summary of Results, at 1. [deleted] Rel-Tek's proposal was evaluated at a price of $[deleted]; Oracle's proposal's evaluated price was $[deleted]. [deleted] Award was made to Oracle on June 22. Rel-Tek's protest of the award followed.

In negotiated procurements, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Barents Group, L.L.C., B-276082, B-276082.2, May 9, 1997, 97-1 CPD ¶ 164 at 10; Martin Marietta Corp., B-233742.4, Jan. 31, 1990, 90-1 CPD ¶ 132 at 7. Rel-Tek contends that certain terms of the LOI, including requirements regarding warranty, acceptance, and compliance with performance specifications, are material requirements that must be met without qualification--regardless of whether the solicitation sets them out as minimum requirements--because they affect the government's rights under the resulting contract. We agree. See Scientific-Atlanta, Inc., B-255343.2, B-255343.4, Mar. 14, 1994, 94-1 CPD ¶ 325 at 9; Montgomery Furniture Co., B-229678, Mar. 1, 1988, 88-1 CPD ¶ 212 at 2. The remaining question, therefore, is whether Oracle's varying proposal terms in these areas demonstrate that the proposal does not comply with the stated requirements. As discussed below, the record here shows that Oracle's proposal did not comply with material requirements of the LOI, and thus was unacceptable.

The LOI included two acceptance periods that are relevant to this protest. The acceptance period requirements under the LOI, § C-3.1 of Amendment No. 0008, at 2, stated that the agency would "notify the contractor of acceptance or rejection

of the FMSS by written notification within 120 calendar days of receipt." Notification of the acceptance or rejection of the Department of Defense Agency License to be delivered with the FMSS would be received within "30 calendar days of receipt of such." Id. at 3.

Our review of the Oracle proposal submissions and the firm's response to the agency's request for information shows that Oracle did not clearly commit to the LOI's required 120-day acceptance provision regarding the FMSS. Rather, the firm continued, up until the time of award, to offer its own acceptance provisions. For instance, in its final proposal revision submission of March 13, Oracle generally stated that it accepted amendment No. 0008's 120-day acceptance period for the FMSS (the firm's proposal also indicated acceptance of the amended LOI's 30-day acceptance period for the license). In its April 3 correspondence, however, Oracle essentially retracted any commitment it may have earlier made to the required 120-day acceptance terms for the FMSS by indicating its intent to instead negotiate the acceptance period terms of any resulting contract. By letter of May 1, the agency informed Oracle that the acceptance (and other) terms of the LOI would remain unchanged; the agency's letter also sought confirmation from Oracle as to the firm's compliance with LOI provisions. In its May 7 response, Oracle, "offer[ing] . . . comments and clarifications," stated that "[a]cceptance of COTS Programs shall be in accordance with standard commercial practices, as set forth in the next paragraph." The next paragraph of that letter discussed the 30-day acceptance period for each "Program license." The evaluators were concerned, and we believe reasonably so, that Oracle was now applying the 30-day acceptance period, which under the LOI was applicable to the license, to the FMSS itself, thus shortening the LOI's 120-day acceptance period for the FMSS. As one evaluator pointed out, Oracle's SLSA at times uses the term "program license" to refer to the actual software program, rather than only to the license to use the program (e.g., the SLSA, regarding the performance of the program for warranty purposes, refers to performance of the "Program license." SLSA at § 5.2.A).

In our opinion, the Oracle proposal, read as a whole, is, at best, ambiguous as to whether the firm committed to accept the LOI's 120-day acceptance period for the FMSS. This is a material ambiguity, since shortening the FMSS acceptance period from 120 to 30 days limits the agency's rights in this regard. The other offerors agreed to meet the LOI's acceptance terms, and, in so doing, took on the associated additional risks, while Oracle did not and thereby limited its risk.[2]

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[2]In its comments responding to the agency's report, Oracle argues that, since its May 7 response added language asking that the agency "[p]lease delete" the LOI requirement, the submission was only a precatory suggestion by the offeror that the agency change its requirement, and that it cannot be interpreted as taking exception to the requirement. Intervenor's Comments, Sept. 28, 1998, at 21. Although, in

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Next, the record demonstrates that Oracle also failed to commit to the LOI's warranty requirements. Section 3.7 of the SOW states that the offeror's "warranty shall begin the day of final inspection and acceptance by the [agency] and shall continue to be in effect for 360 [calendar] days from the issuance date of such." (Emphasis added.) Oracle's SLSA, however, provides for a [deleted] warranty to begin upon [deleted] of the warranted product to the agency.[3] As discussed above, the LOI's acceptance period requirement for the FMSS program provides for acceptance or rejection of the FMSS within 120 days of delivery. Oracle's SLSA warranty is inconsistent with the LOI warranty period requirement, since, under the clear terms of the LOI, the required 360-day warranty period is not to commence until final acceptance--well after (as much as [deleted] after) [deleted] of the product. In other words, Oracle's [deleted] warranty will cease as much as [deleted] before the end of the warranty period required by the LOI. Oracle's failure to commit to the LOI's material warranty terms limits the government's rights in this area. See Montgomery Furniture, supra, at 2.

Further, in its April 3 response to the agency's questions about its final proposal revision, Oracle listed section H-6 of the LOI, regarding software performance, as one of the issues that still had to be negotiated. Section H-6 of the LOI, at 16, provides:

> Any software furnished or modified under this contract must conform to and perform in accordance with DFAS's specifications and requirements as set forth in this letter of interest and all other . . . core requirements must be met.

Subsequently, in its May 7 response to the agency's May 1 letter reiterating that the LOI terms were to remain unchanged, Oracle suggested that section H-6 be deleted, and stated: "The COTS Programs provided under this [LOI] or any subsequent orders stemming from this [LOI] are warranted for a period of [deleted] as further set forth in the [GSA] schedule . . . and [Oracle's] SLSA (Sections 5.2 and 5.3)."

The technical evaluators questioned the technical acceptability of Oracle's proposal based on this qualification regarding section H-6; the agency's legal review,

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[2](...continued)
some instances, an offeror's precatory request for different requirements may convey only a desire for certain contract terms, without indicating the offeror's noncompliance with original solicitation requirements, see, e.g., GMI, Inc., B-239064, July 3, 1990, 90-2 CPD ¶ 8 at 3, that is not the case here, where award was made to a firm that had not committed to comply with all acceptance periods included in the LOI.

[3]The Oracle SLSA, which provides [deleted].

however, concluded that the proposal was acceptable despite the qualification, without elaborating on the basis of that determination. We agree with the evaluators' determination--the materiality of the requirement (performance in accordance with all required specifications) is clear, as is the fact that Oracle never stated prior to award that it accepted the required performance terms. On the contrary, the record shows that Oracle indicated an intention not to be bound by the performance requirements of § H-6, and committed itself only to performance in accordance with the [deleted] terms of its own SLSA. [deleted]

Although the agency had earlier informed Oracle that all LOI requirements remained unchanged, the firm continued to propose its own terms for performance of the stated requirements. The record shows that Oracle, although it had been questioned by the agency about its intended compliance with material terms of the solicitation, did not clearly state that it would comply with stated material requirements regarding acceptance, warranty, and software performance. Accordingly, we sustain the protest.

We recommend that the DFAS conduct discussions with all offerors whose proposals were in the competitive range at the time of award, request best and final offers, and proceed with the source selection process.[4] If, after the selection process has concluded, another offeror's proposal is determined to offer the greatest value to the government under the terms of the LOI, the DFAS should terminate Oracle's contract, and award to that offeror. We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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[4]Rel-Tek also raised additional protest issues--i.e., regarding the realism of Oracle's proposed price, the adequacy of discussions, and an alleged conflict of interest arising from the recent employment by Oracle of a former DFAS senior executive. Our corrective recommendation for the most part renders these additional issues academic. Nonetheless, we have reviewed these issues and, based on the protest record, we conclude that they are without merit.