



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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

File: B-280463.7

Date: July 1, 1999

Stephen S. Kaye, Esq., and Tina R. Tyson, Esq., Bryan Cave, for the requester.
J. Andrew Jackson, Esq., and Tina D. Reynolds, 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

Request for modification of remedy is denied where agency's implementation of recommendation cures procurement impropriety and prevents auction among competitors.

DECISION

Rel-Tek Systems & Design, Inc. requests that our Office modify the corrective recommendations included in our decision in Rel-Tek Sys. & Design, Inc., B-280463.3, Nov. 25, 1998, 99-1 CPD ¶ 2, in which we sustained Rel-Tek's protest of an award 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. We sustained the protest because Oracle's proposal failed to unambiguously demonstrate compliance with certain LOI requirements regarding acceptance, warranty, and software performance.

In that decision, we recommended that DFAS conduct discussions with all offerors whose proposals were in the competitive range at the time of award, request best and final offers (BAFO), and proceed with the source selection process. We further recommended that, if, after the selection process had concluded, another offeror's proposal was determined to offer the greatest value to the government under the

terms of the LOI, Oracle's contract should be terminated, and award made to that offeror.¹

DFAS limited its implementation of our corrective recommendations to the three solicitation requirements (regarding acceptance, warranty, and software performance provisions of the LOI) with which Oracle's proposal failed to unambiguously comply. Specifically, the agency reopened discussions, but limited them to these areas of the proposals, noting for Oracle that its proposal did not comply with these requirements. The agency reports that, since the remaining offerors' proposals had no identifiable deficiencies in these three areas, the agency did not raise discussion questions with these firms.² The agency subsequently issued to each competitive range offeror a request for a new BAFO, instructing each offeror to limit any proposal revisions to these three technical areas (*i.e.*, acceptance, warranty, and software performance) and their associated costs.

Rel-Tek requests that we modify our corrective recommendations. Rel-Tek bases its request on the allegedly restrictive terms of the agency's request for new BAFOs, under which Rel-Tek asserts it will not receive effective relief.³ Rel-Tek contends that the terms of the recompetition are improper, since Rel-Tek is precluded from changing areas of its proposal that the firm desires to change in order to be more

¹ We also recommended that the protester be reimbursed the reasonable costs of filing and pursuing its protest.

² These offerors, including Rel-Tek, were given the opportunity to suggest discussion questions themselves, limited to the same three LOI requirements. The offerors did not raise any questions for discussion with the agency.

³ Our review of Rel-Tek's request for modification of remedy focuses on the terms of the agency's BAFO request. Although Rel-Tek challenges the agency's failure, during the recompetition, to conduct discussions with the firm regarding other areas of its proposal, we see no basis to object to the agency's action on this ground. As we stated in our initial decision, Rel-Tek's challenges to the agency's discussions with the firm did not provide a basis to sustain the protest (*i.e.*, the protester did not persuasively show that discussions were not adequate or that it was competitively prejudiced by improper discussions). *Rel-Tek Sys. & Design, Inc., supra*, at 6, n.4. Rel-Tek has not timely sought reconsideration of that decision. 4 C.F.R. § 21.14 (1998). Our generally stated recommendation for discussions was not intended to be as wide-ranging as Rel-Tek contends, but instead, was crafted to recognize the agency's discretion in this area, while anticipating that, at a minimum, the agency would conduct discussions with Oracle regarding the material deficiencies in its proposal, *see Furuno U.S.A., Inc.—Recon.*, B-221814.2, June 10, 1986, 86-1 CPD ¶ 540 at 3, and request revised proposals from all competitive range offerors.

competitive. Essentially, Rel-Tek seeks a decision from our Office recommending recompetition on the basis of unrestricted discussions and BAFOs.⁴

The agency, on the other hand, asserts that it has adequately corrected the prior procurement impropriety by giving Oracle an opportunity to comply with the cited LOI requirements it did not meet prior to award, and allowing the remaining offerors a similar opportunity to revise these limited areas of their proposals, including cost proposal revisions related to these requirements. The agency asserts that the limitation imposed on the BAFO revisions is necessary here to prevent an improper auction, since the remaining competitors, who were debriefed after award, have learned not only their competitive standing and proposal evaluations, but also the awardee's substantially lower evaluated costs.

Generally, offerors in response to discussions may revise any aspect of their proposals as they see fit--including portions of their proposals which were not the subject of discussions. System Planning Corp., B-244697.4, June 15, 1992, 92-1 CPD ¶ 516 at 3-4. There may, however, be appropriate circumstances where an agency, in conducting discussions to implement a recommendation of our Office for corrective action, may reasonably decide to limit the revisions offerors may make to their proposals. Id. As a general matter, the details of implementing our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. Serv-Air, Inc., B-258243.4, Mar. 3, 1995, 95-1 CPD ¶ 125 at 2-3. Moreover, we will not question the agency's ultimate manner of compliance so long as it remedies the procurement impropriety that was the basis for the decision's recommendation. See Furuno U.S.A., Inc.--Recon., supra, at 3-4.

⁴Rel-Tek also requests that we modify our recommendations to include a recommendation for the disqualification of Oracle from the recompetition--based in part on the alleged advantage Oracle now has from its continued performance of the contract--or, in the alternative, that we recommend that Rel-Tek be reimbursed its proposal preparation costs. Although the disqualification of Oracle was unsuccessfully sought by Rel-Tek during the protest, and although Rel-Tek should have anticipated continued performance of the contract by Oracle during the recompetition, neither matter was raised in a timely reconsideration request. Further, since, as discussed above, Rel-Tek has been provided a reasonable opportunity to compete further for the award, there is no basis for a recommendation that its proposal preparation costs be reimbursed. To the extent Rel-Tek also alleges, on information and belief, that Oracle is not performing the contract in accordance with the LOI requirements, the agency reports that it has no knowledge of such failure to perform; and the allegation otherwise raises a matter of contract administration not for our review. 4 C.F.R. §21.5(a).

The agency cites previous decisions issued by our Office in support of the propriety of its actions in limiting the terms of the BAFOs requested from the offerors to correct the procurement deficiency cited in our decision (*i.e.*, the agency's award of the contract on the basis of a proposal which failed to unambiguously demonstrate compliance with certain solicitation requirements). For example, the agency cites our decision in System Planning Corp., *supra*, where the agency had effectively waived for the awardee a solicitation requirement for the submission of an audited financial statement. We agreed that a limited request for information from each offeror was an appropriate way to remedy the impropriety, which did not affect other portions of the proposals. Here, the procurement impropriety in the award to Oracle similarly involves separable aspects of that firm's proposal, which do not affect other portions of the proposal or other LOI requirements.⁵

In addition, here, as in System Planning, there is no indication that the agency's requirements have changed since the initial BAFO submissions. Further, Rel-Tek offers no explanation, and we see none, of any changed circumstances that warrant requiring the agency to allow the competitive range offerors to revise their proposals in other areas--other than the fact that those offerors are now aware of Oracle's substantially lower evaluated costs.⁶

Focusing on the disclosure of Oracle's evaluated costs and the offerors' competitive standing, the agency asserts that limiting the terms of the new BAFOs is necessary to prevent an auction, in accordance with Federal Acquisition Regulation (FAR) § 15.610(e)(2) (June 1997), which generally prohibits auction techniques, including

⁵ To the extent Rel-Tek contends that the limited BAFO request prejudices its chances for award, since the firm cannot alter its cost proposal in other areas that may have included costs related to these three LOI requirements, we are not persuaded by this argument--Rel-Tek has not shown that the terms of the BAFO request are unnecessarily restrictive. The agency's BAFO request, limited to the offerors' technical and cost-related proposal revisions for acceptance, warranty, and system performance, did not prohibit revision to other areas of the offerors' proposals to the extent that those proposal areas contained terms and related costs for the three requirements at issue.

⁶ Another decision cited by the agency is Serv-Air, Inc., *supra*. In that case, we found that limited discussions, including proposal revisions limited to cost proposals, were acceptable to cure the procurement deficiency found in the underlying protest--the protester had been deprived of meaningful discussions regarding its general and administrative expense rates. As here, the limited terms of the BAFO request cured the procurement deficiency, while eliminating any concerns about the possibility of technical leveling and reducing any further costly delay caused by the protest process.

the disclosure of offerors' prices during discussions.⁷ Rel-Tek's modification of remedy request effectively seeks the opportunity to engage in an auction, with knowledge of the Oracle proposal's evaluated costs. Under these circumstances, we find reasonable the agency's position that such an auction should be prevented.

As stated above, reopening of discussions in response to corrective recommendations to allow for the submission of limited proposal revisions aimed at correcting a specific procurement impropriety is generally unobjectionable in a negotiated procurement, especially where the limited procurement impropriety does not reasonably affect other areas of the evaluation of proposals. System Planning Corp., supra. Given the risk of an auction upon recompetition of a protested procurement, an opportunity to submit unlimited BAFO revisions after disclosure of prices may not be warranted where the agency can otherwise reasonably correct the earlier procurement defect. See Krueger Int'l, Inc., B-260953.4, Oct. 4, 1995, 96-1 CPD ¶ 235 at 6.

Here, given, on the one hand, the potential for auction arising from disclosure of the awardee's substantially lower evaluated costs and the offerors' competitive standing, and, on the other hand, the fact that the procurement impropriety can be corrected with limited revised proposals, and that there has been no change to the agency's requirements, we see no basis to require the agency to, in effect, reopen the entire procurement by permitting unlimited proposal revisions. In sum, we conclude that the agency's implementation of our corrective recommendations was reasonable. Accordingly, we deny Rel-Tek's request for modification of those recommendations.

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⁷ We note that, although the cited regulatory provision regarding auctions governs this procurement, the recently revised FAR provision regarding limitations on the disclosure of offerors' prices during discussions does not include language regarding the prevention of auctions. FAR § 15.306(e)(3) (FAC 97-02).