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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: CourtSmart Digital Systems, Inc.

File: B-292995.2; B-292995.3

Date: February 13, 2004

James H. Roberts, III, Esq., Van Scoyoc Kelly, for the protester.
Jeffrey B. Krashin, Esq., Thompson & Waldron, and William E. Casselman, II, Esq., for York Telecom Corporation, the intervenor.
Seth Binstock, Esq., Social Security Administration, and Thedlus L. Thompson, Esq., General Services Administration, for the agencies.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Issuance of order that included non-Federal Supply Schedule (FSS) item under a competition among FSS vendors was improper.

2. Awardee's quotation under a competition among Federal Supply Schedule vendors was unacceptable where it was not compliant with the solicitation provision requiring compliance with section 508 of the Rehabilitation Act, which requires electronic and information technology that will allow individuals with disabilities the same access as persons who are not individuals with disabilities.

3. In a competition among Federal Supply Schedule vendors, quotations were not evaluated on an equitable basis with respect to an experience requirement.

4. Agency's determination that protester's software for portable digital recording system proposed in a competition under the Federal Supply Schedule (FSS) was unacceptable is not supported by the record.

DECISION

CourtSmart Digital Systems, Inc. protests the issuance of an order to York Telecom Corporation under a request for quotations (RFQ) issued by the Social Security Administration (SSA) for a portable digital recording system under the Federal Supply Schedule (FSS).

We sustain the protest.

The RFQ contemplated the issuance of a fixed-priced order for products and services under the selected vendor's FSS contract. The RFQ included a detailed statement of work (SOW) stating that the agency's requirement was for "a single, stand-alone, portable recording system." The agency intends to purchase 1,470 of these systems to be used on a nationwide basis to record hearings and appeals related to applications for SSA disability benefits. Each system is to be installed on and/or used with a laptop computer, a sound card and video teleconference equipment that SSA will provide as government-furnished equipment. The system must include the commercial off-the-shelf (COTS) recording software and the hardware necessary to allow audio generated at hearings to be recorded. The successful vendor will be required to install all of the systems within a period of 18 months at SSA locations throughout the continental United States, Hawaii, Puerto Rico and the U.S. Virgin Islands, and to provide support and maintenance services. RFQ, SOW, at 1-2; attach. 1.

The RFQ included a technical questionnaire and price charts, and identified a website, www.itic.org/policy/508/Sec508.html, for obtaining a Voluntary Product Accessibility Template (VPAT), which vendors were to complete and return as part of their quotations. The VPAT is used to show the compliance of the vendor's proposed system with the accessibility standards for individuals with disabilities imposed by section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794d (2000), and its implementing regulations.[1]

The RFQ required each vendor to quote items that were either on the vendor's FSS contract or would be on that contract prior to award. If items were not on a vendor's contract at the time a quotation was submitted, the quotation had to identify such items as "open market" items, and state whether and when the vendor expected the items to be added to the vendor's FSS contract. Open market items added to a

[1] Section 508 of the Rehabilitation Act includes a requirement that federal agencies procure electronic and information technology (EIT) (such as the system being procured here) that allows individuals with disabilities the same access as persons who are not individuals with disabilities unless an undue burden would be imposed on the agency. 29 U.S.C. § 794d(a)(1)(A). The Architectural and Transportation Barriers Compliance Board established the EIT standards published at 36 C.F.R. Part 1194 (2003). In implementing section 508, Federal Acquisition Regulation (FAR) Subpart 39.2 requires that the acquisition of commercial-item EIT supplies and services meet the applicable accessibility standards at 36 C.F.R. Part 1194 if they are available in the commercial marketplace in time to meet the agency's delivery requirements, unless this creates an undue burden on the agency (that is, significant difficulty or expense) or the acquisition falls under certain other exceptions not applicable here.

vendor's FSS contract prior to award would be acceptable. The RFQ also stated the following:

> [T]he government will not consider award based on competing part of the requirement separately. The government will reject quotations that contain line items from non-GSA contracts[.]

RFQ, Evaluation Information, at 1.

The RFQ stated that the agency might make award without discussions or clarifications, and stated the following basis for award selection:

> Award will be made, after consideration of [section] 508 compliance issues, to the lowest price, technically acceptable offeror providing a GSA schedule contract quotation.

RFQ, Evaluation Information, at 1. The RFQ defined "technically acceptable" as follows:

> Meeting the section 508 criteria, the technical requirements of the solicitation (including hands-on pre-award testing) and acceptable past performance will constitute technical acceptability. Please note that if the government determines in the course of its technical evaluation that one (or more) quotations are significantly more [section] 508 compliant than the others, it will only consider for award the quotation (or quotations) that provide the most [section] 508 compliant product as of the time of award.

RFQ, Evaluation Information, at 1.

According to the RFQ, evaluation for the section 508 and technical requirements criteria was to be based on SSA's review of the VPATs and technical questionnaires completed by the vendors, and on the pre-award testing of systems. The pre-award testing for compliance with technical requirements was to be performed on the complete system of hardware and software quoted by each vendor. Besides testing for compliance with the technical requirements, testing also was to be used to determine compatibility with SSA's environment, ease of use, and actual functionality. At the same time as the technical requirements testing, the agency (or an independent third party requested by the agency) was to perform testing of the recording software for compliance with section 508. RFQ, Evaluation Information, at 2-3.

Evaluation under the past performance criterion was to be conducted through checks with references identified in the vendors' quotations and other sources. The RFQ defined past performance as "a measure of how well an offeror performed under previous, similar contracts." Id. at 1-2. Additionally, the SOW stated that a

vendor "shall provide evidence that it has completed successfully a project similar in scope to this one." RFQ, Notice of Requirement, at 1 n.1; SOW, at 2. To evaluate compliance with this provision, vendors were asked, "In the last five years, have you successfully implemented a project that was national in scope (throughout the U.S, plus Hawaii, Puerto Rico and Virgin Islands) within an 18 month period of time?" RFQ, Technical Questionnaire, at 8.

The agency received quotations from [DELETED] vendors. SSA held demonstrations of the systems proposed by [DELETED] of the vendors, including CourtSmart and York, and conducted pre-award testing of these vendors' proposed systems. The agency states that it "completed an initial [section] 508 testing" on York's system, but "did not close out all issues at that time"; York's quotation indicated that its system was not section 508 compliant. Agency Report, Tab 12, York's Quotation, at 53; app. C, VPAT; app. D, Consultant's Assessment, at 3; Tab 25, Summary of Award Memo, at 4 n.12. No other vendor's system was tested for section 508 compliance, although at least CourtSmart's quotation indicated that its system was section 508 compliant. See Agency Report, Tab 11, CourtSmart's Quotation, VPAT, at 2.

Ultimately, the agency determined that all quotations, except York's, which had the highest price, were technically unacceptable under one or more evaluation criteria. CourtSmart's significantly lower-priced quotation was considered unacceptable under the past performance criterion, even though it had very relevant successful experience in supplying and installing portable digital recording systems, solely because it did not satisfy the requirement of having completed a similar "nationwide" project within 18 months. SSA also found that CourtSmart's proposed software failed in several areas during the demonstration and pre-award testing when used with SSA's software and hardware. On September 30, the agency placed the order with York. This protest followed.

CourtSmart alleges that the agency unreasonably determined that York's quotation was technically acceptable because York quoted significant items not on York's FSS contract and York's software was not section 508 compliant as required by the RFQ. The protester also alleges that the agency unreasonably determined during pre-award testing that CourtSmart's quotation was technically unacceptable, and unreasonably evaluated CourtSmart as unacceptable under the past performance criteria simply because it assertedly did not have experience performing a nationwide project.

The FSS program, directed and managed by the General Services Administration (GSA), gives federal agencies a simplified process for obtaining commonly used commercial supplies and services. FAR § 8.401(a). Orders placed using the procedures established for the FSS program satisfy the statutory and regulatory requirement for full and open competition. FAR §§ 6.102(d)(3), 8.404(a). Non-FSS products and services may not be purchased using FSS procedures; instead, their

purchase requires compliance with the applicable procurement laws and regulations, including those requiring the use of competitive procedures. Symplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 4; see ATA Def. Indus., Inc. v. United States, 38 Fed. Cl. 489, 504 (1997). Therefore, where, as here, an agency solicits quotations from vendors for purchase from the FSS, the issuance of a purchase order to a vendor whose quotation includes a non-FSS item priced above the micro-purchase threshold is improper. Symplicity Corp., supra, at 4-5; T-L-C Sys., B-285687.2, Sept. 29, 2000, 2000 CPD ¶ 166 at 4.

Here, it is undisputed that at least one item in York's proposed system--the audio mixer--was not on York's FSS schedule. York's quotation identified the mixer as an item on an FSS contract of another vendor, Biamp Systems, with which York stated it had a "contractor team arrangement."[2] However, the Biamp FSS contract identified in York's quotation expired several years ago, and the Biamp mixer was, therefore, not an FSS item. Not only is the mixer a necessary component of the digital recording system being procured under this RFQ, but it is the most significant hardware item, with the highest total line item price that York quoted (the total extended price for the mixer is [DELETED] dollars and comprises almost [DELETED] percent of York's total final price). Since the agency's placement of the order with York was based on a digital recording system using a non-FSS mixer, the selection of York was improper. Symplicity Corp., supra, at 4-5; T-L-C Sys., supra.

SSA alleges that this improper award did not prejudice CourtSmart because that firm's quotation was technically unacceptable. SSA points to CourtSmart's failure to satisfy the solicitation requirement that it have experience in installing similar systems nationwide and the failure of its software, as demonstrated and tested, to meet various technical requirements. However, as discussed in detail below, the record shows that the agency's judgments in these regards were based on an unreasonable evaluation. Moreover, as explained below, York's proposal should have been considered unacceptable under the section 508 compliance evaluation criterion. Therefore, the agency's prejudice argument fails.[3]

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[2] GSA states that its procedures encourage the use of contractor team arrangements, pursuant to FAR Subpart 9.6 (authorizing contractor team arrangements). According to GSA, a vendor's FSS contract permits a vendor to offer, as part of its solution to an agency's requirements, a combination of FSS items from its own FSS contract and from other vendors' FSS contracts, provided that it has a contractor team arrangement with the other vendors. York's revised quotation stated that York had partnered with 10 other FSS vendors to quote FSS items from those vendors' FSS contracts.

[3] Following the protester's supplemental comments responding to the agency's supplemental report on this and other matters, the agency notified our Office that it had confirmed that the mixer was a non-FSS item, and that, as corrective action in response to the protest, it would delete the mixer from the order to York and

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The agency otherwise alleges that both it and York believed the Biamp mixer was an FSS item, and therefore, the defect in the award to York should be correctable under the regulations allowing for correction of a mutual mistake apparent after award pursuant to FAR §§ 14.407-4, 15.508. This argument is meritless because there was no mistake in York's quotation. York intended to quote the Biamp mixer, and SSA understood that York intended to quote that item. The FSS contract number for the item was correctly identified and, as previously stated, that contract had expired years earlier. York attempted to verify the FSS status using GSA resources and was unable to identify the Biamp mixer as an FSS item, at which point York elected to rely on statements made by Biamp rather than GSA resources. Declaration of York's Vice President of Engineering (Jan. 15, 2004) at 2, attachs. While that is an action that York may now regret, there was no correctible or waivable mistake in York's quotation. See McGhee Constr., Inc., B-255863, Apr. 13, 1994, 94-1 CPD ¶ 254 at 2.

CourtSmart alleges that York's quotation identifying the Biamp mixer as an FSS item constitutes an intentional material misrepresentation, or that York demonstrated such reckless disregard for, or deliberate ignorance of, the mixer being a non-FSS item that its actions were tantamount to an intentional misrepresentation with the intent to deceive SSA. CourtSmart requests that York be barred from any recompetition for SSA's requirements. While our Office has recommended such consequences for intentional material misrepresentations, Informatics, Inc., B-188566, Jan. 20, 1978, 78-1 CPD ¶ 53 at 13, the record here does not show that York made an intentional misrepresentation.

As stated above, in preparing its quotation, York attempted to trace Biamp's contract number to a current GSA schedule contract and was unsuccessful. York then asked Biamp about this, and Biamp stated that the FSS contract number was correct and was a recent FSS contract with GSA.[4] York states that, based on prior experience, it

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otherwise proceed with the York order. Our Office has previously held that post-award deletion of non-FSS items is not adequate corrective action where, as here, the agency solicited and evaluated quotations for an integrated solution. T-L-C Sys., supra, at 4. In an effort to distinguish its purported corrective action from T-L-C, SSA stated that its needs for a mixer have changed, such that it would delete the Biamp mixer from York's order, even if it were an FSS item, and that it will conduct a competition for a mixer after the agency determines its actual needs. This does not cure the agency's improper action because the agency solicited and received quotations from other vendors that had prepared their quotes under the RFQ's guidance that the mixer was part of the integrated solution and had to be an FSS item. See Symplicity Corp., supra, at 5 n.5. The agency may, however, address any changed needs it has in conjunction with our recommendation below.

[4] The record does not contain evidence as to why Biamp so informed York.

considered that the GSA resources might not reflect the most current information and, because vendors had allegedly never given York an incorrect contract number, it chose to rely on Biamp's statement. Intervenor's Post-Hearing Comments at 7-10; Hearing Video Transcript (VT) at 13:23-30; Declaration of York's Vice President of Engineering (Jan. 15, 2004), at 2, attachs. As is now readily apparent, there was some risk in relying on Biamp's statement, but we cannot conclude under these circumstances that York acted recklessly or with an intent to deceive SSA in accepting Biamp's statement without further verification.[5] There is no evidence that York actually knew the Biamp contract had expired. On this record, we cannot find that York intentionally misrepresented the FSS status of the proposed Biamp mixer.

Turning to the remainder of the agency's technical evaluation, under the FSS program, FAR Subpart 8.4 anticipates that an agency will review vendors' schedules and place an order with the vendor whose goods or services represent the best value and meet the agency's needs at the lowest overall cost. KPMG Consulting LLP, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 at 10-11; OSI Collection Servs., Inc.; C.B. Accounts, Inc., B-286597.3 et al., June 12, 2001, 2001 CPD ¶ 103 at 4. If, however, the agency issues an RFQ and thus shifts the burden to the vendors for selecting the items from their schedules, the agency must provide guidance about its needs and selection criteria sufficient to allow the vendors to compete intelligently. Where, as here, the agency intends to use the vendors' responses as the basis of a detailed technical evaluation and selection decision, the agency has elected to use an approach that is more like a competition in a negotiated procurement than a simple FSS buy, and the RFQ is therefore required to provide for a fair and equitable competition. COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5. While we recognize that the FAR Part 15 procedures, for contracting by negotiation, do not govern the FSS program, Computer Prods., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 at 4, where, as here, the agency has conducted such a competition and a protest is filed, we will review the record to ensure that the evaluation is reasonable and consistent with the terms of the solicitation and with standards generally applicable to negotiated procurements. KPMG Consulting LLP, supra.

With regard to the evaluation, CourtSmart alleges that the agency unreasonably evaluated York's and CourtSmart's quotations under the section 508 compliance evaluation criterion, and that York's quotation should have been regarded as technically unacceptable. Based on our review of the record, we agree.

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[5] As noted by GSA, ordering agencies should be provided with a copy of any contract teaming arrangement. See http://pub.gsa.gov. Here, the record indicates that the numerous teaming arrangements entered into by York in order to satisfy this order were informal and undocumented, which may have contributed to the order including at least one non-FSS item.

As indicated above, the RFQ stated that "meeting the section 508 criteria [and other RFQ criteria] will constitute technical acceptability." RFQ, Evaluation Information, at 1. York's quotation indicated that its software was not section 508 compliant and would not be compliant by the time of award. Agency Report, Tab 12, York's Quotation, at 53; app. C, VPAT; app. D, Consultant's Assessment, at 3. In contrast, CourtSmart's quotation indicated that its system was section 508 compliant. Agency Report, Tab 11, CourtSmart's Quotation, VPAT, at 2. Although the RFQ stated that, as part of the evaluation, SSA would test to evaluate section 508 compliance, SSA apparently only partially tested York's system in this regard and did not find it section 508 compliant, and did not evaluate CourtSmart's or the other quotations for section 508 compliance.

The agency states that the RFQ allowed for award based on an otherwise technically acceptable quotation that was not section 508 compliant if there were no other technically acceptable quotations.[6] In this regard, SSA points to the statement in the RFQ that if "one (or more) quotations are significantly more [section] 508 compliant than the others, it will only consider for award the quotation (or quotations) that provide the most 508 compliant product as of the time of award." RFQ, Evaluation Information, at 1. SSA's technical consultant on the section 508 compliance evaluation testified that software cannot exceed the section 508 requirements, and therefore, this provision of the RFQ can only apply to evaluations where no acceptable software is section 508 compliant. See VT at 14:44-58; see also VT at 9:24-30, 9:43, 10:46-48 (testimony of contracting officer).

CourtSmart disagrees, alleging that the RFQ provision provides for evaluating the degree to which a vendor's software that is section 508 compliant exceeds the minimum requirements. In support, the protester refers to the Access Board's section 508 website, www.section508.gov, which contains the following:

> [Frequently Asked Questions (FAQ)] B.3.ii . . . Note: Offered products and services may provide greater access than required by the Access Board's standards. An agency may, but is not required, to give additional evaluation credit for such greater access.

Also, as indicated above, section 508 and its implementing regulations provide for very limited exceptions to the requirement that electronic and information technology acquired by the government comply with the handicapped accessibility requirements. We note that the Access Board's regulations state with regard to the non-availability exception (claimed by SSA here):

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[6] The agency issued an EIT Commercial Non-availability Certification, dated 1 month after award, stating that no commercially available item complies with both the section 508 requirements and the agency's technical requirements. Agency Report, Tab 26, Non-availability Certification (Oct. 30, 2003).

> When procuring a product, each agency shall procure products which comply with the provision in this part when such products are available in the commercial marketplace or when such products are developed in response to a Government solicitation. Agencies cannot claim a product as a whole is not commercially available because no product in the marketplace meets all the standards. If products are commercially available that meet some but not all of the standards, the agency must procure the product that best meets the standards.

36 C.F.R. § 1194.2(b). In addition, FAQ E.2 on the Access Board's section 508 website, www.section508.gov, states that "absent a determination of undue burden, the agency could not make tradeoffs between the proposals that fully meet the applicable [section 508] provisions and those that only partially meet them."

Given the mandatory nature of section 508 compliance, the Access Board's regulations and guidance, and the RFQ provisions that label this a matter of technical acceptability and contemplate pre-award testing for compliance, we think that the only reasonable interpretation of the RFQ provision relied on by SSA here, calling for a comparative evaluation of section 508 compliance in some cases, is that the agency would select a quotation that exceeded the minimum section 508 standards over a quotation that merely met the standards, and that in cases where no quotation was fully compliant with the section 508 accessibility standards, the agency would select the quotation that best met the section 508 standards.

The terms of the RFQ plainly do not permit the agency to ignore the section 508 evaluation criterion in determining whether a proposal was technically acceptable, as it did here. Under an evaluation consistent with the RFQ, the record evidences that CourtSmart's quotation would have been considered acceptable under the section 508 criterion (presuming its system was tested to verify its claim of section 508 compliance) and York's could not be considered acceptable under this criterion. While the agency states that only York has offered a system that would satisfy the agency's technical requirements, and thus section 508 is not applicable because it reasonably found that no commercially available item satisfies both its technical requirements and section 508 requirements, the RFQ's terms did not allow the agency to waive the section 508 compliance requirements. In any event, the record indicates that, for the reasons stated below, the agency's judgment in this respect was not reasonably based.

CourtSmart alleges that the agency's evaluation of its past performance as unacceptable was unreasonable. CourtSmart states that it has performed a number of contracts installing more complex digital audio recording systems in a number of states throughout the country. The agency's evaluation confirms this. The references contacted by the agency generally gave CourtSmart a favorable assessment of contract performance, providing "excellent to outstanding references

for their product, their installations, support and flexibility in meeting their project needs." Agency Report, Tab 23, Technical Evaluation Report, at 3. However, the agency rated CourtSmart's past performance as unacceptable solely because its experience did not satisfy the requirement for experience consisting of a similar nationwide project performed within an 18-month period of time. Id. at 4.

While the agency states that this experience requirement was a minimum agency requirement,[7] the record shows that the agency determined that at least one other vendor did not have the experience and ability to handle a contract of similar size and scope, but it was rated "neutral" and this lack of experience was found "not sufficient to eliminate [the vendor's quotation] from consideration for award."[8] Agency Report, Tab 23, Technical Evaluation Report, at 10-12, Tab 25, Summary of Award, at 7. Even though it appears from the record that CourtSmart had more relevant digital audio recording system experience than this vendor (as well as York, whose qualifying experience was for installing video teleconference systems in SSA's hearing rooms), CourtSmart's past performance was found unacceptable and the other vendor's was not. Thus, the record suggests that the quotations were not evaluated on an equitable basis with respect to the experience requirement.[9]

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[7] SSA focuses on CourtSmart's failure to meet this requirement in arguing that the protester was not prejudiced by the York order's inclusion of at least one non-FSS item.

[8] While the contracting officer now states that he did not intend this result, VT at 12:06-11, the contemporaneous record does not support his testimony. We find it inappropriate to accord any significant weight to the contracting officer's post protest statement, particularly since it was made during the heat of an adversarial process. Gemmo Impianti SpA, B-290427, Aug. 9, 2002, 2002 CPD ¶ 146 at 4-5; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

[9] The agency's justification for this nationwide project experience requirement, as explained at the hearing, suggests that it was an unreasonable restriction on the competition that overstates the agency's needs. The agency acknowledged that there are no vendors with nationwide experience installing digital audio recording systems, but that it needs a vendor with nationwide experience "integrating" a project of similar scope, i.e., in all 50 states, Puerto Rico and the Virgin Islands. While the agency uses the term "integration" to portray this project as involving a complex installation procedure, in fact, the record evidences that the installation of the system simply involves loading the software onto a laptop computer and connecting the hardware components, which process is repeated for each of SSA's 1,470 labtops. As noted by CourtSmart, this appears to be a "cookie cutter" project (once the components of the system are identified and procured), which CourtSmart states is much simpler than the systems it generally has installed in hundreds of locations in various states. The record does not show that CourtSmart lacks the

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The protester also alleges that the agency unreasonably evaluated CourtSmart's software as unacceptable. At the hearing concerning this protest, CourtSmart's software was demonstrated and the agency representatives explained why the software was considered unacceptable. While the agency provided a long list of reasons in the contemporaneous evaluation and the agency report as to why CourtSmart's software was considered unacceptable, the agency representatives indicated at the hearing that their concern was limited to three or four areas, and our analysis is focused on these areas. See VT at 18:02-28, 18:42-19:00, 19:07-46, 20:02-09. Based on the record, including the hearing testimony, it appears that CourtSmart's software was not fairly or reasonably evaluated in these areas.

For example, one of the remaining areas of concern discussed at the hearing was the SOW requirement that the software be capable of recording 8 hours of hearing testimony on a single 650-megabyte compact disk (CD). RFP, SOW, at 6. CourtSmart's quotation stated that its software met this requirement, and during the pre-selection demonstration, CourtSmart informed SSA that its software could record at sampling rates of 48 kilohertz (kHz) and 44.1 kHz, with the 48 kHz providing the highest quality recording. CourtSmart demonstrated during the evaluation process that its software met the recording storage requirement at the sampling rate of 44.1 kHz. The agency, however, determined that CourtSmart's software did not meet the SOW requirement based on testing at the 48 kHz rate. In contrast, the agency based its evaluation of the storage capacity of the other vendors' software on rates as low as 44.1 kHz, and determined that the storage capacity at the lower sampling rated was acceptable. VT at 19:47-20:00. This

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capability or staffing to travel to the various locales and complete the installations in 18 months. Therefore, it appears that the nationwide project experience requirement may not be a valid justification for excluding experienced vendors from the competition. See VT at 10:02-07, 10:51-11:01, 11:58-12:06,16:35-37, 16:42-55, 17:55-57, 18:34-40, 20:34-38. Furthermore, although we do not decide this issue here, given that CourtSmart is a small business concern, Agency's Supplemental Report at 7; see Agency Report, Tab 10, CourtSmart's Quotation, at 2, the agency's evaluation of this experience requirement, which is traditionally considered to be a matter of responsibility, on a pass/fail basis could arguably be subject to the Small Business Administration's (SBA) certificate of competency (COC) procedures, if this is the sole reason CourtSmart's quotation should be determined unacceptable. See 15 U.S.C. § 637(b)(7) (2000); Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003, 2003 CPD ¶ 33 at 4-6; Neal R. Gross and Co., Inc., B-217508, Apr. 2, 1985, 85-1 CPD ¶ 382, at 2-4. In implementing our recommendation below, the agency should review the need for and application of the minimum experience requirement, and if appropriate coordinate with the SBA regarding the need to follow COC procedures.

application of different testing standards to the protester's evaluation is neither fair nor equitable.

With regard to another area discussed at the hearing for which SSA found CourtSmart's software unacceptable, the SOW stated that the software "shall allow SSA users" to copy recordings between various storage locations. RFP, SOW, at 7. CourtSmart's software did this through use of Windows Explorer on the agency's laptop Windows operating system. However, the agency states that the software itself must have the recording capability without using the copy features on the laptop that are not part of the vendor's software. The protester disagrees with the agency's interpretation of the SOW, and states that the SOW only requires that a user be able to copy recordings made using the software.

A solicitation must be read as a whole and in a reasonable manner, giving effect to all its provisions. Davies Rail and Mech. Works, Inc., B-278260.2, Feb. 25, 1998, 98-1 CPD ¶ 134 at 6. Here, the SOW has many requirements for the software stated in different manners. In some cases, the RFQ states that the software must have a specific feature, such as "the software shall . . . provide multi-speed playback." RFP, SOW, at 7. In other cases, such as the copying requirement at issue, the RFQ states, "the software shall allow SSA users to" perform some task. While in the former case the SOW language clearly states that the software itself must contain the stated feature, it would be reasonable to conclude that the addition of the words "allow SSA users to" perform a task means that the software, rather than providing a given functionality within the confines of the software, must allow the SSA user to perform the function using the entire system, which in this case includes a government-furnished laptop computer with a Windows operating system.[10] CourtSmart's software does allow SSA users to copy recordings using the SSA laptop computers.

The remainder the agency's areas of concern discussed at the hearing are that the testing of CourtSmart's software produced error messages that negatively affected the software's performance, and would not export to more than one "non-proprietary format." The agency replicated these test conditions during the hearing. VT at 18:51-19:00, 19:10-46, 20:21-27. CourtSmart stated that it was not familiar with these error messages because they had never occurred for CourtSmart, and asserted that its software does export to more than one non-proprietary format. CourtSmart suggested that the CD from which the software was loaded into the agency's system was defective.[11] The agency's technical expert stated that this explanation is

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[10] The technical questionnaire included in the RFQ asks whether the software "provides for" duplication between various storage locations. RFQ, Technical Questionnaire, at 3. This language is ambiguous in the context of the two interpretations at issue here; it does not point to one interpretation over the other.

[11] CourtSmart otherwise surmised that the error messages required a minor "fix" that would not affect the COTS status of CourtSmart's software. CourtSmart stated that,

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possible. Moreover, these agency concerns occurred only during the agency's testing of the software (not during CourtSmart's demonstration either pre-selection or at the hearing before our Office). Id. From this record, the actual cause for the error messages cannot be established, and, absent further investigations and discussions, should not form the basis for determining CourtSmart's software was unacceptable.

As illustrated by the foregoing examples, based on our review, we think that the SSA's determination that CourtSmart's software was unacceptable is not supported by the record.

In sum, York's quotation was unacceptable and could not be selected because it included at least one non-FSS item, and it was also unacceptable under the section 508 compliance evaluation criterion. Moreover, the record also raises questions concerning the fairness and reasonableness of the agency's technical and past performance evaluation. Therefore, we sustain the protest.[12]

We recommend that the agency cancel the order to York,[13] assess its actual requirements, amend the RFQ as necessary (or cancel it and issue a new solicitation

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following an initial demonstration that was cut short due to an agency network problem, CourtSmart performed another demonstration using another copy of its software, at which time the error messages did not appear. The agency did not accept CourtSmart's offer to leave the software and hardware used at the second demonstration with the agency for further testing, but instead the agency used the software provided for the first aborted demonstration. The agency does not recall the offer. VT at 20:27-30. We note that the RFQ stated that the agency would retain one complete set of the software and hardware demonstrated and, since this was CourtSmart's only opportunity to demonstrate the complete set, the agency should apparently have retained it under the terms of the RFQ whether or not the offer was made.

[12] The record also evidences that the agency conducted discussions with York, but no other vendor, after its system had been demonstrated and tested, during which York modified its proposed system in an effort to provide items that were on the FSS, rather than on the open market as York had proposed. See Agency Report, Tabs 19 & 20, York Quotation Revision (Sept. 24, 2003), York E-Mail Messages to SSA; Tab 25, Summary of Award, at 8. This was inconsistent with the RFQ requirement that the complete system quoted be demonstrated. RFQ, Evaluation Information, at 2.

[13] We make our recommendation without regard to the progress of this contract, as we are required to by statute, because the agency overrode the suspension of contract performance based on a determination that continued performance during the protest would be in the best interests of the government. See 31 U.S.C.
(continued...)

if changes in the agency's requirements would allow for broader field of competitors), request revised quotations (including resubmission of software and hardware to be demonstrated and tested), and make a new source selection. We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2003). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

(...continued)
§ 3553(d)(3)(C)(i)(I) (2000). In any event, during the hearing, SSA indicated that only two or three systems have been installed, VT at 15:51-52, 18:30-32, and that its needs for the mixer, which was a substantial part of the system, have changed.