Pietrovito

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

Decision

Matter of: Technical Assessment Systems, Inc.

File: B-242436

Date: May 3, 1991

Marjorie H. Corrallo for the protester.
David J. O'Connor and Anthony G. Beyer, Esq., United States Environmental Protection Agency, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency is not required to evaluate as an unsolicited proposal protester's letters offering computer software for sale, where the agency reasonably determined that the letters, which announced the general availability of the software and contained product descriptions, were advertising material or an offer of a commercial product, and not an unsolicited proposal.

2. Agency did not improperly disclose protester's ideas contained in letters offering computer software where the information in the letters was freely provided to the agency without restrictions on its use or disclosure, or any indication that the protester considered the information confidential or proprietary; restriction on the use of ideas in an unsolicited proposal do not apply since the letters were not unsolicited proposals but advertising material or an offer of a commercial product.

3. Agency need not comply with Federal Acquisition Regulation § 11.002 policy that commercial products be obtained by the government whenever practicable in placing an order to develop software under an existing contract.

DECISION

Technical Assessment Systems, Inc. (TAS) protests the award of Work Assignment III-101 to Research Triangle Institute (RTI) by the United States Environmental Protection Agency (EPA) under Contract No. 68-02-4544. TAS contends that EPA failed to consider its unsolicited proposal for work that was incorporated in the work assignment, that EPA converted ideas

contained in the unsolicited proposal, and that EPA failed to consider TAS' offer of a commercial product to satisfy EPA's needs.

We deny the protest.

Contract No. 68-02-4544, a cost-plus-fixed-fee, level of effort contract, was competitively awarded to RTI on September 30, 1987, for a base year and 4 option years to perform research and other support services to support EPA's study of human exposure to environmental pollutants, including pesticides. In evaluating pesticide tolerances, EPA uses a computer-based system developed by RTI known as the Dietary Risk Assessment System (DRES), which brings together food consumption survey data, food conversion files (which convert food items to crops), and dietary pesticide residues, for estimating dietary exposure risk.

Work Assignment III-101, issued August 28, 1990, tasked RTI to, among other things, integrate new Department of Agriculture food consumption data and recipe files; to add new statistics and population subgroups; and to improve the pesticide exposure system. This work included placing DRES on a microcomputer.1/

By letters of May 29, 1990, TAS offered to EPA a microcomputer version of DRES, including the modification of TAS' software to access EPA's current files, the updating of food consumption data and recipe files, and training. EPA did not evaluate TAS' offer. After learning of the issuance of the work assignment to RTI, TAS timely filed this protest.

TAS argues that its offer to provide microcomputer software to support DRES was an unsolicited proposal that EPA was required to consider. EPA responds that it did not consider TAS' offer to be an unsolicited proposal but an advertisement that TAS had commercial software available since TAS' letters did not identify themselves as unsolicited proposals, they were not marked confidential or proprietary, and they were not submitted to the appropriate agency contact.2/

We agree with the agency that TAS' offer was not an unsolicited proposal. Federal Acquisition Regulation (FAR) § 15.501 generally defines an "unsolicited proposal" to be a

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1/ DRES is currently used on a mainframe computer.

2/ The EPA Acquisition Regulation provides that EPA's director of the Grants Administration Division is the "contact point established to coordinate the receipt and handling of unsolicited proposals." 48 C.F.R. § 1515.506 (1990).

written proposal submitted to an agency for the purpose of obtaining a government contract and which is not responsive to a formal or informal request. On the other hand, "advertising material" is defined in FAR § 15.501 to be "material designed to acquaint the Government with a prospective contractor's present products or . . . capabilities, or to determine the Government's interest in buying these products" and a "commercial products offer" is defined as an offer of a product generally sold to the public which the vendor wishes to introduce to the government; advertising materials and commercial product offers do not constitute an unsolicited proposal. FAR § 15.503(b).

Here, TAS' letters provided that its firm is "pleased to announce the general availability of EXPOSURE 4, our microcomputer version of the Detailed Acute Dietary Exposure software" and that TAS has "finally gone public with our EXPOSURE 4 software." The letters set forth product specifications, i.e., a detailed synopsis of the software's capabilities, and an offer to provide the software and other services at a quoted price. Given the language of the letters--that TAS now has software available--we find reasonable the agency's determination that the letters were advertising material and not unsolicited proposals. Accordingly, EPA was not required to evaluate the letters as unsolicited proposals.

TAS also protests, citing FAR § 15.508(a), that EPA improperly used the ideas underlying the firm's methodology in its quotes as the basis for negotiating RTI's work assignment, without first obtaining TAS' agreement.3/ The regulation in question states that:

> "Government personnel shall not use any data, concept, idea, or other part of an unsolicited proposal as the basis, or part of the basis, for a solicitation or in negotiations with any firm unless the offeror is notified of and agrees to intended use. However, this prohibition does not preclude using any data, concept, or idea available to the Government from other sources without restriction."

Specifically, TAS contends that EPA appropriated its ideas to use a microcomputer, rather than EPA's mainframe computer, and also appropriated its indexing and data management techniques. TAS argues that EPA should have known that the information provided was disclosed in confidence because TAS software demonstrated for EPA indicates on the computer that

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3/ The record shows that EPA provided RTI with TAS' product specifications but not its price quote.

TAS retains ownership of the software and that the use of the software is subject to a license agreement.4/ TAS, however, "does not contend that the government misappropriated a trade secret, or otherwise disclosed TAS's actual data."

We find no merit to TAS' argument that EPA violated the prohibition contained in FAR § 15.508(a) since, as noted above, the letters submitted to EPA were not unsolicited proposals and, therefore, FAR § 15.508(a), which only restricts the disclosure or use of ideas and concepts contained within an unsolicited proposal, is not applicable. We also do not find that EPA had any reason to know that TAS considered its quote (including the detailed synopsis of the software) to be confidential or proprietary. This information was provided to the agency without any indication that the information was confidential or proprietary to TAS or that its use or disclosure was restricted. Rather, as noted above, the agency considered the information to be an advertisement of TAS' products and services, which TAS freely provided to EPA.5/ Moreover, EPA did not obtain the software and therefore did not provide it to RTI. Accordingly, we do not find improper EPA's disclosure to RTI of TAS' description of its software's capabilities.

TAS also argues that EPA violated FAR § 11.002 when it issued a task order to RTI to develop the microcomputer software when TAS offered to provide the agency with an existing commercial product. FAR § 11.002, which states the government's general policy to acquire commercial products where practicable, is not applicable here. Part 11 of the FAR authorizes agencies to conduct market research and analysis in order to ascertain the availability of commercial products to meet their minimum needs. Pancor Corp., B-234168, Mar. 29, 1989, 89-1 CPD ¶ 328. This, however, does not require procuring agencies to test the market and consider commercial products each time the agency decides to place an order within the scope of an existing contract. In this regard, we do not find unreasonable the agency's determination that RTI, as the incumbent contractor

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4/ This notice did not appear in TAS' tendered commercial literature for its software.

5/ The holder of trade secret or other confidential information can lose its proprietary rights in protected information, if the information is not disclosed in confidence or in circumstances that can imply the confidentiality of the disclosure. In other words, protected information is no longer protected when it becomes general or public knowledge. See Chromalloy Div.-Oklahoma of Chromalloy Am. Corp., 56 Comp. Gen. 537 (1977), 77-1 CPD ¶ 262, aff'd on recon., B-187051, Oct. 6, 1977, 77-2 CPD ¶ 275.

supporting EPA's study of human exposure to pesticides, as well as the contractor who developed the original version of DRES, would be in the best position to develop suitable software to continue to support the program.

TAS finally protests that EPA failed to obtain competition in issuing the work assignment to RTI. TAS, however, does not contend that the work assignment is beyond the scope of the original contract6/ but argues that RTI's level of effort contract is in the nature of a basic ordering agreement (BOA), which required EPA to obtain competition prior to issuing an order. See FAR § 16.703(d)(1). This argument is without merit because RTI's contract does not in any way resemble a BOA or other basic agreement. A BOA or basic agreement is not a contract but an agreement to enter into future contracts. See FAR § 16.702(a). Here, RTI has a binding contract with EPA, under which the agency can order, without contract modification, any services within the scope of the contract up to a specified level of effort at an agreed upon cost and fee. There is no requirement for competition for services acquired within the scope of an existing contract.7/

The protest is denied.

James F. Hinchman
General Counsel

6/ From our review of the record, we find that the work assignment is within the scope of the original contract. RTI's contract provides that it will perform such services as exposure monitoring and data collection, management and analysis of pollution exposure. The work assignment was for integrating new food data and recipe files, adding statistics and subgroups, and developing microcomputer software for DRES to allow the determination of exposure to pesticides. See Information Ventures, Inc., B-240458, Nov. 21, 1990, 90-1 CPD ¶ 414.

7/ For basically the same reasons, TAS' complaint that this requirement was not synopsized in the Commerce Business Daily (CBD) has no merit, since FAR subparts 5.1 and 5.2 do not require a CBD publication of requirements ordered under an existing contract.