



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

Decision

Matter of: Attachmate Corporation

File: B-250030.6; B-250030.7

Date: July 30, 1993

Stephen Sale, Esq., Fehrenbacher, Sale, Quinn & Deese, for the protester.
David Cohen, Esq., and Lisa Hovelson, Esq., Cohen & White, for Network Software Associates, Inc., an interested party.
Capt. Gerald P. Kohns, Department of the Army, for the agency.
David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly accepted awardee's certification that proposed computer software (which was identified in its proposal) complied with solicitation commercial item requirement is denied where record indicates that contracting officer was unaware prior to award of any facts inconsistent with certification of commerciality, and subsequent information confirms that products which were either identical to the proposed software, or which differed by reason of only minor modification, were sold or licensed to the general public.
2. Protest that contracting officer acted improperly in waiving for the awardee, but not for the protester, requirement for operational capability demonstration (OCD) of proposed computer software is denied where solicitation reserved to the government the right to waive OCD, and awardee proposed commercial software programs which either the agency had previously procured and successfully used, or which differed from such programs only by reason of minor modifications.

DECISION

Attachmate Corporation protests the Department of the Army's award of a contract to Network Software Associates, Inc. (NSA), under request for proposals (RFP) No. DABT60-91-R-0046, for computer software. Attachmate alleges that NSA's proposed software was noncompliant with certain mandatory solicitation requirements.

We deny the protest.

The solicitation contemplated the award of a requirements contract for the delivery of various software programs-- including personal computer emulation adapters, emulation control programs, vector graphics emulation software and low memory emulation programs--to the responsible offeror which passed an operational capability demonstration (OCD) (unless waived by the agency) and submitted the low, technically acceptable offer. Proposals were received from seven offerors. Following discussions and the receipt of best and final offers (BAFO), the Army determined that Attachmate had submitted the low technically acceptable offer. Although two other offerors had submitted lower offers, they, unlike Attachmate, failed to pass the OCD. Upon learning of the subsequent award to Attachmate, NSA protested to our Office that Attachmate's proposed low memory emulation program was noncompliant with a requirement in the solicitation as issued to support IBM 3270 print capabilities. The Army disputed NSA's interpretation of the specifications on the basis that the solicitation as amended did not require the low memory software to support print functions. Nevertheless, the Army reopened negotiations based upon its finding that, after the conclusion of discussions and receipt of BAFOs, the agency had improperly permitted Attachmate to revise its proposed 90-day delivery schedule to conform to the 30-day schedule required by the solicitation. We therefore dismissed NSA's protest as academic.

The Army then amended the solicitation to clarify its actual requirements and requested the submission of revised technical proposals. All proposals were found to be technically acceptable and new BAFOs were requested. Based upon its evaluation of the subsequent BAFOs, the Army determined that further discussions concerning offerors' pricing schedules were necessary. Following these discussions and an additional round of BAFOs, the agency determined that NSA had submitted the low, technically acceptable offer. After award was made to NSA, Attachmate filed this protest with our Office.

Attachmate has raised numerous arguments against the award to NSA. Although we discuss only the most important below, we have also considered Attachmate's remaining grounds for protest, and we find them to be without merit.

Attachmate argues that the Army improperly waived the commerciality requirement in making award to NSA. In this regard, the solicitation included the clause found at Defense Federal Acquisition Regulation Supplement § 252.211-7012, "Certifications-Commercial Items," which provides that "[o]ffers received in response to this

solicitation that do not offer commercial items SHALL NOT BE CONSIDERED FOR AWARD." Pursuant to that clause, offerors were required by the solicitation to certify whether the items proposed were commercial items, defined by the clause as follows:

"(1) 'Commercial items' means items regularly used in the course of normal business operations for other than Government purposes which:

(i) have been sold or licensed to the general public;

(ii) have not been sold or licensed, but have been offered for sale or license to the general public;

(iii) are not yet available in the commercial marketplace, but will be available for commercial delivery in a reasonable period of time;

(iv) are described in paragraphs (i), (ii) or (iii) that would require only minor modification in order to meet the requirements of the procuring agency.

"(2) 'Minor modification' means a modification to a commercial item that does not alter the commercial item's function or essential physical characteristics."

NSA certified in its proposal that two of its proposed software programs--its NSA 78 CUT (Control Unit Terminal) software proposed to meet the solicitation requirement for low memory IBM 3278/3279 emulation software and its "EliteMinus" IBM 3270 low memory emulation software--were commercial products under subclause (b)(1)(i) of the solicitation definition, that is, items having "been sold or licensed to the general public." Attachmate questions the agency's acceptance of NSA's certifications, claiming that the proposed items have not been sold or licensed to the general public and therefore are not commercial items as certified.

There is no basis for questioning the Army's acceptance of NSA's certification of commerciality. Nothing in the record indicates that the contracting officer was on notice prior to award of facts which would lead to the conclusion that the items to be furnished were not commercial items as defined by the solicitation. Absent such notice, the

contracting officer could rely upon the certification. See generally Oliver Prods. Co., B-245762, Jan. 7, 1992, 92-1 CPD ¶ 33 (certification for Buy American Act purposes). Moreover, information furnished by NSA during the protest process confirms the commercial nature of its proposed software. According to NSA, more than 1,000 copies of the NSA 78 CUT software have been licensed to commercial customers. In addition, NSA states that its 3270 EliteMinus software is identical to its IBM 3270 ElitePlus emulation software, more than 10,000 copies of which have been licensed to commercial customers, with the exception that the print support function found in the ElitePlus software has been disabled in the EliteMinus software. We find reasonable the Army's determination that the disablement in the EliteMinus software of the print support function found in the ElitePlus software is at most a minor modification, and therefore does not preclude a finding of commerciality based upon the commercial sales of the ElitePlus software. The Army reports that disablement of the printer support function does not alter the function or essential physical characteristics of the software in its intended use; indeed, according to the agency, users of the ElitePlus software typically have configured the software with the printer support function inactive, as in the EliteMinus software. Attachmate has not shown otherwise. See Hershey Foo's Corp., B-245250.3, Feb. 3, 1992, 92-1 CPD ¶ 133.

Attachmate also questions the acceptability of NSA's proposal to combine several software programs into a single emulation package so as to comply with the following solicitation requirement:

"The proposed software and circuitry shall be fully compatible with all characteristics provided by both IBM's Distributed Function Terminal (DFT) capability and IBM's Control Unit Terminal (CUT) mode. This shall be accomplished by one emulation package."¹

Under NSA's approach, an emulation package consisting of either (1) the NSA 78 CUT and ElitePlus software programs, linked by a batch file called Configuration Assist, or (2) the NSA 78 CUT and EliteMinus software, linked by the Configuration Assist file, is loaded into the computer's hard drive. Then, using a 3-screen menu provided by the Configuration Assist file, a user selects either the DFT mode of IBM 3270 emulation (as provided by the ElitePlus or EliteMinus emulation program) or the CUT mode of IBM

¹Likewise, in response to an offeror's question, the Army stated that "only one emulation package should be loaded and running."

emulation (as provided by the NSA 78 CUT program), and the selected emulation mode/program is loaded into the computer's random access memory (RAM).

Attachmate maintains that each of NSA's software products--i.e., the NSA 78, ElitePlus, EliteMinus and Configuration Assist software products--must be considered a separate package and cannot be combined without violating the solicitation limitation to a single emulation package. Furthermore, Attachmate argues that the addition of the Configuration Assist file, which had not previously been sold to the public, rendered the resulting emulation package noncommercial. Finally, Attachmate contends that, in any case, when the NSA 78 CUT and ElitePlus or EliteMinus emulation programs are run together, the resulting demand on system RAM, when combined with the space in the RAM occupied by the MS/DOS operating system and the proposed graphics package, exceeds the maximum RAM available (640K) as specified in the solicitation.

Attachmate's position is without merit. We agree with the Army that bundling the three software products-- Configuration Assist, NSA 78 CUT, and ElitePlus or EliteMinus--into a single package is not inconsistent with the solicitation requirement that the required emulation of IBM terminals be accomplished by a single emulation package. First, the term "package" is a broad term which the solicitation did not define; nothing in the solicitation precluded the bundling of multiple software products into a single package. As noted by the Army, the NSA's products are furnished on a single diskette and, once loaded, are transparent to the user, who simply chooses either the CUT or DFT mode by means of the menu. We find reasonable the agency's position that NSA bundling of products so that they are transparent to the viewer meets the RFP requirement for a single software "package." Nor, in our view, does the addition of the Configuration Assist batch file preclude a finding of commerciality. As pointed out by the Army, the Configuration Assist file comprises only 97 lines of code providing a 3-screen menu; in contrast, the NSA 78 CUT program comprises approximately 8,000 lines of code and the ElitePlus and EliteMinus programs each comprise approximately 151,000 lines of code. We agree with the agency that given the relative size and limited function of the Configuration Assist file, it amounts to no more than a minor modification to otherwise commercial products.

As for the system limitation to 640K RAM, we agree with the Army that Attachmate's claim of noncompliance is based on several misunderstandings concerning the functioning and size of the emulation packages. Although, as noted by Attachmate, the commercial literature for the NSA 78 CUT software states that the program can only be run on systems

with a minimum of 128K of RAM, it is evident from the literature that the NSA 78 CUT program itself only requires 28K; the remainder of the recommended capacity is reserved for other programs, such as the MS/DOS operating system. Further, contrary to Attachmate's assumption, both the NSA 78 CUT program and the ElitePlus or EliteMinus programs will not be resident in RAM at the same time; rather, the user will select one of these emulation modes using the Configuration Assist batch file and that single program then will be loaded into RAM. When corrected for these misunderstandings, Attachmate's own calculations demonstrate that the system can accommodate NSA's emulation package within the overall system limitation of 640K of RAM.

Attachmate maintains that the Army improperly failed to require NSA to undergo an OCD even though it made the initial award to Attachmate only after it passed an OCD. This argument is without merit. The solicitation specifically reserved to the agency the right to waive the OCD. The Army reports that it waived the OCD for NSA because, with the exception of the EliteMinus software program, which was only a minor modification of the ElitePlus program, NSA proposed commercial software programs which the Army has previously procured and successfully used. Given the agency's familiarity with NSA's proposed software and its prior successful performance, we find no basis for concluding that the waiver of the OCD for NSA was arbitrary or prejudicial to the protester. See generally International Technology Corp., B-226898, Dec. 2, 1987, 87-2 CPD ¶ 537; Le Don Computer Servs., Inc., B-225451.2; B-225451.3, Apr. 28, 1987, 87-1 CPD ¶ 441.

The protest is denied.


for James F. Hinchman
General Counsel