



Decision

Matter of: Total Procurement Services, Inc.

File: B-255934.3

Date: August 16, 1994

Richard Snyder for the protester.
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Defense Commercial Communications Office, Defense
Information Systems Agency, for the agency.
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of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Where the final license agreement for electronic data interchange (EDI) value added network (VAN) services contains no closing date for receipt of executed agreements, and where the protester, a potential EDI VAN provider, challenges the absence of a provision in the final agreement requiring immediate acknowledgment by a contracting activity of receipt of an electronic transaction, the protest is untimely since the protester waited 6 weeks after the final agreement was issued to raise the matter.

DECISION

This decision is in response to a protest of the terms of a licensing agreement which itself involves a preliminary stage in the implementation of an electronic commerce program by the Department of Defense (DOD), specifically, DOD's licensing of firms to serve as electronic conduits between DOD contracting activities and potential contractors.

In May 1988, the Deputy Secretary of Defense directed DOD contracting activities to implement electronic commerce, making "maximum use of electronic data interchange (EDI) for the paperless processing of all business-related transactions." EDI is a computer-to-computer exchange of business information using standard electronic formats. By 1995, DOD plans to conduct 75 percent of its business transactions electronically. As a result of the implementation of an electronic commerce program, DOD expects a reduction in data entry errors, paper handling

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requirements, inventories, and ordering times; the elimination of mailing costs; and the enhancement of case management activities.

In November 1993, the Defense Commercial Communications Office (DECCO), Defense Information Systems Agency, issued a draft, no-cost license agreement, No. DCA200-94-H-0015, and related documents which provided the framework for the electronic exchange of business information between the government and potential contractors through the use of value added network (VAN) providers, *i.e.*, firms licensed by the government to provide EDI VAN services. Under the license agreement, an EDI VAN provider is required to transmit, receive, and store EDI messages for potential contractors. An EDI VAN provider also is required to provide the parties to which the EDI messages are addressed access to the messages. An EDI VAN provider must furnish DOD with at least one EDI mailbox and necessary software for monitoring compliance with the terms and conditions of the license agreement and for testing and troubleshooting the electronic commerce system. DOD may store data in the mailbox for up to 5 business days. Firms which execute the license agreement, and ultimately are determined to satisfy the terms and conditions of the agreement, will be licensed by the government and considered participating, fully tested EDI VAN providers. All transactions electronically exchanged between contracting activities and potential contractors must be processed through licensed EDI VAN providers.

In December, DECCO's contracting officer held a pre-solicitation conference at which time she answered questions from prospective EDI VAN providers concerning the electronic commerce program and the terms and conditions of the draft license agreement. The contracting officer also accepted additional written questions after the pre-solicitation conference. Following the issuance of revisions to the draft agreement and related documents, by letter dated January 14, 1994, the contracting officer furnished to all prospective EDI VAN providers, including Total Procurement Services, Inc. (TPS), written answers to the pre-solicitation questions. One question focused on when a contracting activity would provide an acknowledgment of receipt of an electronic transaction. The contracting officer responded that a contracting activity would deliver an acknowledgment within 3 business days after receipt of the electronic transaction, excluding federal holidays.

On March 1, DECCO issued the final license agreement, with the same numerical designation, at which time all prospective EDI VAN providers, including TPS, were invited to execute the agreement. The final agreement included the

above-referenced requirements, but contained no closing date for receipt of executed agreements. On April 12, TPS filed this protest.

TPS complains that the final license agreement contains no provision requiring a contracting activity to immediately acknowledge receipt of a potential contractor's electronic transaction. As a result, TPS maintains that the EDI VAN provider is required to assume an undue risk and may be unjustly exposed to liability for alleged untimely delivery of an electronic transaction on behalf of the potential contractor which it represents. For example, TPS speculates that without immediate acknowledgment, the contracting activity could disclaim receipt of an electronic transaction and circumvent award of a contract to an otherwise acceptable potential contractor which chose TPS as its EDI VAN provider, thus causing TPS to incur possible liability. TPS believes that if the final agreement contained a provision requiring a contracting activity to immediately acknowledge receipt of an electronic transaction, and pursuant to such a provision, TPS, as the EDI VAN provider, did not receive an immediate acknowledgment, it would have a basis for knowing that it was necessary to timely repeat the transmittal.

¹Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq. (1988), our bid protest jurisdiction encompasses the procurement of property or services by federal agencies. Fluid Eng'g Assocs., 68 Comp. Gen. 447 (1989), 89-1 CPD ¶ 520. Accordingly, our Office will not review a protest concerning a license agreement which does not involve the procurement of property or services. Where a license agreement or concession contract confers a benefit upon the government and furthers the function of an agency, we view the agreement or contract as one involving the procurement of property or services and therefore subject to our bid protest jurisdiction. See, e.g., Alpine Camping Servs., B-238625.2, June 22, 1990, 90-1 CPD ¶ 580 (tasks required to be performed as a condition to receiving concession permits for the use and occupancy of federal land resulted in benefits to the government and furthered the function of the agency, and, thus, involved the procurement of services); cf., Crystal Cruises, Inc., B-238347, Feb. 1, 1990, 90-1 CPD ¶ 141, aff'd, B-238347.2, June 14, 1990, 90-1 CPD ¶ 560 (the agency's issuance of concession permits for entry into a national park was deemed to be in the nature of a sale by the agency of a permit or license to enter government property, not a procurement of services). We assume jurisdiction here since it is clear that beneficial services will be provided to the government by the licensees.

Generally, protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals must be filed prior to bid opening or the time set for receipt of initial proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1994). In cases other than those covered by 4 C.F.R. § 21.2(a)(1), our Regulations require that protests be filed no later than 10 days after the basis of protest is known, or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). In this case, the final license agreement, issued on March 1, 1994, contained no provision requiring immediate acknowledgment by a contracting activity of receipt of a potential contractor's electronic transaction, and included no closing date for receipt of executed agreements. Accordingly, in the absence of a closing date, the timeliness of TPS' objection to the lack of an immediate transaction receipt acknowledgment provision in the final agreement is governed by the 10-day rule of 4 C.F.R. § 21.2(a)(2). Laidlaw Env'tl. Servs. (GS), Inc., B-245587; B-245587.2, Jan. 16, 1992, 92-1 CPD ¶ 82.

Because TPS waited until April 12, 6 weeks after the final license agreement was issued, to protest the absence of a provision in the final agreement requiring immediate acknowledgment by a contracting activity of receipt of a potential contractor's electronic transaction, its protest is untimely.²

Moreover, to prevail in a timely protest, TPS would have to show that the absence of a provision in the final license agreement providing for a contracting activity to immediately acknowledge receipt of a potential contractor's electronic transaction violates law or regulation. While TPS asserts that the absence of an immediate acknowledgment provision violates Federal Acquisition Regulation (FAR) § 15.411, captioned "Receipt of proposals and quotations," that section contains no such requirement; it states only that procedures for the receipt and handling of proposals and quotations should be similar to the procedures outlined in FAR § 14.401 for the receipt and safeguarding of bids, and that proposals and quotations must be marked with the date and time of receipt and, after receipt, must be safeguarded from unauthorized disclosure. FAR § 14.401 also

²TPS was aware that DECCO did not contemplate immediate acknowledgment when it received, by letter dated January 14, the contracting officer's response to a pre-solicitation question that a contracting activity would deliver an acknowledgment within 3 business days after receipt of an electronic transaction.

contains no requirement for immediate acknowledgment of receipt of bids.

TPS' concern--without immediate acknowledgment from a contracting activity of receipt of a potential contractor's electronic transaction, the EDI VAN provider is required to assume the risk of liability for alleged untimely delivery of the transaction--appears to be more in the nature of a disagreement with DOD's policy to not insulate its licensed VANs from that risk, but instead to leave it to those who choose to provide VAN services to find appropriate ways of minimizing or otherwise dealing with that risk. In this regard, since risks are inherent in procurements, and the government may properly impose substantial risks on firms contracting with the government and minimal risks upon itself, firms are reasonably expected to use their professional expertise and judgment in anticipating and handling these risks. See Essex Electro Eng'rs, Inc., 72 Comp. Gen. 299 (1993), 93-2 CPD ¶ 141. We are aware of nothing would prevent an EDI VAN provider from limiting its risk of late delivery just as commercial carriers expressly limit the circumstances under and extent to which they will assume liability for late delivery.³

The protest is dismissed.

Ronald Berger
Associate General Counsel

³While TPS has not executed the final license agreement, 15 other firms have executed the final agreement. Of these firms, six currently have been deemed to satisfy the terms and conditions of the final agreement and therefore have been licensed by DECCO as EDI VAN providers. Presumably, these VANs do not view the risk as an undue burden.