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United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: ASC Group, Inc.

File: B-407136

Date: November 15, 2012

Daniel L. Everest, Jr., and Stephen D. Blancq, for the protester.
Timothy J. Ryan, Esq., Department of Defense, Defense Logistics Agency, for the agency.
Paul N. Wengert, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that terms of the licensing agreement required by a solicitation for software were unduly restrictive of competition is denied where the agency's market research reasonably supported the agency's conclusion that these terms would best meet the agency's needs.

DECISION

ASC Group, Inc., of Vienna, Virginia, a small business, protests the terms of request for proposals (RFP) No. SP3300-12-R-0005, issued by the Department of Defense, Defense Logistics Agency (DLA), for a web-based commercial software quality management tool (QMT), and supporting services. ASC Group argues that the RFP improperly restricts competition by specifying that the software permit use by a specified number of concurrent users.

We deny the protest.

BACKGROUND

DLA monitors the performance of various services provided by its support contractors. The QMT software application will allow DLA to automate that process, by establishing surveillance requirements, scheduling personnel to perform surveillance, documenting performance, and reporting results. That information allows DLA to track and monitor trends in performance, and to establish and monitor any needed preventive or corrective actions. AR, Tab 3, Preliminary Market Research Report, at 3; Protester's Supplemental Comments, attach. A, at 3.

Before DLA issued the RFP, the agency conducted market research to assess the availability of commercial QMT software. In mid-2010, DLA surveyed the available commercial products, and among other things, analyzed the commercial terms offered by vendors for licensing the software. The analysis showed that commercial vendors typically licensed QMT software based on a fixed number of concurrent users from an unrestricted population (a concurrent-user license), or else based on a fixed list of users without limit on concurrent use among that population (a name license, or seat license). The market research indicated that concurrent-user licensing appeared to be the most common. The market research also concluded that commercial license terms typically classified individual users as having either "full" access or "review/comment" access. Commercial terms differed over whether the license was perpetual (a one-time purchase to license the current version) or subscription-based (analogous to a term lease of software license rights). AR, Tab 3, Preliminary Market Research Report, at 5-6.

Following the initial market research, in Autumn 2010, DLA published a request for information (RFI), which requested that interested vendors respond with information on the capabilities of available QMT software, the extent of their commercial sales, and rough pricing for licensing, maintenance, and training. AR, Tab 4, DLA Request for Information, at 2. DLA received RFI responses from 6 small businesses, and 2 large businesses. ASC did not respond to the RFI.

In Spring 2012, DLA analyzed the name licensing structure of the contract for its existing QMT and the results of the market research. From this analysis, DLA concluded that by changing from the existing name licensing structure to a concurrent-user licensing structure for the new contract, DLA could align its license rights with its actual usage of the QMT, could better control software access centrally by automatically timing out users that were inactive, and could deploy the software to the maximum number of potential users. AR, Tab 7, Memorandum for Record, Apr. 2, 2012, at 1. DLA also concluded that, under a concurrent-user licensing structure, the agency would expect to receive significantly lower prices than under the name licensing structure for the existing QMT software. AR, Tab 6, Addendum to Acquisition Plan, May 23, 2012, at 1. Accordingly, DLA issued the RFP seeking a commercial QMT software application on a concurrent-user licensing basis.

The RFP, issued on July 20, 2012 as a small business set-aside, sought proposals to supply a commercial off-the-shelf QMT software application and supporting services (software installation, training, and technical support). RFP at 3. The RFP specified that DLA was seeking a license for 100 edit- and 100 read-access users concurrently, under a perpetual license, with options to add up to 50 additional users of each type in each of four annual option periods. RFP at 6, 10, 12, 14, 17. DLA specified that it required the license to have "a concurrent licensing structure." PWS at 1; RFP at 6. The RFP also specified that proposals were due by August 20.

ASC submitted multiple inquiries to DLA before proposals were due. Among other things, ASC questioned the RFP requirement for concurrent-user licensing, and it argued that DLA should instead provide data describing the agency's software usage pattern to allow each offeror to propose a licensing scheme that it felt would meet DLA's needs. AR, Tab 8, E-mail from ASC to DLA, Aug. 3, 2012, attach. 1, at 1-3; see generally Protest exh. 1-10, E-mails from ASC to DLA. When DLA did not accede to ASC's requests, the firm filed this protest before the closing time for proposal submission. ASC did not submit a proposal.

DISCUSSION

In its protest, ASC argues that DLA has unjustifiably restricted competition by requiring vendors to offer current-user licensing. ASC argues that DLA should permit offerors to propose other licensing structures, and in particular, a name licensing structure--that is, a license that permits software use based on specifically named users. Protest at 2-3. ASC argues that name licensing would meet DLA's needs because, whenever a user lacking privileges needed to use the QMT, the process for deactivating one user and activating another "is quick and easy from within the software." Protester's Comments at 5 n.3. Therefore, ASC argues, the RFP specification requiring a concurrent-user license unreasonably restricts competition.

DLA responds that its market research showed that concurrent-user licensing was a common commercial term for QMT software, that the agency's requirements for the QMT software most closely align with the flexibility of concurrent-user licensing, and that the agency expects to achieve significant savings as a result of concurrent-user licensing. DLA emphasizes that its goals for improving the agency's monitoring of contractor performance will require increased use of the QMT in its 14 distribution centers and potentially the agency's entire headquarters enterprise. DLA argues that concurrent-user licensing will provide the flexibility and scalability to do this monitoring, while name-licensed software would require administrative burdens and attendant delays to manage the user list. Therefore, DLA argues, the RFP best suits the agency's needs. Supplemental Agency Report at 2-3.

Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency's needs. We will examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. A protester's mere disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. Northrop Grumman Tech. Servs., Inc., B-406523, June 22, 2012, 2012 CPD ¶ 197 at 8.

The record here supports the reasonableness of DLA's requirement for QMT software with a concurrent-user license. As described above, the contemporaneous record shows that DLA conducted market research before issuing the RFP to determine the performance and licensing models offered in the commercial marketplace. The market research supports the conclusions that small businesses are likely to compete for the agency's QMT requirements and that concurrent-user licensing is commercially available (or even preferred), that is offers flexibility that supports the agency's plans to increase its use of the QMT software, and is likely to result in cost savings. These considerations all support DLA's decision to specify its requirement for concurrent-user licensing terms. Although ASC may desire another licensing method, it has not shown that the RFP is unduly restrictive of competition or that the agency's decision to require concurrent-user licensing lacked a rational basis.

The protest is denied.[1]

Lynn H. Gibson
General Counsel

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[1] ASC argues that other aspects of the RFP are also defective, such as, for example, the RFP did not provide for the evaluation of software efficiency. ASC Supplemental Comments, attach. A, at 4. However, as noted above, ASC did not submit a proposal because of its decision not to offer concurrent-user licensing. See id. at 5 (explaining decision not to offer concurrent-user licensing), 6 (stating that ASC did not submit a proposal). Therefore, ASC is not an interested party to challenge other alleged defects in the RFP; the result of these challenges would have no effect on ASC's likelihood of receiving award of the contract, and therefore we will not consider them.