

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Tempus Nova, Inc.

File: B-412821

Date: June 14, 2016

Michael D. McGill, Esq., Thomas L. McGovern, III, Esq., and Danielle M. Bertie, Esq., Hogan Lovells US LLP, for the protester.

Scott A. Freling, Esq., and John W. Sorrenti, Esq., Covington & Burling LLP, for Softchoice Corporation, an intervenor.

Jonathan D. Tepper, Esq., and Holly Styles, Esq., Department of the Treasury, Internal Revenue Service, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that agency issued an improper, out-of-scope, sole-source delivery order against a previously-awarded Federal Supply Schedule blanket purchase agreement is sustained where record shows that the delivery order contemplates providing products that were not included in the underlying blanket purchase agreement.

DECISION

Tempus Nova, Inc. (TN), of Denver, Colorado, protests the issuance of a delivery order to Softchoice Corporation, of Chicago, Illinois, under blanket purchase agreement (BPA) No. TIRNO-13-Z-00009, which previously was issued to Softchoice by the Department of the Treasury, Internal Revenue Service (IRS), under that firm's Federal Supply Schedule (FSS) contract.¹ TN maintains that the delivery order is beyond the scope of Softchoice's underlying BPA and was improperly issued on a sole-source basis.

We sustain the protest.

¹ TN is an authorized reseller of Google products and services. Softchoice is an authorized reseller of Microsoft products and services.

BACKGROUND

In 2013, the IRS issued a BPA to Softchoice to acquire maintenance and “software assurance” for the agency’s existing inventory of Microsoft products and services for a base year and two 1-year options.² Agency Report (AR) exh. D, BPA. The BPA describes the scope of the acquisition as follows:

IRS currently owns perpetual licenses for all Microsoft products outlined in the attached spreadsheet.

IRS is requesting a pricing proposal for an Enterprise Agreement encompassing Maintenance and Software Assurance, where applicable, for the products outlined in the attached spreadsheet for one base year and two option years, as well as, pricing for each of the listed software products, for each of the 3 years, for additional licenses that may be purchased.

Id. at 4. The BPA includes a complete schedule of all of the Microsoft products owned by the IRS--listed by product name and quantity--at the time it was executed. Id. at 10-13.

The BPA further describes the agency’s rights as follows:

During the term of this agreement, IRS shall have the right to install on, use, or access from, for each user, the latest version of each product, outlined in the attached spreadsheet, that is or becomes commercially available during the term of the agreement. IRS also retains the right to use any prior version of all products outlined.

AR, exh. D, BPA, at 6. In addition, the BPA provides that the agency reserves the right to receive any product upgrades, including version upgrades and replacement products, for all software purchased by the IRS. Id. at 7. The BPA also provides that, in the event that products owned by IRS become unsupported by Microsoft during the term of the BPA, IRS retained the right to convert its licenses to comparable, supported, products at no cost to the agency. Id.

In the most basic terms, the BPA contemplates the acquisition of software maintenance services that provide the agency either with the latest version of its currently-owned software products, or where those products are no longer

² “Software assurance” is a term used by Microsoft to describe a proprietary service that it offers to provide periodic updates and technical support for previously-acquired software. See <https://www.microsoft.com/en-us/licensing/licensing-programs/software-assurance-default.aspx> (last visited June 13, 2016).

supported by Microsoft, a comparable replacement product. In effect, the IRS was seeking to keep its existing portfolio of software licenses up-to-date with the latest versions of Microsoft products.

On June 19, 2014, the IRS issued a delivery order against the BPA that is the subject of this protest.³ AR, exh. E, Delivery Order No. 4. The delivery order contemplates a period of performance of a base year and two 1-year options. Id. On June 24, 2015, the agency issued a modification to the delivery order that exercised the first option year of the original delivery order, and also added several line items that were not included under the original delivery order. AR, exh. E.2, Modification No. 2. We discuss the terms of the delivery order and the modification in detail below.

PROTEST

TN maintains that the agency improperly is using the delivery order at issue to acquire, on a sole-source basis, what is known as e-mail-as-a-service (EaaS).⁴ Whereas, the agency's prior e-mail capabilities are based on software licensed to the agency that is installed on the agency's computing assets (principally desktop computers, laptop computers and servers), EaaS is a cloud-based subscription service or product that does not involve installing software on the agency's computing assets. Instead, the service is hosted in a Microsoft-owned cloud computing environment that provides both the functionality of the agency's requirements, along with remote storage of the agency's data. TN argues that, if the agency is interested in acquiring an EaaS capability, it must compete its requirements among vendors capable of providing the service. TN maintains that its Google-offered products will meet the agency's requirements for EaaS.

The agency denies that it has acquired an EaaS capability, and maintains instead that it simply has upgraded its licenses to the latest version of Microsoft's products. The contracting officer specifically represents as follows:

Nowhere in the delivery order 0004 has the IRS purchased Microsoft Office 365 or EaaS (See delivery order 0004, mod 0001 and 0002). The IRS has purchased Office Pro Plus licenses on a term basis within delivery order 0004 which all reside on locally installed desktops/laptops (delivery Order 0004). The IRS had 117,500 Office

³ The agency did not publicize the fact that it had issued a delivery order to Softchoice. TN became aware of the agency's actions through an e-mail exchange between its personnel and IRS personnel and filed its protest within 10 days of that e-mail exchange.

⁴ Microsoft's EaaS product is known by the name Office 365.

Professional Plus licenses in its inventory since at least March 2013. (See BPA pg 11). The IRS is merely continuing to use comparable software licenses or the “latest and greatest” version of Office Professional as it has done for years which it is authorized to do under the BPA. Further, the IRS has purchased Microsoft Exchange licenses within modification 0002 to delivery order 0004. (See Do 4 mod 2). All of the Exchange licenses are deployed locally on premise at the IRS and there has been no deployment to a cloud for any user’s email within the IRS. The IRS has had Microsoft Exchange licenses within its inventory since at least March 2013 (See BPA pg 10).

Contracting Officer’s Statement at 8.

The Competition in Contracting Act generally requires “full and open competition” in government procurements as obtained through the use of competitive procedures. 41 U.S.C. § 3301. FSS delivery orders that are outside the scope of the underlying BPA are similarly subject to the requirement for competition. See Onix Networking Corp., B-411841, Nov. 9, 2015, 2015 CPD ¶ 330 at 6-7. In determining whether a delivery order is outside the scope of an underlying contract (or in this case, a BPA), our Office considers whether there is a material difference between the delivery order and the underlying BPA. Id. Evidence of a material difference is found by reviewing the BPA as awarded, and the terms of the delivery order issued, and considering whether the original solicitation adequately advised offerors of the potential for the type of work contemplated by the delivery order. Id. The overall inquiry is whether the delivery order is of a nature that potential offerors reasonably would have anticipated competing for the goods or services being acquired through issuance of the delivery order. Id.

Here, the record belies the agency’s representations to our Office during the protest concerning what it was acquiring and how it intended to deploy what it had acquired.

As noted above, the contracting officer represents that the agency acquired “Office Pro Plus” licenses on a term basis, but that this was unobjectionable because the agency had a quantity of “Office Professional Plus” licenses in its inventory, and the “Office Pro Plus” licenses are simply the ‘latest and greatest’ version of its “Office Professional Plus” licenses. The record shows, however, that the “Office Pro Plus” product is, in fact, an Office 365 cloud-based product, which is distinct from the “Office Professional Plus” licenses owned by the agency. See AR, exh. E, Delivery Order, at Contract Line Item Nos. 0007, 1004, 2004; exh. L, Softchoice’s FSS Price List, at 440.⁵ Thus, the contracting officer’s representation that the agency is

⁵ Microsoft’s own product literature confirms the fact that “Office Professional Plus” is a distinct product from “Office Pro Plus.” Microsoft’s website states:

(continued...)

merely acquiring the latest--or upgraded--version of its "Office Professional Plus" licenses is factually inaccurate.

The record includes corroborating evidence demonstrating that the agency understood that it was acquiring a cloud-based solution using Microsoft's Office 365 product line, and was not merely upgrading its inventory of "Office Professional Plus" licenses. In this connection, the record includes an e-mail sent by one of the agency's senior information technology (IT) officials noting the fact that she (and others) had not been advised that the agency had acquired Office 365 subscriptions. The e-mail in question states:

I am not sure what factors were considered when it was prematurely decided that the 30,000 Detroit mailboxes would move to the cloud. I was also not privy to the procurement of the 90k [90,000] Office 365 licenses. From a few meetings I have been involved in, I believe inaccurate and/or incomplete information has been provided to the IT Executives and the CTO [Chief Technology Officer] regarding a cloud solution for email.

AR, exh. H, Miscellaneous Agency Correspondence, at H-271.

The record therefore demonstrates that under the delivery order, the agency acquired "Office Pro Plus" subscriptions--a cloud-based Microsoft Office 365 product--even though the portfolio of software assets identified in the BPA did not include any cloud-based products.

The record also shows that when the agency issued Modification No. 2 to the original delivery order (exercising the first option year under the delivery order) it added several line items to acquire "Exchange Plan 2" monthly subscriptions. AR, exh. E.2, Modification No. 2, Line Item Nos. 1008, 2006. The part number for this product corresponds to a product identified in Softchoice's FSS contract as "Exchange Online Plan 2." AR, exh. L, Softchoice's FSS Price List, at 439. These subscriptions allow the agency to migrate e-mail users to the cloud. In this connection, the modification provides as follows:

(...continued)

Both Office Professional Plus 2016 and Office 365 ProPlus deliver the same application experiences. However, Office Professional Plus 2016 is a traditional Office installation that is tied to the computers it is installed on, and it is available through volume licensing only. A user-based service, Office 365 ProPlus is available as a subscription.

See <https://products.office.com/en-us/business/office-365-proplus-business-software> (emphasis supplied; last visited June 13, 2016).

Exchange Online: Exchange licenses can be used on premises or in the O365 Government Community Cloud. . . . The contractor will facilitate the migration of IRS user mailboxes based upon a mutually agreed upon migration plan at no additional charge.

AR, exh. E.2, Modification No. 2, at 9; see also id., Softchoice Letter Accompanying the Modification, at 2 (“Exchange Plan 2 licenses can be used on premises or in the Office 365 Government Community Cloud.”).

Although the contracting officer states that the IRS has Microsoft Exchange licenses in its inventory, those licenses are identified as “Exchange Standard Client Access Licenses” in the BPA. AR, exh. D, BPA at 10. Those licenses are different from the online subscription service being acquired by the agency under the modification. Microsoft’s product literature describes “Exchange Client Access Licenses” as software licenses that enable users to access an organization’s network server, in this case, the IRS’s own servers. See <https://www.microsoft.com/en-us/Licensing/product-licensing/client-access-license.aspx> (last visited June 13, 2016). In contrast, Microsoft’s Exchange Online service is described in Microsoft’s product literature as a product designed to host e-mail on Microsoft’s servers, that is, in the cloud. See <https://products.office.com/en-us/exchange/exchange-online> (last visited June 13, 2016).

Microsoft’s Exchange Online service also may be deployed in a “hybrid” environment. In this latter connection, the record shows that the agency is interested in a “hybrid” e-mail solution, which would allow the agency to have certain e-mail users’ accounts hosted on the agency’s own servers--based on the identified users’ requirements for enhanced security--while allowing the majority of the agency’s e-mail accounts to be hosted in the cloud. See AR, exh. H, Miscellaneous Agency Correspondence, at 201, 203 (“IRS may require a hybrid EaaS cloud environment up to 10,000 Exchange users remaining on premises.”). Microsoft’s product literature explains that the Microsoft Exchange Online environment allows for customization of the e-mail environment:

Exchange lets you tailor your solution based on your unique needs and ensures that your communications are always available, while you remain in control. Move to the cloud overnight, deploy on-premises, or manage a hybrid deployment with mailboxes that are both online and on-premises.

See <https://products.office.com/en-us/exchange/microsoft-exchange-features-email-for-business> (last visited June 13, 2016).

The record therefore shows that under the modification, the agency acquired “Exchange Online” subscriptions--a cloud-based Microsoft Office 365 product--even

though the portfolio of software assets identified in the BPA did not include any cloud-based products.

As a final matter, we have no basis to question the contracting officer's representation that, at this time, all of the software the agency has acquired is being used only in the IRS-owned computing environment. However, the record shows that the decision to deploy the software only within the IRS computing environment was made in reaction to TN's protest. In this connection, the record includes an e-mail from an IRS employee discussing the agency's course of action in response to the protest. The e-mail provides as follows:

[J]ust had a meeting . . . dealing with an external protest for our award 9 months ago to utilize a hybrid Microsoft cloud solution to deliver the NARA [National Archives and Record Administration] requirements by the end of this year. There were no good options in dealing with the protest, but we have a path in which we will go forward with the software but stay on irs-owned equipment and premises. The team needs to look at the costs and schedule which may be significant, but would be minimal compared to the long term delay (year +) options of competing the requirements to handle the protest.

Will loop you into the conversation when we see the revisions from the strategic decision to reverse course to utilize the hybrid approach.

AR, exh. H, Miscellaneous Agency Correspondence, at H-13.

In sum, the record shows that the agency used the delivery order to acquire a "hybrid" cloud-based solution for its e-mail requirements. However, the acquisition of products or services to implement a cloud-based solution is outside the scope of the underlying BPA which, by its terms, is limited to acquiring updated or replacement versions of the agency's preexisting software portfolio that is installed in the agency's own computing environment. We note as well that the fact that the agency has at the present time decided not to deploy to the cloud--a decision made in direct response to the TN protest--does not mean that it has not acquired a cloud-based suite of products. It follows that the delivery order at issue in the protest amounts to an improper, out-of-scope, sole-source award. In light of the foregoing considerations, we sustain TN's protest.

RECOMMENDATION

The record here shows that the agency is interested in acquiring a hybrid, cloud-based EaaS solution to meet its e-mail needs, notwithstanding its current claims to the contrary. We also note that the period of performance for the delivery order will end shortly (the modification identifies the current period of performance as ending on June 19, 2016), and that the agency represents that it does not intend to use that

contractual vehicle any longer. Agency Letter to GAO and the Parties, Apr. 6, 2016. In addition, inasmuch as the agency's acquisition of "Office Pro Plus" and "Exchange Online" was made on a time-based subscription basis, it would appear that the agency's subscriptions for those services will expire shortly.

We recommend that, to the extent the agency has a requirement for a hybrid, cloud-based EaaS solution, it should either acquire its needs competitively, or take the steps necessary to acquire its needs using other than competitive procedures. 41 U.S.C. § 3304. We also recommend that the agency reimburse TN the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel