



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Merlin International, Inc.

File: B-310611

Date: January 2, 2008

Richard B. Oliver, Esq., McKenna Long & Aldridge, for the protester.
Allison V. Feierabend, Esq., and Joseph P. Hornyak, Esq. Holland & Knight, for MTM Technologies, Inc., an intervenor.
Capt. Joshua Drewitz, Department of the Army, for the agency.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that successful vendor's encryption software does not meet agency's requirement for compatibility with specified operating systems is denied where vendor's blanket purchase agreement included required vendor certification of compatibility, which satisfied requirement.

DECISION

Merlin International, Inc. protests the Department of the Army's issuance of a purchase order to MTM Technologies, Inc. under Federal Supply Schedule (FSS) blanket purchase agreement (BPA) No. FA8771-07-A-0301, for encryption software. Merlin alleges that MTM's software does not meet the agency's requirements, and that the agency improperly failed to permit Merlin to compete for the requirement, instead issuing the purchase order to MTM on a sole-source basis.

We deny the protest.

The Army reports that the Office of Management and the Budget has directed all federal agencies to encrypt personal identifiable information and agency sensitive but unclassified information on all mobile devices. Agency Report (AR) at 2. Here, pursuant to this directive, the Army sought to procure commercial-off-the-shelf data at rest encryption (DAR) software through the issuance of multiple purchase orders against the Department of Defense (DOD) Enterprise Software Initiative/General Services Administration (GSA) Smart Buy DAR FSS BPA. The Army determined that, in addition to being listed on the Smart Buy BPA, the software must meet six requirements. Justification and Approval, Sept. 28, 2007, at 4-5. As relevant here, the

software was required to be listed on the Army's Information Assurance Approved Product List (IAAPL) and to have a Federal Information Processing Standards (FIPS) 140-2 validation certificate for the MAC OS X, WIN Mobile 5.0, and WIN Mobile 6.0 operating systems, or, if the certificate is not available, a vendor statement that its product will operate with these operating systems without modification. *Id.* at 4-5.

From July through September 2007, the agency reviewed vendors' BPAs for encryption software products, and determined that MTM was the only current BPA holder with a product that met all of its requirements. Contracting Officer's Statement at 1. The Army issued the purchase order to MTM on September 30.

Merlin asserts that the issuance of the purchase order was improper because MTM's encryption software does not meet several of the Army's requirements. This argument is without merit. The agency's requirement was for FIPS 140-2 certification for the operating system or, if the certification was unavailable, a vendor statement attesting that its product operates with the identified operating systems without modification. MTM's BPA includes this vendor statement: "Although not tested and validated within them, this product or module is also installed without any modifications in the following operating systems . . . and thus the cryptography will operate correctly with MAC OS X . . ." (underline in original). Certification of FIPS Validation, MTM's BPA, at 589. This vendor statement expressly satisfies the agency's requirement.

Merlin asserts that MTM's software is not compatible with the MAC OS X operating system. In this regard, it cites a statement in MTM's BPA that "[MTM's software does not] currently provide support for the Mac OS X. Support can be easily added . . ." The parties dispute the meaning of the reference in this statement to "support." Merlin asserts that the reference indicated that MTM's product does not operate with the MAC OS X system, contrary to the agency's requirement. The Army and MTM, on the other hand, state that the language referred only to help desk support, and had nothing to do with compatibility with MAC OS X. Agency Statement, Dec. 14, 2007; MTM Statement, Dec. 14, 2007. We find that the BPA language is not clear, but that the agency's and MTM's explanation of the language is the more plausible one. The BPA does not explicitly state that the software is not compatible with, does not operate with, or even does not support MAC OS X. Rather, it states that the software does not "currently provide support," and that "Support can be easily added," which language, we think, is more consistent with the agency's and MTM's explanation that the BPA was speaking to the possibility of adding functionality--such as help desk support, as the agency and MTM suggest--in the future. This interpretation is all the more plausible in light of MTM's vendor statement, discussed above, which unequivocally states that the quoted product will operate with MAC OS X. Since MTM supplied the required certification, and there was no clear indication that MTM intended to take exception to the requirement with regard to MAC OS X, the Army reasonably concluded that the MTM product met the requirement.

Merlin also argues that the MTM software should not be considered compatible with the Windows Mobile versions 5.0 and 6.0 operating systems, because MTM's handheld product was successfully "hacked" during validation testing at Southern Methodist University (SMU).

This argument is without merit. First, Merlin does not identify the handheld product to which it is referring, or explain how it relates to the validation testing of MTM's encryption software. Moreover, the Army reports that SMU is not an authorized federal laboratory for testing products for inclusion on the IAPPL, and that it did not request testing at SMU. In any case, the Army only required that the product be FIPS 140-2 certified, or that the vendor statement be provided. As the agency points out, MTM's vendor certification letter expressly states that its products will operate correctly, without modification, in the Windows Mobile 5.0 and 6.0 operating systems. Since MTM included the required vendor statement in its BPA, AR at 8, we think the agency reasonably determined that MTM met the requirement for compatibility with the Windows Mobile 5.0 and 6.0 operating systems.

Merlin maintains that the Army did not reasonably justify its decision to purchase the encryption software from MTM on a sole-source basis. Merlin is not an interested party to challenge this determination. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000 and Supp. IV 2004), only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2007). Here, while Merlin states that it will have an acceptable product on the BPA in the future, it does not dispute that it did not have a product on the BPA that met all of the agency's requirements at the time of the sole-source determination. This being the case, Merlin would not have been eligible to receive the purchase order if the agency had not issued it to MTM on a sole-source basis. Thus, Merlin is not an interested party to challenge the Army's determination to proceed on a sole-source basis. Sales Resources Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 5.¹

¹On November 7, in response to a dismissal request from the Army, Merlin argued for the first time that the agency should have issued the purchase order for a limited amount of time so that Merlin would have an opportunity to become qualified to meet its needs. A protest based on other than a solicitation impropriety must be filed within 10 days after the protester knows or should know the basis of protest. 4 C.F.R. § 21.2(a)(2). New, independent grounds of protest that supplement a timely protest must independently satisfy the timeliness requirements under our Regulations. Advanced Seal Tech., Inc., B-242362, Apr. 9, 1991, 91-1 CPD ¶ 363 at 3. Since Merlin should have been aware of this basis of protest when it filed its protest on October 10, but did not raise the issue until November 7, it is untimely.

The protest is denied.

Gary L. Kepplinger
General Counsel