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**Comptroller General
of the United States**

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

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Decision

Matter of: CourtSmart Digital Systems, Inc.

File: B-292995.8

Date: December 9, 2004

James H. Roberts III, Esq., and Carrol H. Kinsey, Jr., Esq., Van Scoyoc Kelly, for the protester.

Jeffrey B. Krashin, Esq., Thompson & Waldron, and William E. Casselman II, Esq., for York Telecom Corporation, the intervenor.

Seth Binstock, Esq., Douglas Cohen, Esq., and Clary Hanmer, Esq., Social Security Administration, for the agency.

Henry J. Gorczycki, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's quoted software does not satisfy a solicitation requirement is denied, where the parties disagree as to the interpretation of this requirement and, even accepting the protester's interpretation, the protester is not prejudiced by the agency's waiver of this requirement.
2. Protest that awardee did not demonstrate that its offered software was part of a product line installed and operational in 100 court or hearing rooms, as required by the solicitation, is denied, where agency reasonably determined that offered software was an upgraded version of software within an existing product line that satisfied the solicitation requirement.
3. Awardee's software was reasonably found to be more access compliant under Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d (2000), where awardee's software received a higher compliance test score than the protester's software, and the solicitation stated that the overall test scores would establish the comparative degree of compliance with the standards.

DECISION

CourtSmart Digital Systems, Inc. protests the award under the Federal Supply Schedule (FSS) of a blanket purchase agreement (BPA) for portable digital recording systems to York Telecom Corporation pursuant to a request for quotations (RFQ) issued by the Social Security Administration (SSA).

We deny the protest.

The agency intends to purchase an estimated 1,470 digital recording systems, and related services, to be used on a nationwide basis to record hearings and appeals related to applications for SSA disability benefits. A digital recording system will consist of commercial off-the-shelf (COTS) software and hardware for digital audio recording and storage on government-furnished laptop computers. Agency Report (AR), Tab 13, Statement of Work, at 2. The accessibility standards for individuals with disabilities imposed by section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794d (2000), and its implementing regulations,¹ are applicable to this acquisition. *Id.* at 41.

The RFQ, as initially issued, contemplated the award of a fixed-priced order for products and services under the selected vendor's FSS contract. A number of vendors, including CourtSmart and York, submitted quotations and demonstrated their recording systems. SSA determined that only York's system was technically acceptable and placed an order with York. CourtSmart protested to our Office, and we found that SSA had improperly issued the order to York for a number of reasons: York's quotation included a non-FSS item; York's quoted system did not comply with Section 508 standards; and the agency unreasonably and unequally evaluated proposals under other evaluation criteria. Accordingly, we sustained the protest and

¹ Section 508 of the Rehabilitation Act requires federal agencies, in their procurements of electronic and information technology (EIT) (such as the system being procured here) to procure EIT that allows individuals with disabilities the same access as non-disabled persons unless an undue burden would be imposed on the agency. 29 U.S.C. § 794d(a)(1)(A). EIT accessibility standards were published by the Architectural and Transportation Barriers Compliance Board. *See* 36 C.F.R. Part 1194 (2004). Federal Acquisition Regulation (FAR) Subpart 39.2 requires that the acquisition of commercial-item EIT supplies and services meet the applicable accessibility standards set forth at 36 C.F.R. Part 1194 if they are available in the commercial marketplace in time to meet the agency's delivery requirements, unless this creates an undue burden on the agency (that is, significant difficulty or expense) or the acquisition falls under certain other exceptions not applicable here. If products are available, but do not meet all of the standards, "the agency must procure the product that best meets the standards." 36 C.F.R. § 1194.2(b).

recommended that SSA cancel York's order, amend the solicitation as necessary (or cancel the RFQ and issue a new solicitation), obtain revised quotations, and make a new source selection. CourtSmart Digital Sys., Inc., B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79.

SSA amended the RFQ to, among other things, provide for the award of a fixed-price BPA for a term of up to 60 months. AR, Tab 1, Draft BPA, at 3; Tab 16, Notice of Requirement, at 4. The amended RFQ terms are contained in a number of separate documents in the record: AR, Tab 1, Draft BPA and Pricing Instructions and Pricing Charts; Tab 7, SSA Section 508 Testing Methodology; Tab 9, Evaluation and Award Information; Tab 13, Statement of Work (SOW), and Tab 16, Notice of Requirement.

Vendors were informed that quotations were to include shrink-wrapped copies of the software, information demonstrating compliance with technical requirements, a project management plan, experience and past performance information, a completed Voluntary Product Accessibility Template (VPAT),² and completed pricing charts. AR, Tab 16, Notice of Requirement, at 1-3.

The RFQ stated that award would be made to the quoter:

- 1) Who takes no exception to the terms and conditions of the BPA, and
- 2) Whose quoted supplies, services, and Project Management Plan are technically acceptable, and
- 3) Whose software is the most Section 508 compliant (either fully compliant or compliant to the greatest degree) of the quotations after meeting 1) and 2). In the event two or more vendors supplies and services meet 1) and 2), and are found by SSA to be equally Section 508 compliant for the quoted software, award will be made to the vendor whose response represents the best value and will result in the lowest overall cost alternative in accordance with FAR Subpart 8.404.

AR, Tab 9, Evaluation and Award Information, at 2. Vendors were also informed that, in the event a best value analysis is conducted because the quotes of two or more vendors are found to be "equally Section 508 compliant," then "experience and past performance when combined are significantly more important than price." Id. at 3.

The RFQ provided that the agency would perform "hands-on" Section 508 testing of the quoted software, see id., and provided a testing methodology that described the

² The VPAT is a Section 508 compliance tool, which is available on SSA's website. See <http://www.ssa.gov/oag/info/section508_evaluation_template.htm>.

basis upon which the agency would quantify the degree to which tested software complied with the Section 508 standards. This testing methodology included a “checklist and scoring chart” that identified all of the applicable standards and the corresponding points assigned to each standard. Under the stated methodology, if a vendor’s software complied with the requirements of a standard, no points would be deducted for that standard. If, however, the software was found to be noncompliant with some aspect of a standard, the significance of the noncompliance would be assessed, and a corresponding deduction taken from the points available for that standard. AR, Tab 7, SSA Section 508 Testing Methodology. Vendors were informed as follows:

The aggregate number of points assigned during testing indicates the product’s level of Section 508 compliance, as determined by [SSA] as follows: products receiving the maximum number of points for all Section 508 standards are considered fully 508 compliant. Products receiving less than the maximum number of points are considered to be non-compliant. Where no products are fully compliant, the SSA Section 508 determination is based on the product with the highest number of aggregate points for all standards in the attached chart.

Id. at 1.

Detailed technical requirements for the digital recording systems were provided in the solicitation’s SOW. With respect to software, vendors were informed that “[a]ll software used in the [digital recording] solution must be ‘field-tested’ and have a demonstrated product line in a courtroom or hearing room environment.” AR, Tab 13, SOW, at 17. “Field-tested” was defined by the SOW “for the purposes of this RFQ as being tested with a demonstrated product line in a court or hearing room environment, and installed and operational in a minimum of 100 court or hearing rooms.” Id. at 3. The RFQ did not define “product line.”³ Vendors were also informed that all software provided must be COTS “that does not require (and does not contain) any code modifications to meet the technical requirements of this statement of work.”⁴ Id. at 17.

³ The Carnegie-Mellon Software Engineering Institute defines a “software product line” as “a set of software-intensive systems that share a common, managed set of features satisfying the specific needs of a particular market segment or mission and that are developed from a common set of core assets in a prescribed way.” See <http://www.sei.cmu.edu/plp/frame_report/what.is.a.PL.htm>.

⁴ This SOW provision included a footnote that informed vendors that “Section 508 compliance is not part of the technical requirements.” AR, Tab 13, SOW, 17 n.2.

The RFQ also provided that:

[t]he Government will, if necessary, discuss deficiencies in quotations with vendors and accept revisions to quotations (other than software revisions) based on those discussions. The Government will not accept revisions of any sort (updates, new versions, patches, etc.) to the quoted software after the vendor's delivery of it to the government as part of the quotation

AR, Tab 9, Evaluation and Award Information, at 1.

The agency received revised quotations from CourtSmart and York by the due date for submission of quotations. Contracting Officer's Statement at 1. CourtSmart quoted its own software, entitled "Portable Digital Recording Software CSMM v4.5LT." AR, Tab 21, CourtSmart's Quotation, at second unnumbered page. York quoted software from FTR, Ltd.,⁵ entitled "TheRecord Applications." AR, Tab 20, York's Quotation, at 11. Because York had previously offered FTR Gold software in response to the original RFQ, York in its revised quotation explained:

In October 2003 at the Court Technology Conference in Kansas City, FTR Limited unveiled its new corporate image, based on the idea that everything they do is "For The Record". In February 2004 FTR moved to new corporate headquarters in Phoenix, AZ. In May of 2004 FTR Limited launched its latest version of the flagship solution, FTR GOLD and changed the name to TheRecord Applications. TheRecord Applications is a set of upgrades to the FTR GOLD solution, which are specifically designed to provide a set of easy to use, stable software tools to capture, store, locate, retrieve, duplicate, transcribe and review the court record. TheRecord [A]pplications are Section 508 compliant and add the ability to capture video as well as 4-channel or 2-channel audio.

AR, Tab 20, York's Quotation, at 11.

Following evaluation of the quotations, the agency conducted discussions with both vendors and accepted quotation revisions. AR, Tab 33, Summary of BPA Award, at 4-7. The agency determined that the firms' revised quotations were technically acceptable. Id. at 4. Both vendors quoted discounts from their FSS contract prices. CourtSmart's total quotation price was \$10,792,590, and York's total quotation price was \$15,360,155. The agency found both vendors' prices to be fair and reasonable. Id. at 6-7.

⁵ York's quotation stated that York and FTR joined together to submit the quotation. AR, Tab 20, York's Quotation, at 4.

The vendors' software was also tested for Section 508 compliance. Because the agency had difficulty testing both vendors' software packages, SSA asked a number of questions of both vendors. SSA found that neither vendor's software fully complied with all of the Section 508 standards. Out of a possible maximum score of 810 points for full Section 508 compliance, CourtSmart's software received a score of 428, and York's software received a score of 579. AR, Tab 33, Summary of BPA Award, at 5. In accordance with the RFQ's stated evaluation methodology, SSA concluded that York's software, which had received the higher compliance score, was more Section 508 compliant than was CourtSmart's.

Award was made to York, and this protest followed.

CourtSmart argues that York's quotation is technically unacceptable, because York's quoted software, TheRecord Applications, was only recently issued and cannot satisfy the "field-tested" requirement that the quoted software be installed and operational in a minimum of 100 court or hearing rooms. Protester's Comments at 2-3.

SSA and York do not dispute that TheRecord Applications has not yet been installed in 100 court or hearing rooms, but argue that the "field-tested" requirement only provides that the "product line," from which the software is derived, must be installed and operational in 100 court or hearing rooms. SSA states that requiring the "product line" (as opposed to the offered software itself) to be installed and operational in 100 court or hearing rooms represents the agency's actual needs. Contracting Officer's Supplemental Statement at 1. In this regard, SSA states that neither CourtSmart or York offered software that was installed and operational in 100 court or hearing rooms and that both firms' quotations were found acceptable because the firms had demonstrated product lines that satisfied this requirement.⁶

Where, as here, a dispute exists as to the meaning of a solicitation provision, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. Zeta Constr. Co., Inc., B-244672, Nov. 5, 1991, 91-2 CPD ¶ 428 at 4.

The parties have very different interpretations of this solicitation requirement. SSA's interpretation is that offered software satisfies the "field-tested" requirement when it

⁶ SSA states that both vendors quoted recently revised/released versions of their software that have not been installed and operational in 100 court or hearing rooms. In this regard, SSA states that CourtSmart offered software that contained recent revisions, the most recent of which was made on June 21, the same day on which CourtSmart submitted its quotation. See Agency Supplemental Submission (Oct. 28, 2004), at 2. CourtSmart does not dispute this.

is derived from a product line that is installed and operational in 100 court or hearing rooms. CourtSmart contends that the quoted software must be installed and operational in 100 court or hearing rooms. We need not resolve this dispute, because even were we to accept CourtSmart's interpretation of the "field-tested" requirement as the only reasonable interpretation of this provision, we would conclude that SSA waived this solicitation requirement. SSA states that its actual needs do not require that offered software be installed and operational in 100 court or hearing rooms, only that the vendor's product line be so installed and operational, and that, in this regard, neither CourtSmart nor York offered software that satisfied CourtSmart's interpretation of the requirement. Rather, SSA found both vendors' quotes acceptable on the basis that the vendors had demonstrated product lines that satisfied SSA's interpretation of the requirement.

We will not sustain a protest absent a showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Here, CourtSmart has not stated or shown that it could or would have modified its quotation had it known of the agency's interpretation of the "field-tested" requirement. Although CourtSmart argues that it was prejudiced because it was not given an opportunity to submit a revised quotation,⁷ it does not state that the revisions it sought to make addressed the "field-tested" requirement. To establish prejudice in circumstances such as here, the protester must show that it would have submitted a different quotation that would have had a reasonable possibility for award had it known of the agency's interpretation of this provision. See Geo-Seis Helicopters, Inc., B-294543, Nov. 22, 2004, 2004 CPD ¶ ___ at 3-4; Brown & Root, Inc. and Perini Corp., a joint venture, B-270505.2, B-270505.3, Sept. 12, 1996, 96-2 CPD ¶ 143 at 10-11.

CourtSmart also contends that York's offered software is not part of the same FTR product line upon which SSA based its conclusion that York's quote satisfied the "field-tested" requirement. In this regard, CourtSmart argues that York misled SSA by misrepresenting that TheRecord Applications software was part of the same FTR

⁷ CourtSmart initially protested that SSA did not allow CourtSmart to revise its software after submitting its quotation, in response to SSA's questions related to Section 508 compliance testing. As noted above, CourtSmart does not state that any of the revisions it wished to make in its software relates to the "field-tested" requirement. In its report on the protest, SSA provided a detailed response, and the protester did not subsequently address this issue in its comments. Accordingly, we find that the protester abandoned this argument. Continental RPVs, B-292768.2, B-292868.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 4 n.2.

product line that was installed and operational in over 100 court or hearing rooms. CourtSmart contends that York's order should be canceled and the firm disqualified from any further competition on the basis of this alleged material misrepresentation.

SSA and York assert that York's offered software is part of the FTR product line, which includes FTR Gold and TheRecord Applications, see Intervenor's Supplemental Comments, Affidavit of FTR's President, at 5, and point to York's quotation, which states that TheRecord Applications software was "the latest version of . . . FTR Gold," that FTR "changed the name" of this latest version to TheRecord Applications, and that "TheRecord Applications is a set of upgrades to the FTR Gold solution" AR, Tab 20, York's Quotation, at 11. TheRecord Applications software is a software suite, called TheRecord Reporter, which is comprised of TheRecord Recorder (a digital recorder), TheRecord Player (a digital player), and TheRecord Annotator (providing note-taking and notation capabilities). AR, Tab 20, York's Quotation, at 11-19. FTR Gold is a software suite that essentially consists of the same components, albeit with different names--that is, FTR Reporter, FTR Player Plus and FTR Log Notes. Intervenor's Supplemental Comments at 2 n.1. The Intervenor states that products within the FTR product line, including FTR Gold and TheRecord Reporter, share core technological elements, including key design concepts and low-level object code, the primary difference between FTR Gold and TheRecord Reporter being that the latter supports video recording, which is not a requirement here, and is designed to address Section 508 standards. Id., Affidavit of FTR's President, at 5. The most recent version of FTR Gold, prior to the upgrades included in TheRecord Reporter, is FTR Gold 2.1, which FTR still markets to customers not seeking either video recording capabilities or compliance with Section 508 standards. Id. at 7. The intervenor states that the TheRecord Reporter was issued as "version 3.1" to reflect that it is a revised version of FTR Gold 2.1, and not an entirely new product line (in which case it would have been designated as version 1.1).⁸

In contending that TheRecord Applications software is not part of the FTR product line, CourtSmart argues that TheRecord Applications software is "distinct and fundamentally different" from the FTR Gold software because TheRecord Applications software provides video recording and playback, which FTR Gold does not. Protester's Supplemental Comments at 2. Also, CourtSmart points to a number of statements made by FTR or its employees, which the protester argues indicate that FTR considers TheRecord Reporter to be a new product line and not part of the FTR product line. For example, CourtSmart notes that in an annual report filed by

⁸ York states that FTR took advantage of recent improvements in personal computer technology to give TheRecord Reporter a new look, and the new name was simply a corporate decision to promote the upgraded product using a different marketing approach/sales channel that will provide more technical assistance to customers. York states that FTR's new approach is [DELETED]. Id. at 7.

FTR's parent corporation, FTR Holdings Ltd., with the Australian Stock Exchange, it was stated that:

[i]n addition to releasing updated versions of existing products, FTR released several new products of note:

TheRecord Reporter . . . Building on the elegant simplicity of FTR Gold, TheRecord applications record and manage both audio and video in the same, simple and straight-forward manner originally introduced with FTR Gold. The new, updated styling has helped make TheRecord application a quick success.

Protester's Second Supplemental Comments, encl. 1, FTR Holdings Annual Report, at 2. CourtSmart also points to a posting on an electronic bulletin board for the American Association of Electronic Reporter & Transcribers, Inc. by an FTR "sales engineer." In response to a posted query asking whether FTR Gold and TheRecord Reporter are the same product, the FTR employee stated that they are "two different product lines," explaining that although the two are similar in many respects, TheRecord Reporter does not replace FTR Gold. *Id.*, encl. 2, Electronic Bulletin Board Postings, at 7.

We conclude from our review of the record that SSA reasonably determined, in its evaluation of whether York's quotation satisfied the "field-tested" requirement, that TheRecord Applications software was part of the FTR product line that is installed and operational in 100 court or hearing rooms. Although CourtSmart disagrees with the agency's judgment in this regard, it has not shown that because the TheRecord Applications software offers enhanced features—that is, video recording and playback—not offered by FTR Gold, this necessarily means that the two software products are part of two different product lines. In this regard, the annual report made to the Australian Stock Exchange actually supports the agency's judgment, given that this report notes that TheRecord Applications software builds upon the FTR Gold software. In finding the agency's judgment reasonable, we recognize that an FTR employee stated on an electronic bulletin board that TheRecord Reporter and FTR Gold are different product lines; nevertheless, this one employee's opinion appears inconsistent with the remainder of the record, which indicates that TheRecord Reporter is the latest revision of the FTR Gold software. Overall, therefore, we conclude that the protest record does not demonstrate that York misled the agency as to the nature of the software it was quoting.

CourtSmart also protests that SSA should have found that both firms' quotations were equally and substantially non-compliant with the Section 508 standards. The protester, however, does not challenge any of the ratings received by either vendor under the Section 508 standards evaluation.

As noted above, SSA point-scored each vendor's proposed software for Section 508 compliance in accordance with the evaluation methodology stated in the RFQ. Here,

as CourtSmart itself recognizes, York's quoted product received a higher Section 508 compliance score than did CourtSmart's product (579 or 71 percent of the 810 total possible points as compared to 428 or 53 percent of the possible points). CourtSmart's Comments at 10. The RFQ provided that where, as here, no vendor's software was found Section 508 compliant, award would be made to the vendor whose software was the most Section 508 compliant. See AR, Tab 9, Evaluation and Award Information, at 2. The RFQ also provided that a product's level of Section 508 compliance (where no product was fully compliant) would be determined by the number of points received. AR, Tab 7, SSA Section 508 Testing Methodology, at 1. Because York's software received significantly more points than did CourtSmart's, the agency was following the RFQ evaluation scheme in determining that York's software was more Section 508 compliant than CourtSmart's. To the extent CourtSmart believes that the agency should have used a different methodology to determine the extent of a vendor's Section 508 compliance, the protest is an untimely challenge to the terms of the RFQ, which we will not consider here. 4 C.F.R. § 21.2(a)(1).

The protester also complains that the agency in awarding the BPA to York failed to consider CourtSmart's significantly lower quoted price and therefore the agency failed to consider the cost to the government as required by the Competition in Contracting Act of 1984, 41 U.S.C. § 253a(b)(1). Here again, though, the RFQ provided that where, as occurred in this competition, the offered products were not evaluated to be equally Section 508 compliant, the agency would make award to the vendor "[w]hose software is the most Section 508 compliant" and that a cost/technical tradeoff would only be made where the vendors were equally Section 508 compliant. AR, Tab 9, Evaluation and Award Information, at 2. Therefore, this basis of protest is also an untimely challenge to the express terms of the solicitation. 4 C.F.R. § 21.2(a)(1).

The protest is denied.

Anthony H. Gamboa
General Counsel