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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: Input Solutions, Inc.

File: B-294123

Date: August 31, 2004

Joel S. Rubinstein, Esq. and Lawrence M. Prosen, Esq., Bell, Boyd & Lloyd, for the protester.

Todd Glass for Progressive Technology Federal Systems, Inc., an intervenor.

Emily Vartanian, Esq., Library of Congress, for the agency.

Susan K. McAuliffe, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that certain statements made by the contracting officer in an e-mail message created a latent ambiguity in a solicitation's performance requirements is denied where protester's interpretation of the communication was unreasonable and, as a result, no latent ambiguity was created. Moreover, if we accepted the protester's interpretation of the communication, the ambiguity would be patent, not latent, and its protest, at this juncture, would be untimely.

DECISION

Input Solutions, Inc. (ISI) protests the issuance of a delivery order to Progressive Technology Federal Systems, Inc. (PTFS) under request for quotations (RFQ) No. LC04-Q-1984, issued by the Library of Congress for scanning and conversion of microfilm document images to digitized images in portable document format (PDF) files. ISI, the incumbent contractor for these services, contends that it was misled by certain statements made by the contracting officer (CO) about the performance requirements. ISI contends that the challenged agency communication created a latent ambiguity in the work requirements and that, as a result, the quotations received were based on different understandings of the scope of work.

We deny the protest.

The RFQ, issued on April 28, 2004, provided limited general performance specifications for scanning/conversion services, and sought quotes from General Services Administration Federal Supply Schedule (FSS) contractors. The RFQ anticipated, for instance, scanning/conversion of up to 111,875 standard image pages

per 7 business days, with fewer images expected for nonstandard, low quality film images. RFQ at 2. Vendors were to determine their own performance methods and no technical information was requested by the RFQ. In addition to identifying their FSS contracts for the services, vendors were to provide three prices for evaluation: a price per page for standard quality images; a “tier 1” low quality film surcharge (to be added to its standard quality image page price) for the conversion of poor quality images; and a “tier 2” low quality film charge expressed as an hourly rate. The RFQ provided for a performance period of slightly more than 1 year and contemplated selection of the lowest priced vendor. Id.

On May 5, ISI contacted the CO by e-mail asking for a “description of the requirements to perform conversion to standard quality image [and tier 2 low quality image] deliverables,” noting that “[p]ricing is requested . . . but no description is given.” E-mail from ISI to CO, May 5, 2004. The CO responded that “[t]he nature of the work related to this RFQ is the same that your company has been doing for the past few years.” E-mail from CO to ISI, May 5, 2004. The CO, recognizing that ISI’s familiarity with the images and prior conversion work should enable the firm to understand the nature of the work solicited, stated in his e-mail message that “image deliverables should be based on how you previously provided clear, readable images for the Library for the past few years,” and that “[a]s the company that has been performing the work for the past few years I expect you to have intimate knowledge about the nature of the work, the quality of the material, and the true cost of performing the service to our satisfaction.” Id.

Two quotations, ISI’s and PTFS’s, were received by the agency. After finding that both firms were experienced FSS contractors for the scanning/conversion services, the agency selected PTFS on the basis of its substantially lower price. This protest followed.

ISI contends that it understood the CO’s May 5 e-mail message to require the company to base its quotation on its “prior experience with the predecessor RFQ as opposed to the scope of work as described in the RFQ.” Protest at 6. ISI also argues that PTFS’s substantially lower price indicates that the awardee clearly intends to perform a different scope of work—presumably, a scope of work less onerous than ISI has performed in the past. Thus, ISI contends that the CO’s e-mail message created a latent ambiguity regarding the RFQ’s performance requirements that first became apparent when ISI learned of the disparity in prices.¹

¹ ISI also contends that the procurement was conducted on an unequal basis because it was not offered an opportunity to meet with agency personnel, as PTFS was, to discuss the conversion work. The agency responds that, since both firms are experienced FSS contractors for these services and, since ISI already had familiarity with the microfilm images and converted PDF files at the Library of Congress, ISI did not need a meeting, and did not request one. The agency describes its meeting with
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The agency and the intervenor characterize ISI's protest as an untimely challenge to alleged solicitation improprieties that were apparent prior to the closing time for the receipt of quotations, which ISI was required to raise before the closing time. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2004). The protester, however, argues that after it requested clarification of the RFQ, and after the CO clarified the RFQ for ISI in a way that ISI apparently believed superseded the terms of the RFQ, it reasonably assumed all vendors would be provided the same information. Thus, ISI contends that the CO's May 5 e-mail message created a latent ambiguity in the agency's performance requirements that could be protested after the closing time.

As discussed below, we disagree with ISI's interpretation of the CO's e-mail message. As a result, we disagree with ISI's view that the CO's e-mail message created a latent ambiguity here. In addition, even if we agreed with ISI's interpretation of the CO's e-mail message, it created, at best, a patent ambiguity that ISI was required to protest prior to the closing time for the receipt of quotations.

With respect to ISI's argument that the CO's e-mail message provided explicit direction to incorporate the terms of ISI's earlier contract here, our reading of the e-mail communication, as a whole, is that it indicates only that the CO thinks ISI should be familiar with the nature of the work and, as the incumbent, should have sufficient information to understand the type of work and submit a competitive quotation. While, as quoted above, the CO's message stated that the "image deliverables should be based on how you previously provided clear, readable images for the Library," there is nothing in this general language that imports requirements from ISI's predecessor contract into this solicitation. Since ISI's interpretation of the CO's e-mail is unreasonable, it provides no support for ISI's contention that the message created a latent ambiguity about the work required under the RFQ. See Ruska Instrument Corp., B-235247, Aug 7, 1989, 89-2 CPD ¶ 111 at 3.

Moreover, since ISI argues that the CO's e-mail message changed the RFQ's general performance terms--and acknowledges that the RFQ was never amended--the e-mail message, by the terms of ISI's own argument, created, at best, a patent ambiguity

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PTFS as brief, and limited to familiarizing PTFS with the Library's conversion needs through the review of image samples and converted files. We believe it was reasonable for the agency to conclude that ISI was already familiar with the types of images and conversions applicable here, and that ISI did not need such a meeting. Our review of the record leads us to conclude that the meeting held with PTFS during this procurement was not prejudicial to ISI, because it did not create an unequal competition among the vendors. We also have no reason to believe that the Library would have refused to meet with ISI had it requested a meeting.

that had to be protested prior to the closing time for the receipt of quotations.² 4 C.F.R. § 21.2(a)(1); see Motorola, Inc., B-277862, Dec. 3, 1997, 97-2 CPD ¶ 155 at 7. In addition, to the extent ISI contends that the RFQ gave vendors insufficient information to compete on an equal basis, its challenge had to be filed prior to the time for submission of quotes. Contact Int'l Corp., B-246937, Dec. 20, 1991, 91-2 CPD ¶ 571 at 3, aff'd, B-246937.2, Feb. 5, 1992, 92-1 CPD ¶ 150. Similarly, to the extent ISI contends that the agency failed to issue a solicitation amendment to incorporate the CO's e-mail message into the RFQ, this matter also had to be raised prior to the closing time. See Texnokpatikh, B-245835.2, Feb. 6, 1992, 92-1 CPD ¶ 153 at 3.

The protest is denied.

Anthony H. Gamboa
General Counsel

² In this regard, this protest is distinguishable from the cases cited by the protester that involve procurement improprieties where a protester, to its competitive disadvantage, was unaware of a material solicitation clarification by the agency that was shared with its competitors but not the protester. See, e.g., Metcalf Const. Co., Inc. v. U.S., 53 Fed. Cl. 617 (2002). Here, if the e-mail meant what ISI claims, the message was patently inconsistent with the solicitation's terms, and ISI knew that no formal amendment had been issued to incorporate the clarified terms.