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Decision

Matter of: Integration Technologies Group, Inc.

File: B-295958; B-295958.2

Date: May 13, 2005

David S. Cohen, Esq., John J. O'Brien, Esq., Rowena E. Laxa, Esq., and Catherine K. Kroll, Esq., Cohen Mohr LLP, for the protester.

James H. Roberts, III, Esq., and Carrol H. Kinsey, Jr., Esq., Van Scoyoc Kelly PLLC, and Grace Bateman, Esq., and Kevin P. Connelly, Esq., Seyfarth Shaw LLP, for Electronic Vision Access Solutions, an intervenor.

Maura C. Brown, Esq., Department of Veterans Affairs, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably eliminated from the competitive range a proposal for a computer system for use by blind veterans that included a 107-key keyboard instead of the 104-key keyboard required by the solicitation.
 2. Agency reasonably made a nonavailability determination waiving application of the Trade Agreements Act, 19 U.S.C. §§ 2501-81 (2000), to a procurement, where award was to be made on a group basis and all proposals included components that were not acquired from the United States or designated countries.
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DECISION

Integration Technologies Group, Inc. (ITG) protests the award of a contract to Electronic Vision Access Solutions (EVAS) under request for proposals (RFP) No. 797-NC-04-0004, issued by the Department of Veterans Affairs (VA) for computers for blind veterans.

We deny the protest.

The RFP provided for award of a requirements contract for a base year with four 1-year options. Award was to be made on a "best value" basis, considering (in descending order of importance) technical, price, past performance, and small disadvantaged business utilization criteria. The technical factor consisted of subfactors for ease of use, connectors and controls easily differentiated by touch,

experience and training of technical representatives in working with blind and low vision veterans, and compliance with Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d (2000). The solicitation announced that only one award would be made under the RFP.

The RFP estimated that the VA would order 1,000 computers for use by blind veterans at VA medical centers nationwide. The solicitation requested unit and extended prices for the line items. There was a separate line item for the computer hardware system (which included such things as the operating system, keyboard, mouse, CD-Rom drive, floppy drive, hard drive, Intel Pentium processor, RAM memory, USB ports, video card, network card, sound card, mouse pad, speakers, modem, surge protector, and mini-tower case) and nine other line items for the accompanying flat screen monitors, printers, mouse track ball, scanners, and software.

While the components of the hardware system line item were not listed as separate line items, some components were specified as brand name or equal products and were required to comply with mandatory “salient characteristics” in the RFP. For example, the RFP specified that the keyboard had to be a “Microsoft with 104 keys (or equal product)” and identified “104 keys” as the “salient characteristic” for the “brand name or equal” keyboard. RFP at 15, 19. In response to an offeror’s question, the agency indicated that a “Windows 104 keyboard” was required. RFP amend. 6, Q&A No. 17.

The RFP also required that the offered computer comply with the Trade Agreements Act (TAA), 19 U.S.C. §§ 2501-81 (2000), which, as implemented by the Federal Acquisition Regulation (FAR), generally requires that “end products” be acquired from the United States or designated countries. 19 U.S.C. § 2512(a)(1)(A); FAR § 25.403(c).

ITG and EVAS were among 10 offerors that responded to the RFP. None of the proposals fully complied with the TAA; all offered hardware systems and other line item equipment with one or more components that were made in non-designated countries, and the agency determined, on that basis, that the offered “end products” were not from designated countries or the United States. In accordance with the TAA and relevant FAR provisions, the agency made a “nonavailability determination” to exempt the procurement from TAA compliance, and proceeded with the evaluation of the proposals and award. AR, Tab 9, Price Negotiation Memorandum, at 2.

As determined by the agency, the three highest technically rated proposals were submitted by EVAS, [REDACTED], and ITG. EVAS’s proposal, priced at \$15,324,455, was the lowest priced and one of the two highest technically rated proposals. EVAS’s proposal was rated “very good” under the technical factor, “excellent” under the past performance factor, and “poor” under the small disadvantaged business

factor. Id. at 9. [REDACTED]. ITG's proposal, priced at \$18,525,095 was the third highest technically rated offer. Its proposal was rated "acceptable" under the technical factor, "excellent" under the past performance factor, and "fair" under the small disadvantaged business factor. Id. at 3.

The VA made a competitive range determination that eliminated all proposals except EVAS's and [REDACTED]. After considering the relative price of ITG's proposal, the agency eliminated the proposal from the competitive range because ITG proposed a keyboard that failed to meet a minimum specification, such that no award based on its proposal was "possible," and because two other proposals had "significantly better technical ratings." Id. at 10. In this regard, ITG's proposed keyboard did not conform to the solicitation because it was not "a Microsoft or equal keyboard with 104 keys" as required, but instead had 107 keys. After discussions with the two competitive range offerors, the VA performed a cost/technical tradeoff and selected EVAS for award. The agency then notified ITG that its proposal had been eliminated from the competitive range and that award had been made to EVAS, and this protest followed.

ITG first complains that, although the VA found ITG's proposal acceptable under the technical factor, the agency unreasonably rejected the proposal because ITG's proposed keyboard had 107 keys. According to the protester, its proposed keyboard is the "functional equivalent" of the Microsoft 104-key keyboard and should have been considered an equal product, as allowed under the RFP's "brand name or equal" specification. ITG further argues that the solicitation did not specify the precise number and placement of the keys.

Contrary to ITG's protest contention, the RFP did specify as a salient (i.e., mandatory) characteristic that "104 keys" were required regardless of whether an offeror supplied a Microsoft or another brand keyboard.¹ See RFP at 19 (specifying "104 keys"); RFP amend. 6, Q&A No. 17 (clarifying that a "Windows 104 keyboard" was required). The VA explains that the reason for this requirement was that teaching materials are "based on standard key placement" and that the standardized layout of these keyboards is "essential to non-visual use," since the blind "depend upon key placement as well as open space locations to orient themselves to keyboards they cannot see."² AR at 10. In finding ITG's keyboard noncompliant, the agency stated that:

¹ It appears from the record that ITG recognized that 104 keys was a feature distinct from Microsoft compatibility. In an e-mail communication from ITG to its suppliers, the firm identified 104 keys and Microsoft compatibility as separate keyboard requirements. See Supplemental Protest, exh. 12, at 1.

² As explained by the VA's Supervisor Blind Rehabilitation Specialist:

(continued...)

[ITG] offered a 107 “key” keyboard that made use more difficult for visually impaired veterans with diminished tactile (touch) sensitivity. Ease of use is significantly hampered because [the] keyboard is crowded.³

....

With the 107 keys, the lack of space between keys on the keyboard made it difficult to differentiate by touch. This failure of ITG’s keyboard to meet the specifications eliminated their offer from further consideration.

AR, Tab 9, Price Negotiation Memorandum at 3, 10.

In proposing a keyboard that has 107 keys, ITG’s proposal failed to meet the mandatory requirement of the solicitation that the keyboard have 104 keys, and therefore could not be accepted for award. See White Storage & Retrieval Sys., Inc., B-250245, Jan. 19, 1993, 93-1 CPD ¶ 70 at 3. Although the agency assigned ITG’s

(...continued)

[W]hen training veterans with visual impairments to utilize computers, the layout of the keyboard is essential to success. Instructors develop and utilize teaching materials that are based upon standard key placement. Students depend upon key placement as well as open space locations to orient themselves to keyboards that they cannot see. Since tactual labels of each key would be inefficient in most cases and impossible in others, the use of the proprioceptive sense (muscle memory) and habituation of key location is essential to non-visual use.

Since standardization of hardware is possible to control and a veteran’s learning capacity is not, the consistent and exact location of keys is essential to success.

AR at 10-11.

³ The three additional keys proposed by ITG were function keys located above the arrow keys on the right side of the keyboard. On a typical 104-key keyboard, there are 3 function keys on top, a space below that, 6 more function keys located in 2 rows, a space below that, and then 4 arrow keys on the bottom of the keyboard. With ITG’s 107-key keyboard, there are 3 new function keys on top, a space, and 9 function keys (which are the function keys on the 104-key keyboard) located in 3 rows immediately above the arrow keys with no space between any of the keys. That is, the 9 function keys from the 104-key keyboard were relocated downward on the 107-key keyboard and a new row of function keys was placed above these three rows of function keys.

proposal a rating of acceptable under this factor, the record shows that the agency recognized the proposal's non-compliance with this solicitation requirement in eliminating its proposal from the competitive range.⁴ See id.

ITG also complains that it was prejudiced by the VA's waiver of TAA compliance for this procurement. ITG contends that such a blanket waiver is inconsistent with the solicitation, as clarified by amendment No. 6. This amendment assertedly indicated that each component would be separately evaluated for TAA compliance to determine whether a nonavailability determination should be made for that particular component. ITG asserts that had the agency announced that it was going to make a general nonavailability determination, the firm would have proposed additional non-TAA compliant parts, such as a 104-key keyboard (as did the awardee), which would have drastically reduced its price.

ITG's argument is inconsistent with the regulatory framework for making nonavailability determinations so as to waive application of the TAA. As noted above, the TAA generally requires that "end products" be acquired from the United States or designated countries. 19 U.S.C. § 2512(a)(1)(A); FAR § 25.403(c). The clause implementing the TAA that was incorporated into the solicitation defines "end products" as "supplies delivered under a line item of a Government contract." FAR § 52.225-5 (June 2003). A TAA compliant "end product" is one that is "wholly the growth, product, or manufacture of a designated country." Id. If there are no offers of "end products" from the United States or designated countries, the agency may make a "nonavailability determination" and proceed with procuring the non-TAA compliant products. FAR § 25.502(b)(3). In determining whether an offer is TAA compliant, the agency must evaluate the offer on a line-item by line-item basis, "unless either the offer or the solicitation specifies evaluation on a group basis." FAR § 25.501(a). In this regard, where the solicitation specifies that "award can be made only on a group of line items or on all line items," the agency is required to reject the offer if the TAA applies "and any part of the offer consists of items restricted in accordance with [FAR §] 25.403(c)." FAR § 25.503(a)(2).

Here, the solicitation stated that a single award of all line items would be made, that is, award would be made on a group basis. The record shows that the agency evaluated each of the separate components of the line items for TAA compliance. Consistent with the applicable regulatory framework, because no proposal offered all line item components that were TAA compliant and award was to be made on a

⁴ ITG also complains that the agency disparately evaluated proposals and considered unstated criteria under the experience and training of technical representatives in working with blind and low vision veterans subfactor of the technical factor. However, we need not consider this issue because the record shows that this aspect of the evaluation was not the reason ITG's proposal was eliminated from the competitive range.

group basis, the agency properly made a single nonavailability determination that was applicable to all components and line items to be provided under the contract.⁵ The regulations do not contemplate that TAA nonavailability decisions would be made on a component-by-component basis where, as here, award was to be made on a group basis, and we are aware of no requirement, and ITG has cited none, that the agency was obligated to reopen the competition once that nonavailability determination was properly made.

ITG's argument here is based entirely on a question and answer included in amendment 6 of the RFP. This question posed a hypothetical to the agency of a computer bundled with a keyboard and mouse from China (a non-designated country) and asked whether the components needed to be TAA compliant. The agency responded:

We cannot accept products from China. The only exception is if every offer comes in with a mouse and keyboard from China, there is a waiver process. If the Offeror[']s position is [that] there are not any manufacturers in the U.S. or designated countries that make these products (mouse & keyboard), then it's up to the Offeror to decide whether or not to submit products from a non-designated country.

RFP, amend. 6, Q&A 10(a). ITG asserts that this advised offerors that the TAA waiver would be obtained on a component-by-component basis rather than on the group basis as done by the VA.

We disagree. When read in context with the rest of the solicitation, it is clear that the agency's answer was only in response to the hypothetical posed, and did not explain the waiver process or indicate that the TAA waiver would be obtained on a component-by-component basis. The agency simply advised offerors that it was their obligation to determine whether or not to submit components from a non-designated country and that a waiver process was available. That process is explained in the applicable regulations, as analyzed above, and was followed here.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁵ We note that ITG's proposal included various non-TAA compliant components of the hardware system line item, that is, the surge protector and speakers, such that its hardware system was not TAA compliant. In addition, ITG offered a non-TAA compliant printer and scanner, which are two other line items listed in the RFP.