



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: SMS Data Products Group, Inc.

File: B-280970.4

Date: January 29, 1999

Mark J. Stechschulte, Esq., for the protester.

Paralee White, Esq., and Lisa K. Miller, Esq., Gadsby & Hannah, for NetCon, Inc., an intervenor.

Maj. David Newsome, Jr., Department of the Army, for the agency.

Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's corrective action of terminating purchase order and issuing a revised solicitation in response to a protest is reasonable where material solicitation requirements and the agency's written clarifications of those requirements were susceptible to more than one reasonable interpretation.

DECISION

SMS Data Products Group, Inc. protests the Department of the Army's decision to terminate SMS's purchase order under solicitation No. DAHA90-98-Q-0124, and to issue a revised request for quotations (RFQ). The Army's corrective action resulted from a protest by Netcon, Inc., a competitor, challenging SMS's ability to meet the RFQ specifications, which caused the Army to conclude that the specifications, as stated and interpreted through agency responses to vendor questions, were ambiguous. SMS contends that there was no ambiguity in the specifications and that recompetition will result in an improper auction.

We deny the protest.

The RFQ sought quotations for a quantity of compact disk servers to Army National Guard units. The RFQ advised prospective vendors that "only GSA quotes will be accepted" (RFQ at 1, block 20) referring to products on the General Services Administration (GSA) Federal Supply Schedule (FSS). Prior to the submission of quotations, a prospective vendor submitted the following question: "This contractor understands it is the government[']s intention to only accept quotes with part numbers currently on GSA schedule as of the Solicitation issue date." Solicitation Questions at ¶ 1. The agency responded, "Correct. It is our intention to procure this requirement from GSA schedules." *Id.* NetCon interpreted this response to mean that only products on the FSS as of May 26, 1998, the RFQ issue date, could be proposed. Since SMS had proposed items that were not on the FSS until after

that date, NetCon protested the issuance of a purchase order to SMS. According to NetCon, had it known that it was acceptable to propose items not yet on the FSS, it could have proposed a less expensive item in response to the RFQ.

The RFQ also required that the "server must have full functionality on a Banyan Vines or a Microsoft NT 4.0 network operating system," that "[a]ll CD servers will be configured to work in either a Banyan Vines or Microsoft NT 4.0 environment," and that the contractor must provide installation documentation which would "provide for both Banyan Vines and Microsoft NT 4.0 networks." Statement of Work (SOW) at 4.1, 4.2, 4.3. Another vendor question referred to these three sections and asked:

There are three different interpretations possible from this language:
a) Each server must be capable of operating with both operating systems; b) The server must be capable of operating with either operating system and the Government will specify the operating system at time of order; or c) The offeror may select either environment as it sees fit. Which if any interpretation is correct? Please keep in mind when responding to this question, that it is more expensive to configure a system to work in both environments.

Solicitation Questions at ¶ 11. The agency responded that "[i]nterpretation A is correct." Id.

NetCon interpreted this response to mean that the servers must be capable of operating simultaneously on both systems. Consequently, it proposed a particular solution to meet this requirement. According to NetCon, had it not had to meet this requirement, it could have proposed a less expensive alternative.

The Army originally defended its decision to issue a purchase order to SMS. In this regard, it explained that it intended for vendors to be able to quote on any product so long as it was on the FSS at the time the purchase order was issued. Likewise it intended the item to be capable of operating on both systems, but not necessarily simultaneously. After reviewing NetCon's comments on the report and a supplementary protest, the agency determined that the questioned requirements and its responses to vendor questions were ambiguous. In the Army's view, NetCon's interpretations were as reasonable as the agency's intended meanings.

The Army advised our Office that it intended to take corrective action by canceling the RFQ and SMS's purchase order, and by issuing a new solicitation. SMS then filed this protest arguing that the requirements were not ambiguous and that resolicitation would result in an improper auction and technical leveling.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Patriot Contract Servs., LLC, et al.,

B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4; Rockville Mailing Serv., Inc., B-270161.2, Apr. 10, 1996, 96-1 CPD ¶ 184 at 4; Oshkosh Truck Corp.; Idaho Norland Corp., B-237058.2, B-237058.3, Feb. 14, 1990, 90-1 CPD ¶ 274 at 4. It is not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; where the agency has reasonable concern that there were errors in the procurement, even if the protest could be denied, we view it as within the agency's discretion to take corrective action. Patriot Contract Servs., LLC, et al., *supra*; Main Bldg. Maintenance, Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3. An agency may amend a solicitation, and request and evaluate further offers where the record shows that the agency made the decision to take this action in good faith, without the specific intent of changing a particular offeror's technical ranking or avoiding an award to a particular offeror. See PRC, Inc., B-233561.8, B-233561.9, Sept. 29, 1992, 92-2 CPD ¶ 215 at 3-4; Burns & Roe Servs. Corp., B-248394, Aug. 25, 1992, 92-2 CPD ¶ 124 at 5; Unisys Corp., B-230019.2, July 12, 1988, 88-2 CPD ¶ 35 at 5. We will not object to an agency's proposed corrective action where the agency concludes that the award, because of perceived flaws in the procurement process, was not necessarily made on a basis most advantageous to the government, so long as the corrective action taken is appropriate to remedy the impropriety. Rockville Mailing Serv., Inc., *supra*.

There is no evidence in the record that suggests the agency is acting other than in good faith. On the contrary, while the protester contends that the agency has not supported its determination to take the corrective action proposed, the record supports that the agency's corrective action is appropriate and not overbroad.

In this regard, the original SOW requirements concerning operability on Banyan Vines and Windows NT 4.0 are less than models of clarity. While the SOW speaks in terms of full functionality on either system, it also requires documentation for both systems. Taken together, the requirements reasonably can be read as specifying alternative operability or dual/simultaneous operability. When the agency then advised offerors that "[e]ach server must be capable of operating with both operating systems," while intending that the servers be capable of operating with either system, the agency exacerbated the ambiguity. Similarly, the FSS requirement, as stated in the RFQ, does not indicate when the products had to be on the FSS. However, when a vendor asked if this meant on the FSS as of the RFQ issue date, the Army's response of "correct" unequivocally validated the vendor's interpretation, even though this was not what the agency intended.

SMS also contends that, because the vendors' prices and products have been exposed, canceling the RFQ and resoliciting will foster an improper auction and technical leveling. Where, as here, the corrective action proposed by the agency is not improper, the prior disclosure of information in an offeror's proposal does not preclude the corrective action, and the resolicitation of the same requirement does

not constitute an improper auction. See Unisys Corp., supra; Sperry Corp., B-222317, July 9, 1986, 86-2 CPD ¶ 48 at 4. The corrective action does not constitute improper leveling, and the possibility that the purchase order may not have been issued based on a fair competition has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction; the statutory requirements for competition take priority over the regulatory constraints on auction techniques. See Unisys Corp., supra.

The protest is denied.

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