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United States General Accounting Office  
Washington, DC 20548

Comptroller General  
of the United States

## Decision

**Matter of:** Locus Technology, Inc.

**File:** B-293012

**Date:** January 16, 2004

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Ragnhild Larkins for the protester.

Mike Colvin, Department of Health and Human Services, for the agency.

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### DIGEST

Protest challenging proposal evaluation is sustained where record reveals that agency failed to consider significant portions of protester's revised proposal in its evaluation and failed to consider offerors' prices in source selection decision.

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### DECISION

Locus Technology, Inc. protests the rejection of its proposal and the issuance of a purchase order to Topaz Technologies, Inc. under request for proposals (RFP) No. NHLBI-PS-2002-105, issued by the National Institutes of Health (NIH)/National Heart, Lung, and Blood Institute for animal facility management software for NIH's Veterinary Research Program (VRP).

We sustain the protest.

The RFP, which was originally issued on August 21, 2002, sought commercially available software to assist the VRP in managing its animal facilities and resources. The RFP specified required functionalities of the software pertaining to animal health, animal husbandry, animal husbandry reporting, animal procurement, protocol management, protocol reporting, billing for services, query, and additional functionality. For example, under the heading animal husbandry, the RFP required the ability to collect data on animal holding; to create a species room inventory; to enter census records manually; and to scan, track and report census data electronically from a barcode reading device.

The solicitation instructed offerors to format their technical proposals "to clearly identify that the proposed commercially available off-the-shelf (COTS) 'Animal

Facility Management Software' meets/does not meet the requirements of the statement of work," and to indicate whether the proposed commercially available software required customization to meet the RFP's requirements. RFP at 20. The RFP advised offerors that they would be required to provide an "active demonstration" of their software. It also instructed them to submit past performance information.

The RFP provided for award to the responsible offeror whose proposal was determined most advantageous to the government, price and other factors (technical approach, product demonstration, and past performance) considered.<sup>1</sup> The RFP did not specify the relative importance of the evaluation factors.

Five offerors, including Locus, submitted proposals by the closing date, as extended, of September 16, 2002. The contract specialist contacted Locus by e-mail on November 18, and again on November 19, to schedule its product demonstration and to seek supplemental and clarifying information regarding its proposal.<sup>2</sup> Locus's demonstration was scheduled for December 4, and Locus submitted additional information in response to the contract specialist's inquiries by e-mail message of December 5.

The technical evaluation panel (TEP) convened on January 16, 2003. Proposals were evaluated in accordance with the following point scheme:

<u>Evaluation factor</u>	<u>Maximum available points</u>
Technical proposal/approach	25
Product demonstration	55
Past performance	20

Technical scores ranged from a high of 77.3 for Topaz to a low of 40.5 for Locus. The discrepancy between the two offerors' scores was almost entirely attributable to the differences in their scores under the two areas: (1) the technical proposal/approach factor, under which Locus received only 5.3 (of 25) points, due in large part to the protester's perceived failure to identify clearly in its written proposal the requirements of the statement of work that its software did or did not meet; and

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<sup>1</sup> The RFP was inconsistent on its face in that it provided for the evaluation of proposals on the basis of technical approach, product demonstration, and price, i.e., it did not list past performance as an evaluation factor, but elsewhere stated that "[t]echnical and past performance, when combined, are 100 points." RFP at 19. There is no indication that the protester was misled by the inconsistency into assuming that past performance would not be considered in the evaluation.

<sup>2</sup> The propriety of these contacts is not an issue in this protest.

(2) their scores under the past performance factor, under which Locus received a score of 0 (of 20) points, apparently based on its failure to submit past performance references with its initial proposal. Under the product demonstration factor, the two proposals received similar scores. Despite the range of scores, the evaluators determined all proposals to be technically acceptable and recommended that all be included in the competitive range.

The procurement was placed on hold between January and May of 2003 while the VRP conducted an assessment of its information technology needs; then, on May 21, the VRP notified offerors via e-mail (without explanation as to the basis for the action) that the solicitation had been cancelled. Approximately 2 months later, in late July, the contract specialist notified offerors, apparently via telephone, that the solicitation had been reopened.<sup>3</sup> Offerors were given the opportunity to revive and revise their proposals, to furnish updated information regarding their software and technical capabilities, and to provide a demonstration of their upgraded/updated product.<sup>4</sup> On August 8, Locus provided a PowerPoint demonstration of updates to its software and submitted a revised/updated proposal, which included updated past performance information.

It is unclear what transpired upon receipt of the revised proposals. While in the agency's report on the protest the contracting officer responds as if Locus's revised proposal had been evaluated, as discussed below, the contemporaneous documentation furnished does not support this position.

By memorandum dated September 12, 2003, the project officer recommended award to Topaz based on its superior technical proposal, its strong past performance, and the high quality of its software products and technology. Memorandum from Project Officer to Contract Specialist at 1. The memorandum summarized the strengths of Topaz's proposal and the weaknesses of Locus's, but included no discussion of other offerors' proposals and made no reference to price (other than to recommend award to Topaz at its proposed price of \$159,000).<sup>5</sup>

On September 30, the contracting officer issued a purchase order in the amount of \$82,000 for some, but not all, of the items proposed by Topaz. In this connection, while Topaz proposed two software programs (with support and training for both) to satisfy the RFP's requirements, the agency was able to fund the purchase of only one

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<sup>3</sup> There is no record of the contract specialist's communication in the agency file; there is, however, a copy of a July 30 e-mail message from the protester to the contract specialist acknowledging his telephone call notifying the protester of the reopening of the competition.

<sup>4</sup> Again, there is no contemporaneous record documenting the agency's actions.

<sup>5</sup> Locus's final revised price was \$50,000.

of the programs at the time of award “due to budgetary constraints.” Contracting Officer’s Statement at 5. The contracting officer notes that the remaining items are to be purchased when funds become available.

By letters dated September 30 and received by the protester, via regular mail, on October 6, the contracting officer notified Locus of the award to Topaz and furnished it with a written debriefing. Locus protested to our Office on October 8. The agency reports that it did not suspend performance upon receipt of the protest because Topaz’s product was “delivered and accepted” on October 6. Agency Report at 3.

Upon receipt of Locus’s protest, which (among other things) objected to the evaluation of the protester’s past performance, the TEP agreed to award the protester an additional 5 points under the past performance evaluation factor, raising its overall score from 40.5 to 45.5. According to an October 10 memorandum from the project officer to the contract specialist:

The Technical Evaluation Panel determined that while Locus Technology, Inc.’s “Colony” product, the product upon which they based their past performance references, is NOT a good fit for our technical needs, and that the product that they demonstrated and offered to us, “Facility,” does not address the various and sundry current needs of our end users, Locus Technology, Inc. has successfully demonstrated that they possess a client base and have successfully sold their products to the government.

The contracting officer concluded that despite the increase in Locus’s technical score, Topaz’s proposal continued to represent the best value to the government.

In considering a protest such as Locus’s objecting to an agency’s evaluation of proposals, we will not reevaluate the proposals, but will instead review the record to determine whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement statutes and regulations. Atlantic Research Mktg. Sys., Inc., B-292743, Dec. 1, 2003, 2003 CPD ¶ \_\_. As explained below, we see material flaws in the agency’s evaluation of Locus’s proposal.

First, it is apparent from the record that the agency failed to consider significant portions of Locus’s final revised proposal in the evaluation. With regard to the technical proposal/approach evaluation factor, under which Locus’s proposal was significantly downgraded, the record simply does not establish that the agency’s evaluation even considered the revisions Locus made in its initial proposal. The contemporaneous evaluation record consists of two documents, the Evaluation Summary Report (ESR) and the Recommendation of Award prepared by the project

officer.<sup>6</sup> While the members of the TEP who signed the ESR dated their signatures in late August or September 2003, the date on the first page of the ESR is January 16, 2003, and the subject line of the report reads “Initial Technical Evaluation Report.” As noted above, initial proposals were submitted in September 2002, and revisions to those proposals were submitted in early August 2003. Thus both the date and the subject line on the ESR itself indicate that the document in fact reflects evaluation findings based on the initial proposals.

More important, the actual narrative describing the evaluators’ findings with regard to Locus’s proposal in no way acknowledges that Locus submitted revisions; on the contrary, the observations reflect only the initial proposal. Thus, for example, the ESR notes that Locus’s “technical proposal included statement ‘N/A’ as response to many specific government requirements.”<sup>7</sup> ESR at 4. The record shows, however, that while Locus’s initial proposal did use the notation “N/A” in response to two of the ten specific requirements listed in the solicitation (protocol management and “query”), the protester’s revised proposal included no notations of “N/A,” instead adding brief statements responding to the two requirements to which it had initially responded “N/A.” In our view, the statement in the ESR regarding Locus’s “N/A” notations can only be interpreted to mean that the evaluation reflected therein, and on which the award recommendation was made, was based on review of only Locus’s initial proposal.

This conclusion is further supported by the discussion in the ESR of the second evaluation factor, product demonstration. The narrative in the ESR regarding Locus’s product demonstration clearly relates to a live demonstration, apparently conducted in December 2002. An opportunity for a second product demonstration was offered in connection with revised proposals, in August 2003. The contracting officer’s post-protest submission describes the second product demonstration that Locus provided as a “static ‘PowerPoint’ presentation and not a live demonstration.” Contracting Officer’s Statement at 7. All the comments in the ESR relate to a live, not a “static,” demonstration, however, further confirming that the findings in the ESR do not reflect consideration of Locus’s revised proposal.

Similarly, with regard to the past performance factor (under which Locus received zero points), it is clear that the agency failed to consider Locus’s revised proposal in the evaluation. In this regard, the ESR states that Locus “did not furnish references

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<sup>6</sup> Since the latter document is evidently based on the ESR, any deficiencies in the ESR likewise make the award recommendation flawed.

<sup>7</sup> This point is repeated by the contracting officer in both the written debriefing and in her statement in response to the protest, as support for the evaluators’ findings regarding Locus’s proposal. Debriefing Letter at 2; Contracting Officer’s Statement at 6.

for evaluation of past performance after multiple requests.” ESR at 6. In fact, Locus submitted a list of 11 references with its final revised proposal. While the agency purported to acknowledge and remedy this error after receipt of Locus’s protest by raising the protester’s score under the past performance evaluation factor from 0 to 5, even the memorandum summarizing the corrective action taken ignores the content of Locus’s final revised proposal, incorrectly stating that Locus’s past performance references were for its “Colony” product when, in fact, a majority of the references were for the “Facility” software offered by Locus in response to the RFP here.

Next, there is no evidence in the contemporaneous record that the contracting officer performed a proper price/technical trade-off—or, for that matter, even considered offerors’ prices—prior to selecting Topaz for award. There is no evaluation of offerors’ prices—on either an individual or comparative basis—in any of the source selection documentation. This is contrary to the requirement that price be considered in every source selection decision, 41 U.S.C. § 253a(c)(1)(B) (2002); Federal Acquisition Regulation (FAR) § 15.304(c)(1), and the requirement that a source selection decision be based on a comparative assessment of proposals against all source selection criteria in the solicitation and that it be documented. FAR § 15.308; Beacon Auto Parts, B-287483, June 13, 2001, 2001 CPD ¶ 116 at 7. Furthermore, even the contracting officer’s post-protest trade-off analysis rests upon the incorrect assumption that technical factors were entitled to considerably greater weight than price in determining best value under this solicitation. In this regard, the contracting officer states as follows:

Based on the order of importance of the evaluation factors for an award, technical factors are of paramount consideration; it is clear to the Contracting Officer that the difference in costs did not outweigh Topaz’s technical superiority to Locus.

Contracting Officer’s Statement at 11. This is contrary to our well-settled rule that where, as here, a solicitation fails to specify the relative weights of technical and price factors, it must be presumed that they are of equal weight. Intermagnetics Gen. Corp., B-286596, Jan. 19, 2001, 2001 CPD ¶ 10 at 8, n. 7.

In sum, because the agency essentially ignored Locus’s revised proposal and failed to consider price in the evaluation, we sustain the protest.

Since the software has already been delivered and accepted, termination of Topaz’s order is no longer an available remedy. Rotair Indus., Inc., B-232702, Dec. 29, 1988, 88-2 CPD ¶ 636 at 3. Accordingly, we do not recommend that the agency reevaluate proposals. Instead, as in other cases where remedial action is no longer practicable, we recommend that Locus be reimbursed its proposal preparation costs. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(2) (2003). We also recommend that the protester be reimbursed for the costs of filing and pursuing its protest. 4 C.F.R. § 21.8(d)(1). In accordance with our regulations, Locus’s certified claim for such costs, detailing the

time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Anthony H. Gamboa  
General Counsel