

Protest of) Date: October 10,, 1991
DATAWARE SYSTEMS LEASE, INC.)
Solicitation No. 104230-91-A-0120) P.S. Protest No. 91-41

DECISION

Dataware Systems Lease, Inc., ("Dataware") protests the award of a contract to TriLogic Corporation ("TriLogic") under Solicitation No. 104230-91-A-0120 for the supply of Digital Equipment Corporation ("DEC") computer equipment. Dataware alleges that unstated evaluation criteria were used, erroneously disqualifying it from eligibility for award, that Dataware was not evaluated fairly in a manner consistent with the evaluation of the awardee, and that the awardee was improperly found responsible.

The solicitation was issued May 5, 1991, by the Office of Procurement, Headquarters, with an offer due date, as amended, of May 30. The solicitation contemplated a firm fixed price contract to supply a basic quantity of DEC equipment, with three options to supply additional quantities on a fiscal year by fiscal year basis.^{1/} Section M.2, Contract Award and Proposal Evaluation, stated, "Award will be made to the lowest price[d] technically acceptable proposal submitted by a responsible offeror that is also an **authorized DEC distributor** (Emphasis in original.)^{1/} The term "authorized DEC distributor" was not further defined. Section J.7 of the solicitation, Explanation to Prospective Offerors, provided that responses to timely written requests for explanation of the terms of the solicitation would be provided by solicitation amendment. No prospective offeror sought an explanation of the term "authorized DEC distributor."

Six proposals were received, including that of Dataware. The contracting officer conducted oral discussions with the six offerors and requested best and final offers. Dataware had submitted the lowest priced offer, but the contracting officer rejected its proposal as unacceptable because Dataware was neither the original equipment manufacturer ("OEM") nor an authorized DEC distributor. Award was made on June 28 to TriLogic Corporation, which had submitted the second lowest priced offer.^{1/}

^{1/} According to Attachment A to the solicitation, the initial deliveries under the contract were to be made by June 17. Amendment A02 to the solicitation, dated June 5, called for the Submission of best and final offers by June 18 and changed the initial delivery date to July 8.

^{2/} Amendment No. A02 changed Section M.2 to read, "Award will be made to the lowest price[d] technically acceptable proposal submitted by a responsible offeror that is the Original Equipment Manufacturer OR an **authorized DEC distributor**(Emphasis in original.)

^{3/} As the result of negotiations which took place between the selection offTriLogic and contract award, the time for initial deliveries was delayed from July 8 to July 15.

Dataware's July 3 protest alleges that the Postal Service erred in concluding that Dataware was not an authorized DEC distributor. On July 16, Dataware supplemented its protest, alleging that the contracting officer erroneously limited the definition of the term "authorized DEC distributor" to first-tier distributors. The protester states that in response to queries from the contracting officer, it provided a letter from DEC, which approved Dataware's Distributor Affiliated OEM ("DAO") Agreement. According to Dataware, the contracting officer never questioned it or its DEC representative with respect to any distinctions between a DAO and an authorized DEC distributor agreement. The protester states that in concluding that TriLogic was an "authorized distributor" while Dataware was not, the Postal Service evaluated two similar entities inconsistently.

Dataware asserts that for the Postal Service's purposes Dataware should be considered an authorized distributor. The protester states that the term "authorized distributor" has no standard industry definition; rather, the term is a subjective one unique to each equipment manufacturer. Dataware contends that the solicitation, industry usage and the Postal Service's pre-award actions "all indicate that the Postal Service sought an entity which was authorized to provide the DEC equipment to be purchased under the subject contract" and that Dataware is such an entity.

Finally, Dataware alleges that TriLogic, the awardee, was not qualified to perform the contract as set forth in the solicitation. Dataware claims that TriLogic's Business Plan indicates that it is not authorized to distribute the equipment in all of the regions covered by the solicitation; that it is not authorized to sell directly to the government; and that it is limited with respect to its ability to schedule the receipt of equipment ordered from the manufacturer. Dataware alleges that the Postal Service showed favoritism toward TriLogic by relaxing the solicitation requirement that first delivery be made on July 8. If TriLogic could not meet the July 8 requirement, Dataware asserts, it should have been declared ineligible before award.^{1/}

The contracting officer states, in response to the protest, that when the Postal Service used the term "authorized DEC distributor," it was seeking an offeror that dealt directly with DEC. He explains that the requiring activity had expressed an urgent need for this equipment. When delivery is critical, the Postal Service seeks authorized distributors having a direct relationship with the OEM in order to ensure that the product will be available to the distributor. This requirement is based on past experience with contractors who were not first-tier distributors and whose contracts had to be terminated for default when they were unable to obtain and provide the necessary supplies.

According to the contracting officer, three attempts were made to elicit information sufficient to establish whether Dataware was a first-tier distributor. Queries to

^{4/} In its supplemented protest, the protester requested disclosure of various documents, including 1) materials used in the evaluation of the offerors, 2) any postaward submissions by DEC and TriLogic and 3) all records pertaining to the alleged improper scheduling change. Requests for information are properly directed to the records custodian, in this case, the contracting officer. This office does not compile information that is not necessary for its decision or resolve conflicts between contracting officers and protesters about the release of information. See Cohlmia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988.

Dataware itself produced a copy of the letter from DEC to Dataware stating that its DAO agreement had been approved, and the statement that "[a]ll Clins [Contract Line Item Numbers] are within the realm of our distribution agreement with DEC."^{4/} The contracting officer, still unsure as to how a DAO agreement compares with an authorized distributor's agreement, contacted DEC. DEC's counsel furnished sample copies of a DAO agreement and an "authorized DEC distributor" agreement. According to DEC, an authorized distributor receives the product directly from DEC, while a DAO obtains its products from the authorized distributor. Based on the sample documents and the explanation of DEC's counsel,^{4/} the contracting officer concluded that Dataware, under its DAO agreement, operates one tier below an authorized distributor and therefore failed to meet the requirements of the solicitation. The contracting officer asserts that it would have been unfair to bona fide authorized distributors to have awarded the contract to Dataware.

In response to the contracting officer's statement, Dataware stresses that the contracting officer used unstated criteria in evaluating Dataware's proposal, as nowhere in the solicitation was there evidence that "authorized distributor" was defined in such a way as to eliminate second-tier distributors. Dataware interprets the term to require only "that the offeror be autho- rized to sell or distribute the DEC products." (Emphasis in original.) The protester further claims that had it known that the Postal Service intended otherwise, it would have protested the first-tier requirement as being unduly restrictive, without a reasonable basis. Dataware asserts that there is no practical reason to prefer a first-tier dealer to a second-tier one that can demonstrate and document its ability to obtain and deliver the needed equipment in a timely manner. Dataware contends that the standard practice in the industry is for all vendors, even first-tier distributors, to purchase items from other distributors to meet immediate needs that cannot be satisfied through their own warehoused inventory. Therefore, the protester concludes, the Postal Service should have awarded the contract to the lowest cost authorized seller of DEC equipment, "whether such vendor obtains its products directly from DEC or another distributor."

In response to our request for additional information, the contracting officer submitted a supplementary statement, in which he explains that the initial delivery date was modified from July 8 to July 15 because of the inability of the Postal Service to officially notify TriLogic of the award until June 28. The contracting officer states that the "extra

^{5/} Dataware alleges that the contracting officer failed to hold meaningful discussions with it. The contracting officer responds that discussions were conducted in accordance with the Procurement Manual (PM), and included discussions designed to obtain proof that Dataware was an authorized DEC distributor. The record shows that the discussions involved "information essential for determining the acceptability" of Dataware's proposal and that Dataware was given the opportunity to respond. The discussions were meaningful pursuant to PM 4.1.5 a.3. See Cohlmia Airline, Inc., P.S. Protest No. 87-41, October 30, 1987. "Requests for clarification or amplification which lead offerors to areas of their proposals that are deficient are sufficient to put them on notice of their deficiencies." Id., citing Serv-Air, Inc., Comp. Gen. Dec. B-189884, September 25, 1978, 782 CPD & 223.

^{6/} The Contracting officer states that DEC confirmed that TriLogic, the awardee, was an authorized distributor. He relied on this confirmation in making his determination that TriLogic met the requirements of the solicitation.

effort expended" to verify Dataware's submissions delayed the process. The contracting officer asserts that as a result, "a reasonable adjustment" to the delivery schedule was warranted. The contracting officer also reiterates that he relied on DEC's confirmation of TriLogic's authorized distributorship. "DEC's confirmation was deemed credible since they were furnished with a copy of the solicitation and were, therefore, well aware of the geographic scope of the requirement." In support of his affirmative responsibility determination, the contracting officer also states that "TriLogic has performed flawlessly under the Contract," which, he states, "obviously confirms that they were able to obtain [the] product from DEC for a requirement of national scope."

In response to the contracting officer's supplementary statement, Dataware reiterates its argument that the "first-tier" distributor requirement was not only unnecessarily restrictive, but also constituted the use of an unstated evaluation criteria. The protester further states that since the target award date was June 26, "[o]ne must suspect that TriLogic was at least 'unofficially' notified . . . and therefore, no extension was necessary or warranted." According to Dataware, the fact that TriLogic might be performing adequately does not prove that the responsibility determination was proper. Dataware submits that the contracting officer has not addressed the specific responsibility issues raised by the protester and instead has limited his inquiries to a determination of the offerors' first-tier status. Dataware reaffirms its request that the contract with TriLogic be terminated and the remaining portion awarded to Dataware.

Discussion

The thrust of Dataware's protest is that it should have been considered an "authorized DEC distributor." The protester asserts that the Postal Service used unstated evaluation criteria in order to erroneously exclude Dataware from consideration for award. Since the solicitation as amended expressly stated that award would be made to an authorized DEC distributor, the requirement itself was not unstated. The protester's intended allegation is that the definition of "authorized DEC distributor" used to eliminate Dataware from consideration was unstated. Such an assertion can be meritorious only if there is more than one reasonable definition of the term and the term is, therefore, ambiguous.^{1/}

Ordinarily, a protest against any solicitation term, including an ambiguous or unduly restrictive solicitation term, must be made before the date for submission of proposals. See Lista International Corporation, P.S. Protest No. 90-47, September 11, 1990. See Procurement Manual (PM) 4.5.4 b. Dataware asserts that it did not know that the Postal Service intended "authorized DEC distributor" to mean an entity with a first-tier relationship with DEC. Had it known, Dataware would have protested the requirement as unduly restrictive.

The record indicates that Dataware at least should have suspected that the term "authorized DEC distributor" meant a vendor with a direct relationship with DEC. Dataware states that the term is defined by each manufacturer. Dataware knew how DEC defines "authorized distributor" because DEC's DAO agreements provide

^{1/} An ambiguity exists if the specifications are "susceptible to two reasonable interpretations." Nasuf Construction Corporation Reconsideration, Comp. Gen. Dec. B-219733.2, March 18, 1986, 86-1 CPD & 263; Compo Corporation, P.S. Protest No. 88-22, May 3, 1988.

expressly that DAOs such as Dataware will obtain their products from "authorized distributors."^{1/} Dataware knew that it possessed a DAO agreement with DEC and was not, for the purposes of that agreement, an authorized distributor. Dataware could have anticipated that the Postal Service, which was seeking to obtain DEC equipment, would define "authorized distributor" as DEC did.

Dataware was, at the very least, on notice to inquire about a possible ambiguity prior to the offer due date. Pitney Bowes, Inc., P.S. Protest No. 89-24, June 20, 1989. Therefore, Dataware's protest against the term and its definition is untimely and must be dismissed.^{1/}

In alleging that TriLogic does not possess the appropriate authorizations or capabilities to perform the contract, Dataware is challenging the contracting officer's affirmative determination of TriLogic's responsibility. On review, such an affirmative finding of responsibility will not be disturbed in the absence of fraud, bad faith, or failure to apply definitive responsibility criteria. Canteen Service, Inc., P.S. Protest No. 90-68, November 15, 1990; EDI Corporation, P.S. Protest No. 83-51, January 26, 1984.

Dataware alleges that the Postal Service was biased in favor of TriLogic and, as a result, treated Dataware's proposal unfairly. Dataware claims that the delivery schedule change constitutes an "improper relaxation of solicitation requirements" which

^{8/} Dataware's DAO agreement is not before us, but Dataware does not dispute the contents of the DEC sample DAO agreement, which DEC provided to the contracting officer and of which Dataware received a copy.

^{9/} Were Dataware's claim that the "authorized DEC distributor" requirement was unduly restrictive considered on its merits, the protest would not succeed.

Whenever a protester challenges a solicitation requirement as unduly restrictive to competition,

it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Pacific Bell, P.S. Protest No. 90-51, December 21, 1990, quoting Amray, Inc., Comp. Gen Dec. B-208308, 83-1 CPD & 43, January 17, 1983; see also Portion Pac Chemical Corp., P.S. Protest No. 84 49, August 1, 1984.

The Postal Service desires a first-tier distributor because past experience suggests that there is less likelihood of inability to obtain the desired goods when there is no middleman. "A contracting officer is not precluded from ameliorating concerns before they present problems." Equipment Marketing Consultants Corporation, P.S. Protest No. 90-07, April 17, 1990; see also, DHL Airways Inc., P.S. Protest No. 89-36, July 7, 1989. Dataware has not met its burden of proving that this requirement was clearly unreasonable.

The mere fact that the requirement operates to exclude second-tier suppliers does not make it unduly restrictive. If a Specification "is otherwise reasonable, the fact that one or more potential offerors may be precluded from participating in the solicitation does not render its terms restrictive if they reflect the legitimate needs of the procuring activity." International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989.

"reflects favoritism toward TriLogic." Dataware's assertion appears to be based on an assumption that a schedule change occurred because TriLogic did not have the capability to adhere to the schedule, and that its incapability was known to the contracting officer.^{10/} Assumptions and unsupported allegations, however, are not proof. Thermico Inc., P.S. Protest No. 90-71, December 21, 1990. The protester bears the burden of proof that favoritism occurred that was prejudicial to the protester. Id. Indeed, a protester "must prove allegations of bad faith or bias by 'well-nigh irrefragable proof' of specific, malicious intent by a contracting officer to harm the protester; otherwise, we presume the contracting officer has acted in good faith." Id., citing Colorado Piping & Mechanical, Inc., P.S. Protest No. 90-23, June 20, 1990. Dataware has not met its burden, and we decline to disturb the contracting officer's affirmative determination of TriLogic's responsibility.

The protest is dismissed in part and denied in part.

[Signed]

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Office of Contracts and Property Law

[Compared to original 5/11/95 WJJ]

^{10/} PM 4.1.5 g.5(b) provides for postselection negotiations:

Any uncertainties or deficiencies remaining in the proposal selected must be clarified or corrected through negotiations leading to a definitive contract. Negotiations must include the disclosure and resolution of all technical deficiencies and all unsubstantiated areas of price or cost, but no changes may be made in the Postal Service's requirements or in the proposal that, if made before contractor selection, would have affected the basis for selection.

Since ability to meet the initial delivery schedule was not an evaluation criteria, the basis for selection would not have been affected had the schedule change been made before selection.