



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Decision

Matter of: Computer Associates International, Inc.--Reconsideration*

File: B-292077.6

Date: May 5, 2004

Claude P. Goddard, Jr., Esq., J. Michael Littlejohn, Esq., J. William Eshelman, Esq., and Elizabeth M. Gill, Esq., Wickwire Gavin, P.C., for the protester.

Marion T. Cordova, Esq., Department of Agriculture, for the agency.

Edward Goldstein, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Prior decision properly held that agency could lawfully issue purchase order to vendor at price quoted in response to request for quotations, notwithstanding language in quotation indicating that it was valid through a specified date and order was issued after that date; quotations are not offers, and vendors are not bound to honor them, so that the concept of an acceptance period has no application to quotations.

DECISION

Computer Associates International, Inc. (CA) requests reconsideration of our decision in Computer Assocs. Int'l, Inc., B-292077.3 et al., Jan. 22, 2004, 2004 CPD ¶ ____, denying CA's protest of the issuance of a purchase order to Serena Software, Inc. under request for quotations (RFQ) No. RFQ-OPPM-3-1007VT, issued by the Office of Procurement and Property Management, Department of Agriculture (USDA), for quotations from Federal Supply Schedule (FSS) vendors for "change management" software.

We deny the request for reconsideration.

* This decision is being released in advance of a public version of the underlying protest decision because of a dispute regarding release of certain information in the public version of that decision.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a) (2004). Here, CA argues that our decision erred in several respects. Principally, CA challenges our decision for upholding the agency's determination to make an offer to Serena at a price that had expired by the terms of Serena's quotation. According to CA, we also improperly held that the agency did not violate any law or regulation when it revised its point rating system after having received the vendors' technical quotations. Last, CA disagrees with our conclusion that CA had abandoned two of its protest grounds.

The solicitation as issued on December 12, 2002 explained that USDA was seeking information; any quotations submitted in response were not offers; the agency would conduct a price/technical tradeoff; and USDA would make an offer to the firm whose quotation represented the "best value" to the government.

On May 16, 2003, USDA amended the RFQ and sought revised price quotations from the vendors. In response, Serena significantly reduced its price and, as part of its revised price quotation, stated: "This offer is valid through June 31 [sic], 2003." Serena's Revised Price Quotation, at 1. Based on the reduced price in Serena's revised price quotation, USDA determined that Serena's quotation represented the best value to the government. The agency, however, did not make Serena an offer until after our Office issued a September decision denying a protest filed by CA challenging the terms of the solicitation and the May 16 amendment. Computer Assocs. Int'l, Inc., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157. When the agency made the September 5 offer, it was at the reduced price identified in Serena's revised price quotation.

CA argued that USDA could not properly have made an offer to Serena at the price identified in the firm's revised price quotation because that price had expired by its own terms. We rejected this argument, holding that the agency's decision neither violated a procurement statute or regulation nor otherwise was unreasonable, since Serena's quotation was not an actual offer, and the vendor thus was under no obligation to accept the agency's September 5 offer, regardless of any "expiration" date set forth in Serena's revised price quotation.

In its request for reconsideration, CA contends that our holding on this issue was in error. CA maintains that it was unreasonable for the agency to have concluded that Serena's quotation represented the "best value" in September because Serena's reduced price was "unavailable" at that time, and Serena's undiscounted price was \$6 million more than CA's price. To conclude otherwise, according to CA, "ignores the reality that Serena's discount explicitly expired by its own terms as of June 30th," renders the quotation process meaningless and undermines the integrity of that process "because the Government can simply ignore the unequivocal words of the vendor and make an award . . . on terms different than those the vendor provided."

Request for Reconsideration at 3-4. CA further maintains that the offer to Serena at an “expired” price provided Serena with an unfair competitive advantage. Id. at 8.

It is true, as CA notes, that when an agency chooses to employ competitive procedures similar to those used in a FAR Part 15 negotiated procurement, in the context of an RFQ, and a protest is filed challenging the outcome of the competition, we will review the record to ensure that the agency’s evaluation of the vendor’s submissions was fair, reasonable and consistent with the terms of the solicitation. KMR, LLC, B-292860, Dec. 22, 2003, 2003 CPD ¶ 233 at 4 (citing COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5). Ignoring the “June 31” language in Serena’s revised quotation, however, was not inconsistent with the express terms of the solicitation, nor was it unfair vis-à-vis the other vendors; rather it was in accord with the fundamental legal nature of a quotation.

We recognize that, in practice, agencies and vendors often treat quotations just as they treat offers. Nonetheless, as a matter of law, quotations are different from bids or offers. The submission of a bid or proposal constitutes, by its very nature, an offer by a contractor that, if accepted, creates a binding legal obligation on both parties. Because of the binding nature of bids and offers, they are held open for acceptance within a specified or reasonable period of time, and our case law has necessarily developed rules regarding the government’s acceptance of “expired” bids or proposals. See, e.g., Consultants Ltd., B-286688.2, May 16, 2001, 2001 CPD ¶ 92 (holding that where a bidder agrees to hold its bid open for the minimum acceptance period required and extends its acceptance period with each agency request, the integrity of the bidding system is not compromised if the bidder is subsequently permitted to revive its expired bid); Esprit Int’l Corp., B-276294, Mar. 10, 1997, 97-1 CPD ¶ 106 at 2 (allowing bidder with shorter acceptance period to revive its bid after it had expired would afford the bidder an unfair advantage since its initial exposure to the risk of the marketplace was for a shorter period of time); CDA Inv. Tech., Inc.–Recon., B-27209.3, Mar. 11, 1997, 97-1 CPD ¶ 103 at 8 (stating that “it is not improper for an agency to accept an expired offer without opening negotiations where . . . acceptance is not prejudicial to the competitive system).

A quotation, on the other hand, is not a submission for acceptance by the government to form a binding contract; rather, vendor quotations are purely informational, Zarc Int’l, Inc., B-292708, Oct. 3, 2003, 2003 CPD ¶ 172 at 2. In the RFQ context, it is the government that makes the offer, albeit generally based on the information provided by the vendor in its quotation, and no binding agreement is created until the vendor accepts the offer. Federal Acquisition Regulation (FAR) § 13.004(a). A vendor submitting a price quotation therefore could, the next moment, reject an offer from the government at its quoted price. Because vendors in the RFQ context hold the power of acceptance and their submissions are purely informational, there is nothing for vendors to hold open; thus, it simply does not make sense to apply the acceptance period concept or the attendant rules regarding expiration of bids or offers to RFQs. As a consequence, notwithstanding the

statement in Serena's revised price quotation that "[t]his offer is valid through June 31 [*sic*], 2003," Serena's discounted price was "valid," or not, at Serena's option, both before and after the date mentioned in the quotation--on whatever date the agency might present an offer to the firm.

In arguing that USDA afforded Serena an unfair advantage, CA maintains that by disregarding the "June 31" language, USDA afforded Serena a "second bite at the apple" because it provided Serena with the opportunity to "hold the Government up for better terms or other prices that might benefit the vendor at the time." Request for Reconsideration at 8. As explained above, however, when any vendor--Serena, CA, or any other--submits a quotation, it always has the option to accept or reject the government's subsequent offer--to take a "second bite at the apple," using CA's phrase--based on the vendor's assessment of prices and/or other information at the time the offer is made.¹

In sum, since the language concerning the price's expiration date in Serena's revised quotation had no operative effect, and thus did not afford Serena an unfair competitive advantage, we properly found that it provided no legal basis for our Office to object to USDA's best-value determination and September 5 offer to Serena at the firm's discounted price.

CA also argues that we wrongly held that USDA did not violate any law or regulation in first obtaining and reviewing vendors' technical submissions and only then developing a point scoring system for the purposes of evaluation. According to CA, the agency's actions in this regard violated longstanding precedent of our Office holding that agencies may not evaluate vendors' submissions based on criteria different from those contemplated by the solicitation. However, in our decision, we expressly found that the points assigned by the agency to each evaluation factor were consistent with the relative weights for those factors as contemplated by the solicitation, and that the agency applied the point scoring system in a consistent manner. CA's repetition of and elaboration on the arguments it raised in its protest concerning the agency's point scoring, and the firm's expression of disagreement with our conclusion that the agency's actions were not improper, do not provide a

¹ In contrast, and as CA recognizes in its submission, we have held, in the sealed bid context, that it is improper to allow a firm to extend or revive a bid that proposed a shorter acceptance period than did the other bidders. See, e.g., ADAK Comm. Sys., Inc., B-222546, July 24, 1986, 86-2 CPD ¶ 103. Because bidders are subject to the risks associated with changing market conditions during the period that their bids are open, accepting such a bid after it has expired would be fundamentally unfair because the bidder with the shorter acceptance period takes less risk of market fluctuation than those providing a longer acceptance period.

basis for granting reconsideration. HK Sys., Inc.—Protest and Recon., B-291647.6, B-291647.7, Aug. 29, 2003, 2003 CPD ¶ 159 at 6.

Last, CA maintains that we erred in concluding that it had abandoned two of its grounds for protest: that USDA's best-value determination was fundamentally flawed because the agency chose a higher-priced and lower technically rated vendor, and that USDA unfairly allowed Serena to make technical revisions to its quotation while denying CA the opportunity to do the same. We did not consider those grounds because the agency had addressed them in its reports, but CA failed to respond in its comments. According to CA, it addressed the arguments, respectively, in its November 17 comments on the agency report and in its December 17 reply to the agency's December 9 response to CA's comments.

CA's challenge of USDA's best-value determination was based on the assumption that CA's price was lower than Serena's price and that CA's technical score was higher than Serena's score. Upon receipt of the agency report, however, CA learned that Serena had substantially reduced its price so that it was in fact below CA's price, and that the agency had revised its technical evaluation resulting in Serena's technical score exceeding CA's. Presumably because CA's assumptions underpinning its challenge to the agency's best-value determination were no longer valid, CA shifted the focus of its protest to principally challenge the agency's consideration of Serena's reduced price and the revised technical scoring; to the extent CA's November 17 comments argued that the agency's best-value determination was unreasonable, they were proffered in that context, and were considered in our resolution of the protest and, as indicated above, properly rejected.

As to CA's complaint that USDA improperly allowed Serena to make technical revisions to its quotation, CA first raised this issue in its November 17 comments, arguing that Serena improperly revised its technical proposal to add information about its favorable ranking from an independent industry analysis organization, the Gartner Group, and information advising the agency that the U.S. Postal Service had awarded a contract to Serena to replace CA products. In its response to these allegations USDA maintained that the information about which CA complained was "mere puffery" and was not even new, since it was set forth in Serena's initial quotation and because the agency had discussions with the Gartner Group during a conference call regarding the selection process; USDA advised that it did not change Serena's technical rating based on the information. CA replied and shifted the tenor of its argument, maintaining that it was improper for USDA to consider information it received from the Gartner Group in the conference call. We addressed that matter in resolving the protest, Decision at 14—because CA fundamentally changed the

nature of its challenge as a result of the agency's response, we properly viewed CA as having otherwise abandoned its argument in this regard.

The request for reconsideration is denied.

Anthony H. Gamboa
General Counsel