



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Sales Resources Consultants, Inc.

File: B-284943; B-284943.2

Date: June 9, 2000

Peter A. Cerick, Esq., for the protester.
William M. Rosen, Esq., for Intellisys Technology Corporation, an intervenor.
David A. Ingold, Esq., Internal Revenue Service, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In deciding whether to place an order for brand name software under a Federal Supply Schedule (FSS) contract, agency is not required to first consider the unsolicited offer of an alternate software product from a vendor that does not have an FSS contract.
2. A protester that does not have a Federal Supply Schedule (FSS) contract is not an interested party to challenge an agency's determination as to its minimum needs and its decision to conduct a limited competition among FSS vendors for a particular brand name software.

DECISION

Sales Resources Consultants, Inc. (SRC) protests the issuance of an order to Beyond.com and Intellisys Technology Corporation (ITC) by the Internal Revenue Service (IRS) under the Federal Supply Schedule (FSS) program for electronic delivery of various Microsoft Corporation software. SRC, which does not have an FSS contract, complains that the IRS refused to consider SRC's unsolicited offer to provide Lotus SmartSuite software¹ to satisfy the agency's needs for office applications software.

¹ Lotus SmartSuite bundles word processing, spreadsheet, database, time management, and other office applications. See <www.lotus.com>.

We dismiss the protest.

In 1998, the IRS decided to standardize its workstation software to provide for service-wide compatibility, system management interfaces, and cost savings. To this end, IRS's chief information officer (CIO) issued a memorandum designating two levels (mandatory and controlled) of commercial off-the-shelf software that may be purchased by the IRS.² See Agency Report, Tab 6, CIO Memorandum 1 (Dec. 14, 1998). The CIO directed that only the listed standard software, which included various Microsoft Corporation software products, could be purchased by the agency. Id. at 2. In March 1999, consistent with the 1998 directive of the CIO, the IRS determined that it would seek to competitively acquire Microsoft Windows NT operating system and Microsoft Office application software under the FSS program. See Agency Report, Tab 7, Brand Name or Equal Justification (Mar. 1, 1999) (justifying restriction to Microsoft operating system and office application software on the basis of compatibility and costs).

In March 1999, the IRS requested reductions in pricing for the Microsoft Corporation software from four FSS vendors, including ITC, with which the IRS had entered blanket purchase agreements (BPA).³ Agency Report, Tab 8, Request for price reduction. ITC entered into a teaming arrangement with Beyond.com, another FSS software vendor, to respond to the IRS's price reduction request,⁴ and on April 26 ITC/Beyond.com provided a price reduction quote to the IRS. Agency Report, Tab 9, ITC/Beyond.com quote. On April 29, Beyond.com's FSS contract was modified to include the software sought by the IRS. Supplemental Contracting Officer's Statement at 2; Supplemental Agency Report, exh. 2, Mod. 1 to Beyond.com's FSS Contract. On May 13, after evaluation of the vendors' responses to the agency's price reduction request, the IRS decided to accept the ITC/Beyond.com teaming arrangement and modified ITC's BPA accordingly. Agency Report, Tab 10, Selection of Microsoft Enterprise Agreement Vendor; Supplemental Contracting Officer's Statement at 2. Two delivery orders have been issued under the ITC/Beyond.com

² There were no exceptions permissible for software in the mandatory category, but office heads could request exceptions for software in the controlled category. Agency Report, Tab 6, CIO Memorandum, at 1.

³ All FSS contracts contain BPA provisions, and ordering agencies are permitted to establish BPAs with FSS contractors for recurring requirements. Federal Acquisition Regulation (FAR) § 8.404(b)(4). FAR § 8.404(b)(3) provides that where, as here, the FSS order would exceed the maximum order threshold of the schedule contract, the ordering office should seek price reductions.

⁴ FAR subpart 9.6 specifically recognizes the validity of contractor teaming arrangements. The General Services Administration (GSA) also recognizes that FSS vendors may team to provide products and services from their combined schedule contracts. See <www.fss.gsa.gov/schedules/sched-wn.cfm>.

FSS teaming arrangement. Agency Report, Tab 2, Jan. 4, 2000 Order, and Tab 11, June 3, 1999 Order.

SRC protests the issuance of the second order for electronic delivery of Microsoft office applications software. SRC variously complains that the IRS has no reasonable basis to restrict its acquisition of office applications software to Microsoft products; that the IRS did not timely or adequately justify its restriction of the acquisition to Microsoft software; that the issuance of the order was “in reality” an unpublicized, sole-source award; and that the IRS did not comply with FSS program “requirements” in selecting the ITC/Beyond.com FSS teaming arrangement to receive delivery orders.

We disagree with SRC that the IRS’s use of a limited competition under the FSS program to satisfy its software needs violates the full and open competition requirements of the Competition in Contracting Act of 1984, 41 U.S.C. § 253(a)(1) (1994), as implemented by FAR part 6. The FSS program, directed and managed by GSA, provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. FAR § 8.401(a). Section 259(b)(3) (1994) of title 41 of the United States Code provides that the procedures established for the GSA’s multiple award schedule program (that is, the FSS program) satisfy the general requirement in 41 U.S.C. § 253(a)(1) for use of competitive procedures:

if--(A) participation in the program has been open to all responsible sources; and (B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government.

SRC argues that the IRS did not comply with 41 U.S.C. § 259(b)(3) because it did not consider its unsolicited offer to provide Lotus SmartSuite software, which SRC states would represent a lower cost alternative to the Microsoft software acquired under the FSS program. We disagree.

Consistent with 41 U.S.C. § 259(b)(3), participation in the FSS program is open to all responsible sources--a fact not disputed by SRC. With respect to the second statutory element, referring to the lowest overall cost alternative meeting the needs of the government, SRC apparently believes that the IRS was required to consider its offer, outside the FSS program, to determine whether purchasing software from the schedule would result in the lowest overall cost alternative. In our view, imposing such a requirement on agencies is inconsistent with the purpose of the FSS program, which, as noted above, is meant to provide a simplified process for obtaining commonly used commercial supplies and services. In this regard, we note that FAR § 6.102(d)(3), which implements 41 U.S.C. § 259(b)(3), indicates that the

requirement for competitive procedures is satisfied through the use of the FSS program, given that the program is open to all responsible sources.⁵ Accordingly, we find reasonable GSA's position that purchases from the schedule using the procedures of FAR subpart 8.4 are considered to result in the lowest overall cost alternative. See <www.fss.gsa.gov/schedules/sched-bk.cfm> ("orders placed following the procedures in FAR [subpart] 8.4 result in the lowest overall cost alternative to meet the needs of the Government"). While one FSS vendor may protest that it offers a lower cost alternative meeting the agency's needs than the vendor selected by the agency, see, e.g., Delta Int'l, Inc., B-284364.2, May 11, 2000, 2000 CPD ¶ ____, we do not believe that 41 U.S.C. § 259(b)(3) requires an agency to consider whether non-FSS alternatives would meet the agency's needs at a cost lower than that offered by FSS vendors, or that the failure to do so constitutes a basis of protest. Because the FSS program meets the requirements of 41 U.S.C. § 259(b)(3), an agency, when placing an order under the FSS, is not required to seek further competition, synopsise the requirement, or determine fair and reasonable pricing, since the planning, solicitation, and award phases of the FSS satisfy these requirements. FAR § 8.404(a); Design Contempo, Inc., B-270483, Mar. 12, 1996, 96-1 CPD ¶ 146 at 2.

SRC also cites numerous examples of what it asserts are failures to comply with FSS program requirements, such that the acquisition was in effect not under the FSS program. See DRS Precision Echo, Inc., B-284080, B-284080.2, Feb. 14, 2000, 2000 CPD ¶ 26 at 2 (order issued against expired FSS contract was outside FSS program).

For example, SRC notes that the software purchased under the second delivery order to the ITC/Beyond.com team was added to Beyond.com's FSS contract after the date on which ITC and Beyond.com entered into a teaming arrangement and 4 days after the submission of the team's price reduction to the IRS. See Protester's Supplemental Comments, May 15, 2000, at 2. SRC acknowledges, however, that the software was on Beyond.com's schedule contract prior to the placement of any delivery orders by the IRS. Protester's Supplemental Comments at 2. We fail to see any violation of FSS program requirements, given that, at the time of the orders, the software was in fact on Beyond.com's schedule contract.

SRC also asserts that the IRS did not adequately conduct acquisition planning and market research, as required by FAR parts 7 and 10, in deciding to satisfy its needs under the FSS program. Protester's Comments at 17-20. The crux of SRC's argument is that adequate acquisition planning and market research would have

⁵ The regulations governing use of the FSS program address the situation that SRC asserts exists here, by stating that, "when the ordering office finds a schedule supply or service elsewhere at a lower price . . . , requesting a price reduction [from FSS contractors] could be advantageous." FAR § 8.404(b)(5).

compelled the IRS to conduct its procurement outside the FSS program and to consider SRC's offer. Acquisition planning and market research are required to ensure that agencies, among other things, develop a plan to suitably satisfy their needs in a timely manner and at a reasonable cost. See FAR §§ 7.101, 10.000. The FSS program specifically satisfies these goals by allowing the government to acquire a wide range of commercial products and services in a timely fashion and at fair and reasonable prices. Thus, we think that, as a general rule, obtaining information from the FSS program and FSS vendors satisfies the agency's obligations to conduct procurement planning and market research. See Canon U.S.A., Inc., B-232262, Nov. 30, 1988, 88-2 CPD ¶ 538 at 2-3.

SRC also argues that ITC's schedule contract provided for at least annual reviews of ITC's BPA with the IRS and that the record does not demonstrate that such reviews were conducted to determine if the BPA still represents the best value to the government. Protester's Comments at 4. This argument is without merit. Because the IRS conducted a competition among its BPA holders, including the ITC/Beyond.com team, to obtain price reductions from the FSS contracts, the agency adequately determined that ordering from the ITC/Beyond.com team represented the lowest overall cost alternative satisfying the government's needs.

SRC also complains that the IRS did not reasonably justify its determination to purchase only Microsoft Corporation software. We find that SRC is not an interested party to challenge this determination. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (Supp. III 1997), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 31 U.S.C. § 3551(2). Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2000). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 2. Here, SRC is not an FSS vendor and is thus ineligible to compete for orders under the FSS program, which the IRS has chosen to use to satisfy its needs. We note in this regard that the Lotus SmartSuite software, which SRC would offer, is available through the FSS program from other vendors. Accordingly, even if SRC could successfully challenge the IRS's determination to limit its FSS competition to Microsoft software, such that the IRS would also seek information from FSS vendors offering the Lotus software, SRC would still not be in line for receipt of an order. In sum, SRC does not have an adequate economic interest to qualify as an interested party for purposes of filing a protest challenging the agency's determination to limit its FSS competition to a Microsoft product.

The protest is dismissed.

Comptroller General
of the United States