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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Dynamic Access Systems

File: B-295356

Date: February 8, 2005

Katherine S. Nucci, Esq., and Timothy Sullivan, Esq., Thompson Coburn LLP, for the protester.

Angela T. Puri, Esq., Department of Housing and Urban Development, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest arguing that an agency overstates its needs by limiting competition to commercial off-the-shelf (COTS) loan software packages that can be installed on agency computers is denied where the record shows that requiring COTS software reasonably reflects the agency's need for a reliable product with a low risk of unsuccessful performance.

DECISION

Dynamic Access Systems challenges the terms of request for proposals (RFP) No. R-DEN-01965, issued by the Department of Housing and Urban Development (HUD) for a commercial off-the-shelf (COTS) software package to replace HUD's current Loan Accounting System for Housing the Elderly and Handicapped (LASHE), and for implementation and follow-on maintenance services for the new software. Dynamic argues that the RFP unduly restricts competition in two ways--by requiring COTS software that can be installed on HUD computers, and by requiring that offerors "must have implemented their COTS package for at least one U.S. Federal Government agency." RFP at 3.

We deny the protest.

BACKGROUND

HUD's current loan accounting software used in support of its elderly and handicapped housing programs has been in place since 1993, is considered by the agency to be antiquated, and has been a continual source of problems for the agency

in terms of processing and maintaining mortgage loan information. Agency Report (AR) at 2. As the current software is not COTS, HUD has had difficulty finding programmers who are familiar with the software. In addition, HUD's current software does not comply with the functional requirements for direct loan systems mandated by the Office of Management and Budget's Joint Financial Management Improvement Program (JFMIP).¹ The ways in which the HUD software is not compliant with JFMIP requirements have been raised by HUD's Inspector General in recent reports. Id. at 3.

In planning for the purchase of a new loan accounting system, HUD contracted for a review of the different available approaches. This review examined numerous options: upgrading the current software, outsourcing the function entirely, procuring COTS software, reengineering current software to operate on a mainframe platform, and reengineering current software to operate on a client-server platform. AR at 4. The review also included market research, a feasibility study, a risk analysis, and a cost-benefit analysis of the approaches identified. At the conclusion of the review, the results of the research and analyses were summarized in a System Decision Paper, wherein HUD's contractor set out each of the approaches and recommended one. Ultimately, the review recommended purchasing a specific COTS software package, known as Nortridge Loan Software. AR, Tab 9 (LASHE System Decision Paper) at 2-5. Despite this recommendation, the Decision Paper also acknowledged that the Nortridge software would not meet all of HUD's requirements without enhancement and advised that "[a]n open procurement may bring to light other software packages that were not found or were not available during the Feasibility Study." Id.

After receipt of the study in May 2002, HUD's Office of the Chief Financial Officer decided to use full and open competition to procure a JFMIP-compliant COTS software package that could be installed onto HUD's computers. In addition, HUD decided to purchase support services for the "installation, implementation, software maintenance/operations support, post implementation support, minor software customization and training." AR at 5; see also RFP at 7.

The RFP implementing this decision was issued on September 14, 2004, and anticipated award of a fixed-price contract for a base period of 1 year with four 1-year options. RFP at 1. The RFP identified four evaluation factors for the assessment of offers: technical capability, project management approach, past

¹ JFMIP is a joint and cooperative undertaking of the Government Accountability Office, the Department of Treasury, Office of Management and Budget, and Office of Personnel Management, which, among other things, tests and certifies core financial management system software. See Savantage Fin. Servs., Inc., B-292046; B-292046.2, June 11, 2003, 2003 CPD ¶ 113 at 2 n.1.

performance, and staffing and resources. Id. at 2-3. Of relevance here, the past performance evaluation factor advised that the agency was looking for “[d]emonstrated successful past performance for the same or highly similar work,” and defined highly similar work to mean that the offeror “must have implemented their COTS package for at least one U.S. Federal Government agency.” Id. at 3. The RFP advised that award would be made to the responsible offeror whose offer “presents the best overall value to the Government, price and other factors considered.” Id. at 2.

Shortly before the due date for the submission of offers, Dynamic filed this protest with our Office.

DISCUSSION

Dynamic argues that HUD overstates its needs by limiting this competition to COTS loan software packages that can be installed on HUD’s computers, and by requiring that offerors have “implemented” their COTS package for at least one federal government agency.² Dynamic contends that the study of available options by HUD’s contractor does not support the agency’s decision to buy a COTS software package because the study failed to properly consider the option of using Dynamic’s hosted solution.³ Dynamic contends that without the requirement for COTS software it could meet HUD’s functional requirements with a hosted solution using software it developed for other HUD programs, but does not sell commercially.

While a contracting agency has the discretion to determine its needs and the best method to accommodate them, Mark Dunning Indus., Inc., B-289378, Feb. 27, 2002, 2002 CPD ¶ 46 at 3-4; Parcel 47C LLC, B-286324; B-286324.2, Dec. 26, 2000, 2001 CPD ¶ 44 at 7, those needs must be specified in a manner designed to achieve full and

² Since we deny Dynamic’s argument that this solicitation improperly limited competition by requiring a COTS software package that can be installed on HUD’s computers, we do not reach Dynamic’s second basis of protest—i.e., that the agency has improperly construed language in the solicitation regarding “implementation” to require offerors to demonstrate past performance by showing that their COTS package actually has been installed at a federal agency. Without a COTS software package, Dynamic is not an interested party under our Bid Protest Regulations to challenge the restrictiveness of the past performance evaluation factor. See 4 C.F.R. § 21.0(a) (2004).

³ As described by Dynamic, its hosted solution provides HUD employees access from their workstations to its loan accounting software, as well as HUD’s loan data. Both the software and the loan data would reside at the company’s data center in Silver Spring, Maryland. The company also provides access via a web-based interface for owners, agents and accounting firms. Initial Protest, Nov. 2, 2004, at 8.

open competition; solicitations may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs. 41 U.S.C. §§ 253a(a)(1)(A), (2)(B) (2000). Where a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3. A protester's mere disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. See AT&T Corp., B-270841 et al., May 1, 1996, 96-1 CPD ¶ 237 at 7-8.

As an overlay to our standard review of a protester's allegation that an agency has included a restrictive requirement not necessary to satisfy the agency's needs, we note that the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, established a preference for the acquisition of commercial items. For civilian agencies this preference is now codified at 41 U.S.C. § 264b (2000). Specifically, the statute directs agencies to state their requirements in terms of functions to be performed, performance requirements, or essential physical requirements, so that commercial items--or to the extent that commercial items are not available, nondevelopmental items--may be used to meet agency requirements. 41 U.S.C. § 246b(a)(1), (2).

As a preliminary matter, we think Dynamic's challenge to HUD's decision to require COTS software that can be installed on HUD computers, in essence, raises two issues--the requirement for commerciality, and the requirement that the software be installed on HUD computers.⁴ Although this protest necessarily reaches our Office as a challenge to the solicitation term that excludes Dynamic from the competition--i.e., that the offered software be a COTS package that can be installed on HUD computers--the groundwork for this dispute was laid long before the solicitation was issued. In essence, HUD reviewed the major options for reworking its LASHE

⁴ For the record, we recognize that, in some sense, a requirement for a COTS software package means, by definition, software that can be purchased and loaded on the purchaser's computer. Thus, to some readers, a requirement for a COTS software package automatically excludes software that is resident on a contractor's computer that is only accessed by the user. Nonetheless, to be clear about the nature of the dispute here, we thought it useful to note the two ways in which the solution Dynamic offers does not meet the agency's stated requirements--it is not commercial, and it cannot be installed at HUD. With respect to installation at HUD, Dynamic concedes that its software would have to be rewritten in a different computer language before its software could operate on HUD computers. Dynamic also advises that the cost of rewriting its software would be too costly for the company to prevail in any competition. Initial Protest, Nov. 2, 2004, at 10 n.2.

program almost 3 years ago, and concluded that the needs of the program would be best met through the purchase of COTS software that operates at HUD. This solicitation implements that choice of approach. Thus, while Dynamic is challenging a specific solicitation term, it is also challenging the overall approach the agency has chosen in meeting its needs.

With respect to its challenge to the 2002 review of available options, the protester argues that the review does not support the conclusion that the agency needs COTS software that can be installed on HUD computers. In this regard, Dynamic argues that the review is flawed because its consideration of Dynamic was limited to a consideration of using a completely outsourced solution that Dynamic provides for other HUD programs.

Our review of the record here shows that Dynamic has been providing noncommercial loan accounting services since 1985 in support of other HUD programs, like the agency's Federal Housing Administration (FHA) multifamily portfolio. Initial Protest at 7-8; Protester's Comments at 8; AR at 11-12; AR, Tab 6 (LASHE Feasibility Study) at 4-5. As the protester explains, its wholly-owned subsidiary, DP Service LLP, provided HUD with a hosted solution for its FHA multifamily portfolio from 1985 to 1998, while loan servicing was provided by approximately 45-50 HUD staffers. Since 1998, HUD has outsourced this function entirely. Under this approach, HUD pays for access to Dynamic's proprietary software, and pays for approximately 30 DP employees who perform the outsourced functions. Protester's Comments at 8.

The 2002 review of different approaches for changing HUD's loan servicing program referred to one of the options--the outsourcing option--as "Outsourcing Servicing to Private Industry (DP Services)." AR, Tab 6 (LASHE Feasibility Study) at 4-3 to 4-5. In reviewing the cost of this option, the study assigned much higher recurring costs to outsourcing--which it again refers to as the DP Services option--than to other options. AR, Tab 5 (LASHE Cost/Benefit Analysis) at 4-3. The protester points out--and the Cost/Benefit Analysis confirms--that the costs are higher because the study is focused on the cost of outsourcing all services. See, e.g., id. There is no evidence that HUD's review included the option of using only DP's hosted software, separate and apart from outsourcing the loan servicing entirely. See id. at 3-1 to 3-3, entitled "Description of Alternatives."

In Dynamic's view, HUD's failure to consider any option related to DP other than complete outsourcing means that the review of options was flawed, and did not consider the lower costs of DP's hosted solution--which would involve only the use of DP's software, and not the cost of the DP employees providing loan servicing. As indicated above, while we think the record supports the protester's contention that the review did not consider Dynamic's hosted solution, we are not convinced that this matter invalidates the review, or the solicitation's requirement for a COTS software package that can be installed on HUD computers.

We start by noting that HUD's review of available options--despite its use of proper names, such as DP's, as shorthand for describing the outsourcing option--examined broad categories of possible solutions for the agency's need to upgrade its loan accounting system; the analysis was not about whether to select, or not select, DP to perform those services. In addition to outsourcing, other options reviewed included upgrading existing agency software, procuring COTS software, developing a new client-server application, or developing a new mainframe application. AR, Tab 6 (LASHE Feasibility Study) at 4-1. Nothing raised by Dynamic suggests that the agency should not have considered these options, including the outsourcing option. In addition, nothing raised by Dynamic suggests that the conclusions reached about these broad options, when compared to each other, were wrong. Instead, Dynamic has simply identified a hybrid of one of the options that was not considered--i.e., its hosted, but not fully-outsourced, solution provided to the agency between 1985 and 1998.

In our view, HUD's 2002 review of the available options for upgrading its loan accounting system adequately explores categories of major possibilities the agency might pursue, even if we agree with the protester that the review might have considered other options as well. More importantly, we do not think that the only support for the agency's decision to procure COTS software is found in the pages of the 2002 study. Instead, we think the record offers other support for the agency's determination of its needs. Specifically, the report explains that HUD's need for a COTS software application is driven by its desire for a reliable product with a low risk of unsuccessful performance, which it presumes a COTS product is more likely to provide. AR at 7. In addition, HUD expresses a desire to reduce the need for software maintenance, and to make it easier to find programmers who are familiar with the software, which it explains has been a problem with its reliance on dated proprietary software. HUD also expresses a desire to avoid the costs associated with developing new software. Id.

Dynamic's answer to HUD's views about its need for a COTS software application is, essentially, that its hosted solution has met the agency's needs for many years, and there is no reason to believe it could not continue to do so. In addition, Dynamic answers many of the concerns identified in the 2002 review which--while part of the review's analysis of an outsourced solution--were addressing features of a hosted solution, wherein the proprietary software and the agency's loan data remain resident at the contractor's facility. See, e.g., AR, Tab 6 (LASHE Feasibility Study) at 4-3 to 4-5.

We do not think Dynamic has shown that the agency's determination to procure a COTS software package was unreasonable, or that its hosted solution must be

viewed as the functional equivalent of a COTS software package.⁵ Dynamic answers the concerns identified by the agency both in the current agency report, and in the 2002 review, in a detailed sworn declaration submitted by Dynamic's president. Even accepting at face value the representations of Dynamic's president about the extent of the modifications needed to meet the functional requirements of the agency, we believe that the agency had a reasonable basis for concluding that there are certain advantages associated with the purchase of COTS products that Dynamic simply does not offer.

For example, HUD argues that the accounting requirements for the direct loan programs at issue here are different from the loan accounting services Dynamic's software currently handles, and that the Dynamic software has never undergone an audit to determine whether it can properly be deemed JFMIP-compliant. AR at 12. Dynamic concedes that the program it is currently involved with "is not a direct loan program and does not have the same budgetary reporting requirements" as here, Protester's Comments, Dec. 14, 2004, Declaration of Dynamic's President at 6, but contends that the required modifications will be minimal. These budgetary reporting requirements are related to whether or not the software can be called JFMIP-compliant. While Dynamic contends that that it will not need to make major changes to its software to be JFMIP-compliant, it also concedes the agency's point that its software has not undergone an audit to determine its compliance. *Id.* The protester's representations on this issue—regardless of the good faith with which they made, or the accuracy of the predictions about the extent of the modification effort needed—cannot provide the same level of expected reliability that comes with the purchase of COTS software that has already been found JFMIP-compliant. As a result, we conclude that Dynamic has not established that the agency must treat its software as the functional equivalent of COTS software.

As a final matter, we note that Dynamic argues that HUD's review of available options prepared in 2002 should be viewed by our Office as, in essence, an attempt to justify a sole-source procurement. *Id.* at 7. As explained above, while the review of options ultimately recommended purchase of a specific name-brand software, the review also acknowledged that there might be other packages available by the time this procurement was completed. AR, Tab 9 (LASHE System Decision Paper) at 2-5.

⁵ In some sense, Dynamic's assertion that its hosted solution must be seen as the functional equivalent of a COTS software package asks our Office to overrule the agency's determination that it prefers to purchase goods (a software package) rather than services (the protester's hosted processing of HUD loan data)—a matter largely within the agency's discretion. To the extent, however, that Dynamic argues that it has been unfairly excluded from this competition because its hosted solution offers all the same benefits as a COTS software package, we agree that it has been excluded, but—as set forth in the decision—we find reasonable the agency's position that Dynamic's hosted solution does not offer the same benefits as COTS software.

In addition, the protester itself acknowledges that there now appear to be two COTS software packages that will meet the agency's needs here. Initial Protest, Nov. 2, 2004, at 10. Also, HUD's report advised that it received "several" proposals that appear to meet the agency's requirements. AR at 17. While these facts alone cannot establish that this solicitation was not unduly restrictive, they do refute any suggestion that the procurement at issue here was effectively a sole-source acquisition. On the contrary, the record shows that the agency achieved competition among multiple offerors with COTS products.

The protest is denied.

Anthony H. Gamboa
General Counsel