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**Comptroller General
of the United States**

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

Decision

Matter of: Avue Technologies Corp., Carahsoft Technology Corp.

File: B-298380.3

Date: November 15, 2006

Frederick W. Claybrook, Jr., Esq., David C. Hammond, Esq., and Brian T. McLaughlin, Esq., Crowell & Moring, for the protesters.
Lori R. Larson, Esq., and Richard M. Sudder II, Esq., Internal Revenue Service, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Clauses pertaining to data rights included in a solicitation issued for a solution to automate the agency's personnel recruitment and hiring processes do not violate applicable regulations where they only seek to protect the government's rights in government data pertaining to the government's personnel recruitment and hiring processes.
 2. Solicitation providing for the award of a fixed-price, indefinite-delivery, indefinite-quantity contract for a solution to automate the agency's personnel recruitment and hiring processes, which requests that offerors provide fixed prices and provides for the evaluation of those prices, reasonably considers cost to the government; the fact that the solicitation does not also provide for the evaluation of other collateral agency personnel cost savings that the protesters claim will be achieved through the use of its automated service is unobjectionable.
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DECISION

Avue Technologies Corp. and Carahsoft Technology Corp. protest the terms of request for proposals (RFP) No. DHS-06-IRS05, issued by the Internal Revenue Service on behalf of the Department of Homeland Security (DHS), for a solution to automate DHS's recruitment and hiring processes.¹

¹ According to the record, Avue is a provider of automated services such as those being solicited here, Carahsoft is a "reseller" of Avue's product, and both "are

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We deny the protest.

By way of background, the solicitation explains that “DHS was formed through the consolidation of 22 agencies into 1 department to protect the nation against threats to the homeland,” and that “[w]ith this merger came a diverse assortment of human resource (HR) systems, policies, and processes that operate independently.” RFP at 19. The solicitation states that subsequent to the formation of DHS, a comprehensive “assessment of the HR systems in use across DHS” was performed, and that as part of the “overall effort to consolidate and modernize the HR systems, DHS has undertaken an initiative to consolidate toward an automated enterprise solution that can contribute to material improvements in the overall hiring process.” Id.

Consistent with this initiative, the agency issued this RFP that seeks a commercial-off-the-shelf, “web-based, automated e-Recruitment solution, including all software, software documentation, implementation support, and services to support the full life cycle of an enterprise-wide hiring/recruitment system.” RFP at 4. The solicitation, issued pursuant to the commercial item procedures of Federal Acquisition Regulation (FAR) part 12, provides for the award of a fixed-price, indefinite-delivery/indefinite-quantity contract, for a base period of 1 year with four 1-year option periods. Award under the RFP is to be made to the offeror submitting the proposal determined to represent the best value to the Government, based upon the evaluation factors of technical requirements, corporate characteristics, and price. RFP at 4, 73-74.

The protesters argue that certain provisions set forth in the solicitation are “in open disregard of the FAR concerning data rights in a commercial item procurement.”² Protest at 1.

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prospective offerors in this procurement and will file offers in response to the RFP.” Protest (B-298380) at 2.

² The solicitation was initially issued on April 4, 2006, and was subsequently amended four times, with the fourth amendment providing a due date for receipt of proposals of May 31, 2006. On that date, the protesters filed a protest with our Office arguing that the RFP was defective in that it required offerors to provide more data rights in their proposed solutions than permitted by regulation, and that the solicitation’s technical evaluation factors were “ambiguous as to whether . . . an offeror will garner any additional credit for proposing more than the minimum requirements stated in the RFP.” Protest (B-298380) at 1, 5. The protesters also argued that the solicitation was “deficient” because it did not “account for the costs and/or savings inherent in selecting one technical approach versus another.” Id. at 4-5. Finally, the protesters contended that the RFP was “ambiguous with respect to a subscription delivery model, and it is overly restrictive if that model is not permissible.” Id. at 1.

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The agency explains that in preparing for the issuance of this solicitation, it convened a “working group to develop the functional and technical requirements,” and it conducted “extensive market research into the products and services available.” Contracting Officer’s Statement at 2. The agency states that “[o]ne of the lessons learned from past acquisitions was that the Government had not previously protected its property,” and that “[a]s a result, at the termination of said contracts, the Government was precluded from using certain data . . . prospectively unless it received permission from the contractor or [the Government] could be potentially liable for fees for the reuse of data due to the data rights invoked by the contractor.” Id. at 6.

Accordingly, the agency repeats throughout its report in response to this protest that it views the protection of its existing data pertaining to the recruitment and hiring processes “that is unique to the federal workplace, [is] available in the federal domain, [was] originally developed by the Government, and [was] supplied by the Government” as critical. Contracting Officer’s Statement at 9; see Contracting Officer’s Statement at 7, 10; Agency Report (AR) at 8, 11. The agency explains that it anticipates that during performance of the contract awarded here it will “supply the successful contractor with existing data that the Agency has previously developed which would be entered into and processed by the contractor’s information systems,” and examples provided by the agency of such data include “existing position descriptions” and “applicant questionnaires.”³ Contracting Officer’s Statement at 7. The agency states that it also anticipates that it “will create data, enter the data, and process it through the contractor’s information system” during the performance of the contract, and that it needs to protect this data as well. Id. at 10. The agency concludes that it is only seeking to retain ownership or unlimited rights in current agency data and data that the agency intends to create during the course of this contract that is related to “hiring and recruiting,” and that it views its retention of ownership or unlimited use of this data, which it views as “the Government’s property,” to be “necessary for the Agency to carry out its workforce management functions related to recruitment and hiring that support the Agency’s

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Our Office was informed by the agency that it would take corrective action in response to the protest by issuing an amendment to the solicitation and allowing for the submission of revised proposals. Accordingly, on June 21, 2006, our Office dismissed the protest as academic. The agency subsequently issued four amendments to the solicitation, with amendment No. 8 requiring that revised proposals be submitted by August 23. On that date, this protest was filed with our Office.

³ Other agency examples of specific recruitment and hiring data categories include hiring evaluation criteria, position duty statements, job analyses, vacancy announcements, job assessments, test results, cumulative employee data, reports, analytics, workforce information, and assessment plans. AR at 8.

critical mission to protect the Homeland, beyond the period of performance for this specific contract.” Contracting Officer’s Statement at 10; see AR at 11. The agency adds in this regard that the personnel recruitment and hiring data it seeks to protect “is data that DHS and other Federal Agencies use routinely to fulfill employment needs.” AR at 14.

In order to accomplish the foregoing objectives, the agency included, among other things, a “Licenses/Programs” clause in the RFP (at 53-54), which in relevant part, provides as follows:

All data and information developed by (excluding commercial computer software or commercial software documentation), entered into and processed through the contractor’s information system(s) under this contract shall be considered government property. Examples of data and information considered government property include but are not limited to the following: hiring evaluation criteria, position duty statements, position descriptions, job analyses, vacancy announcements, job assessments, test results, [knowledge, skills and abilities], cumulative employee data, reports, analytics, workforce information, assessment plans and shared data with third parties (i.e., [Office of Personnel Management], DHS systems, [Office of Management and Budget], EmpowHR, other DHS components). These examples of government property **ARE NOT** commercial computer software even if they are already part of any software product purchased by the Government.⁴

The agency adds that through this clause it is not claiming or attempting to claim “ownership of the computer software or any documents relating to software,” but rather, it is maintaining its ownership of existing agency recruitment and hiring data, as well as recruitment and hiring data the agency creates, enters, and processes through the contractor’s system. Contracting Officer’s Statement at 13; AR at 9-10.

The protesters respond that while the data rights provisions set forth in the solicitation “work[] for ‘software-only’ configurations in which agency personnel must supply all the meat on the bones of the software template provided,” the provisions should not “apply to Avue’s full-content configuration, which supplies the

⁴ As indicated, the solicitation also contained other provisions pertaining to data rights, including the standard clauses at FAR §§ 52.227-14 and 52.227-19, and a “Intellectual property or proprietary information” section in the RFP’s Appendix B. Our discussions centers on the relevant paragraphs of “Licenses/Programs” clause in the RFP, as set forth above, given that this clause was designed by the agency “to clearly define its rights in data for this procurement” and as such is the focus of the protest.

meat as well.”⁵ Protesters’ Comments at 7. The protesters state here that “[i]n Avue’s case, the evaluation criteria, position descriptions . . . , etc., are computer software because Avue provides them, not agency personnel, and DHS has no ownership rights in the Avue data to ‘maintain.’” Id. The protesters clarify that as a general matter they have no objection to the data rights provisions to the extent that they apply “only to Government-generated data in the form it was generated,” but add that they believe that the provisions can also be read as “sweep[ing] in Avue’s database that is legitimately composed of technical data and computer software and is financed solely by Avue.” Id. The protesters explain in this regard that “Avue engineers the content [of its database] with algorithms and other technical data in such a way that the technical data is inextricably bound together with the content,” and that the “database will not work without the technical data Avue generates and embeds in it.” Id.

The protesters argue that to the extent that the solicitation can be read as providing that the agency “will obtain full ownership rights in Avue’s full-content database simply by using it,” it is contrary to certain FAR provisions applicable to the acquisition of commercial items. Specifically, the protesters point to FAR § 12.211, Technical Data, which provides in relevant part that “the Government shall acquire only the technical data and the rights in the data customarily provided to the public with a commercial item or process,” and FAR § 12.212, Computer Software, which provides that “[c]ommercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government’s needs.”

The protesters conclude here by pointing to the solicitation’s “Licenses/Programs” data rights clause, and arguing that “[w]hile Avue’s technical data was not generated ‘under this contract,’ if DHS were to read [the Licenses/Programs clause] to give rights in Avue’s technical data, then DHS would violate FAR [§] 12.211 by asserting rights in Avue’s technical data that are not customarily provided to the public.” Protesters’ Comments at 7-8.

In our view, the record reflects that the agency carefully crafted the solicitation so that it ensures that the government’s rights in its own data related to its recruitment and hiring processes are protected. In this regard, the agency reasonably explains its

⁵ The protesters explain that with a subscription delivery model, such as Avue’s, the necessary services are provided “by subscription,” with no software being delivered to the agency, in contrast to what the protesters term a “‘software only’ configuration,” where software is among the deliverables provided to the contracting agency. Protester’s Comments at 1, 3. The RFP permits offerors to propose either a “subscription type service” or what the protesters term a “software only configuration.” See RFP at 72.

need to protect its existing data regarding its recruitment and hiring of personnel as well as any data regarding its recruitment and hiring processes that is developed during the course of the contract. The agency has made it clear in the data rights provisions set forth in the RFP, as well as during the course of this protest, that it is not seeking to obtain and is not interested in obtaining a vendor's proprietary computer software or to "convert all information developed by the Protesters' system into Government property" as alleged by the protesters. Contracting Officer's Statement at 13; AR at 11; RFP at 53-54, app. B.

We have no reason to question the protesters' assertion that Avue has engineered its subscription service in such a way that any recruitment or hiring data provided by the agency or developed by the agency during the course of this contract will be "inextricably bound" together with Avue's technical data. However, the particularities of the manner in which Avue has engineered its system cannot equate or otherwise translate into an obligation on the agency's part to sacrifice its rights in its own data pertaining to the government's personnel recruitment and hiring processes. That is, as the protesters have presented their protest, they are essentially demanding that because of the particularities of Avue's service, the agency should amend the data rights provisions in the RFP such that they would permit the protesters, should either prevail in this competition, to retain certain of the agency's recruitment and hiring data generated during the performance of the contract, and deny the agency any rights to such data as it has become, as described by the protesters, "inextricably bound" together with Avue's own proprietary data. Such a result would not satisfy the agency's reasonably-based requirement to retain ownership of its own recruitment and hiring data.

We also note that according to the agency's market research, the protesters' concerns here appear unique. Specifically, the agency represents that it has found "no other instance in which competing recruitment system providers, including vendors who provide 'subscription-type' systems . . . similar to the Protesters, require the restrictions the Protesters appear to impose on the data." Contracting Officer's Statement at 8. Given this, it would appear that the protesters' assertion that the solicitation's data rights provisions are improper as they conflict with FAR §§ 12.211 and 12.212 appear to stem from Avue's particular subscription service, rather than what customarily occurs in the commercial marketplace. In this regard, we also note that the agency appears to be correct in its assertion that the personnel recruitment and hiring processes data the agency currently has, intends to develop during the course of the performance of this contract, and seeks to protect, does not appear to fit within the definition of "technical data" as used in FAR § 12.211.⁶

⁶ Section 12.211 of the FAR refers to part 27 of the FAR, wherein "technical data" is defined as "data other than computer software, which are of a scientific or technical nature." FAR § 27.401.

The protesters also argue that the RFP is deficient because the agency has failed to tailor its price evaluation in such a way that it considers, in addition to the costs to the agency of the competing proposals, “the savings to the agency that [the protesters’] service would provide.” Protesters’ Comments at 11. The protesters contend, based upon their own estimations and calculations, that because of the protesters’ “more advanced automation,” the agency’s acquisition of their subscription service will save the agency in personnel and other costs “hundreds of millions of dollars each year” and close to \$1.9 billion over the 5-year term of the contract. Id. at 12-13.

While agencies are required to include cost or price as a significant factor in the evaluation of proposals, they have considerable discretion in determining the particular method to be used in evaluating cost or price. 41 U.S.C. § 253a(c)(1)(B) (2000); FAR 15.304(c)(1); Sun Co., Inc., B-275193, Jan. 29, 1997, 97-1 CPD ¶ 56 at 5.

As the protesters’ argument here was also raised in their initial protest to the agency (B-298380), the agency explains that it considered the protesters’ position while taking corrective action, and concluded that the price evaluation methodology set forth in the RFP—which basically provides for the consideration of the fixed-prices proposed by the offerors—meets the agency’s needs and is “clear, succinct and sufficient for evaluating price under this procurement.” Contracting Officer’s Statement at 16. The agency also questions the merits of the protesters’ assertion that the agency would realize significant collateral savings through the acquisition of the protesters’ particular subscription service, pointing here to, among other things, a particular study “which indicated that agencies that implemented automated recruitment systems achieved significant improvements in timeliness—however, these agencies did not significantly reduce the level of [human resources] staff.” Contracting Officer’s Statement at 16 n.22; see AR at 26.

In our view, the methodology of measuring cost to the government set forth in this RFP, which simply provides for the offerors to provide fixed prices for the services and products proposed, is well within the bounds of agency discretion; agencies often procure services on a fixed price basis. Although the particular method to be used by an agency to evaluate prices should, to the extent possible, accurately measure the costs to be incurred under competing proposals, the evaluation of the most advantageous offer in any procurement should be confined to matters that are quantifiable and not speculative. Sun Co., Inc., *supra*; Daggett Properties, B-227635, Oct. 22, 1987, 87-2 CPD ¶ 384 at 5. The agency disputes the protesters’ assertion that the agency will achieve collateral savings in personnel if their subscription service is procured, and in any event, any such collateral savings would appear to be speculative, not reasonably quantifiable, and not due to a direct cost to the government as a result of this contract, but rather as the result of some potential

reduction in agency personnel that the protesters claim may be achieved should the agency use the protesters' service.⁷

The protest is denied.

Gary L. Kepplinger
General Counsel

⁷ Although the protesters initially asserted that the solicitation's technical evaluation factors contain certain ambiguities, the agency's report in response to the protest addressed these concerns, and the protesters state in their comments on the agency's report that in their view the technical evaluation plan ambiguities are apparently resolved. Protesters' Comments at 15.