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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Wyse Technology, Inc.

File: B-297454

Date: January 24, 2006

Brian A. Darst, Esq., for the protester.
David Erlewine, Esq., Department of Justice, for the agency.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly awarded contract based upon a proposal where the offeror expressly declined to certify that the product to be provided would comply with the Trade Agreements Act as was required by the terms of the solicitation.

DECISION

Wyse Technology, Inc. protests the award of a contract to CDW Government, Inc. (CDWG) under solicitation No. CG0270, issued by the Department of Justice, Federal Prison Industries (FPI) d/b/a UNICOR,¹ for Hewlett Packard HP Compaq t5520 Thin Client devices.² Specifically, Wyse contends that the awardee's brand name product

¹ The agency contends that our Office lacks jurisdiction to review protests of FPI procurements, arguing that FPI is a nonappropriated fund activity. Our Office has previously held that, since FPI is defined by statute as a federal agency, the agency is subject to our jurisdiction under the Competition in Contracting Act, 31 U.S.C. §§ 3551-3556 (2000), amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1811 (2004). USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 2-3.

² The thin client devices are needed by FPI to replace all existing FPI employees' personal computers. The thin client devices have no hard drives, a security feature for the Bureau of Prisons institutions, so all information is retrieved and inputted via a main server.

was manufactured in Taiwan or China, and, thus, the award is in violation of the Trade Agreements Act (TAA), 19 U.S.C. §§ 2501-81 (2000).³

We sustain the protest.

On September 13, 2005, the agency posted the solicitation for the Hewlett Packard HP Compaq t5520 Thin Client devices and “APC Essential Surge Arrest Outlets.”⁴ The solicitation was issued on a “brand-name-or-equal” basis and included the applicable salient characteristics of the brand name products. The solicitation stated that it contemplated the award of a requirements contract with a 2-year period of performance. Agency Report (AR), Tab E, Solicitation.

The procurement was to be conducted under streamlined commercial item and simplified acquisition procedures, Federal Acquisition Regulation (FAR) Subpart 12.6 and Part 13, using an electronic reverse auction.⁵ Participants in the auction were required to register in the Contractor Performance System (CPS) and to submit written proposals to the agency, exclusive of pricing, before September 16 at 11 a.m., EST. The auction was to commence at 1 p.m. and close by 1:20 p.m. EST on that same date. The solicitation stated that award would be made on a “best value” basis, and identified three evaluation factors: past performance, ability to conform to the specifications, and price. The solicitation also stated that although award could be made without discussions, the government “reserves the right to conduct verbal or written discussions with respect to factors other than price with offerors at anytime prior to award.” *Id.* The terms of the solicitation were not protested.

³ The TAA authorizes the President to waive all buy-national laws, regulations, or procedures for the acquisition of eligible “end products” from any country designated as a reciprocating, signatory nation to a recognized agreement or as a least-developed country. In order to encourage trade agreements with additional countries for reciprocal procurement opportunities, the TAA also requires the President to prohibit the procurement of eligible end products from foreign countries not designated pursuant to the Act. 19 U.S.C. § 2511; Hung Myung (USA) Ltd., Inc.; Containertechnik Hamburg GmbH & Co., B-244686 et al., Nov. 7, 1991, 91-2 CPD ¶ 434 at 2-3.

⁴ The acquisition of the outlets was not protested.

⁵ The solicitation did not state whether it was a request for proposals (RFP) or a request for quotations (RFQ) as required by FAR § 12.603(c)(2)(ii). While the solicitation in places did state that “offers” were contemplated and the agency when implementing the award to CDWG indicated that the solicitation was an RFP, the responding vendors referred to this solicitation as an RFQ. This inconsistency does not affect our analysis in this decision. For purposes of consistency, we will refer to the vendors’ responses to the solicitation as proposals.

The information required to be included in the written proposal included three past performance references and a certification that the required representations and certifications were completed on the on-line representations and certifications application (ORCA).⁶ The solicitation also incorporated FAR § 52.212-3, Offeror Representations and Certifications--Commercial Items, paragraph j(2) which provides that “the offeror verifies by submission of this offer that the representations and certifications currently posted electronically at FAR 52.212-3, Offeror Representations and Certifications--Commercial Items, have been entered or updated in the last 12 months, are current, accurate, complete, and applicable to this solicitation” and provides for offerors to update their representations and certifications for the particular acquisition. The solicitation further provided that “[a]ll proposals that fail to certify that the required representations and certifications have been completed at the ORCA website or fail to adhere to the terms and conditions of this solicitation shall no longer be considered for award.” Id.

Among the certifications incorporated and required by this solicitation was the Trade Agreements Certificate, FAR § 52.225-6 (Jan. 2005), which states: “The offeror certifies that each end product . . . is a U.S.-made or designated country end product, as defined in the clause of this solicitation entitled “Trade Agreements,” and provides space where the offeror is required to list those end products that are not U.S.-made or designated country end products. The solicitation also incorporated the “Trade Agreements” clause, FAR §§ 52.212-5, 52.225-5, which as pertinent here requires that only the end products of the United States and designated countries can be provided.

There were six firms, including CDWG and Wyse, that registered in the CPS and submitted written proposals. All of these firms submitted prices in the reverse auction.

CDWG submitted a signed proposal on September 16 in which it proposed to provide the designated brand name HP Compaq t5520 Thin Client. CDWG’s proposal incorporated its representations and certifications entered on the ORCA. In the ORCA, CDWG’s response to the Trade Agreements Certificate stated, “[CDWG] has elected not to complete this provision. Information pertaining to this provision, must be submitted to the Government with individual offers/proposals.” AR, Tab I, CDWG ORCA Public Certification, at 19. According to the ORCA instructions, the representations and certifications could “be supplemented by information submitted to the Government in response to a specific solicitation.” Id. at 1. Here, however, CDWG did not supplement its Trade Agreements Act Certificate. Wyse’s proposal offered the Wyse V30 as an equal product, indicated how it would comply with the

⁶ ORCA is “the primary Government repository for contractor submitted representations and certifications required for the conduct of business with the Government.” FAR § 2.101.

salient characteristics, and certified compliance under the Trade Agreements Certificate. AR, Tab J, Wyse's Proposal, at 2.

CDWG submitted the lowest overall price of \$522,462 in the auction and received a strong past performance rating; Wyse submitted the second lowest overall price of \$525,714.25 in the auction and also received a strong past performance rating. The contracting officer determined that both CDWG and Wyse "appeared to have the ability to deliver products conforming to the specifications." Contracting Officer's Statement at 5. The contracting officer then determined that CDWG, the lowest overall priced offeror, offered the best value to the government. On September 23, the contracting officer made award to CDWG.

Wyse received a written "debriefing" letter on October 5, in which the agency disclosed that CDWG was providing the brand name product. On October 11, Wyse asked Hewlett Packard where the t5520 thin clients were manufactured, and received a response that they were manufactured in Taiwan and will not comply with the TAA, inasmuch as Taiwan is not a designated country whose products can be supplied under the TAA. Protester's Comments, attach. 1. Wyse reports that it provided FPI with this information at a follow-up meeting on October 12, and that the agency informed it that it should have protested this matter prior to September 16 if it believed that the brand name product was not compliant with the TAA.⁷ Wyse then protested to our Office on October 17. Performance of the contract was not stayed and the agency states that the contract was fully performed when the last of the thin clients were delivered on November 8. AR, Tab P, E-mail (Nov. 9, 2005). According to the agency, the delivered products were marked "Made in China" (AR at 4 n.8), which indicates that they were end products of the People's Republic of China, which is not a designated country under the TAA.⁸

⁷ The agency confirms that Wyse asserted at the October 12 meeting that the t5520 thin client was not compliant with the TAA and that it advised that this should have been protested prior to September 16. However, the agency denies receiving the correspondence that Hewlett Packard provided to Wyse indicating that this product was not TAA-compliant.

⁸ Notwithstanding the reasonable inference that can be made by virtue of the "Made in China" inscription that these were end products of China, the agency states that it is still not convinced that the delivered thin clients were the end products of China, and speculates that they may have been substantially transformed in the United States or a designated country. In addition, the agency states that it has as yet been unable to obtain any information from Hewlett Packard regarding where this product was manufactured. While the agency references various Hewlett Packard web pages that it contends show that t5520 thin clients may have been manufactured in the United States or in Hong Kong (a designated country pursuant to the TAA), our review of these web pages contain no evidence that the t5520 thin client is an end product of either country. (The portions of the web pages referenced by FPI in

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Wyse challenges the agency's award determination on the grounds that the awardee's brand name product was the end product of either Taiwan or the People's Republic of China, and thus the award was in violation of the TAA, inasmuch as these countries are not designated countries under the TAA. Wyse asserts that there were several discrepancies, in particular CDWG's failure to certify that it would provide an end product of the United States or a designated country, that should have caused the agency to make inquiries about the acceptability of the product before it made award to CDWG.

FPI initially contends that Wyse's challenge of an apparent TAA violation concerning the brand name referenced in a brand name or equal solicitation is an untimely challenge to the terms of the solicitation, which must be filed prior to bid opening or the time set for receipt of initial proposals under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2005). The agency's argument here is that a protest contending that a brand name designated in the solicitation does not comply with the TAA concerns a solicitation impropriety, which must be filed prior to the closing date for receipt of proposals.

We have been presented with this type of argument before with regard to protests of awards based on the brand name under brand-name-or-equal solicitations and found protests that the brand name would not otherwise satisfy solicitation requirements were timely, even though filed after award. See, e.g., Abbott GmbH Diagnostika, B-241513, B-241513.2, Feb. 7, 1991, 91-1 CPD ¶ 139 at 2. This is so because bids or proposals offering the brand name product also have to satisfy the other stated solicitation requirements. Thus, protests contending that an offered brand name product in response to a brand-name-or-equal solicitation does not satisfy solicitation requirements is not considered a protest concerning a solicitation impropriety that must be protested prior to bid opening or the closing date for receipt of proposals, but such protests can be filed after award. Id. (protest that brand name did not satisfy salient characteristic required by solicitation); Innovative Refrigeration Concepts, B-258655, Feb. 10, 1995, 95-1 CPD ¶ 61 at 3-4 (protest that brand name does not satisfy solicitation requirement that small business product must be provided).

In any event, although Wyse may have been suspicious some time prior to September 16 that the t5520 thin client was not TAA-compliant, the record does not establish that it had evidence of this until October 11, when Hewlett Packard advised that it was not. The agency has provided no evidence that indicates that Wyse

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making this contention appear to merely indicate that these products are available in those countries.)

should have earlier known that this product did not comply with the TAA.⁹ Moreover, according to Wyse, CDWG's failure to certify TAA compliance for this particular acquisition did not come to Wyse's attention until the October 12 meeting. See Protester's Supplemental Comments at 2. Under the circumstances, we consider Wyse's protest filed on October 17 to be timely.

With regard to the merits of Wyse's protest, we find that CDWG did not offer to comply with the TAA in its proposal or otherwise, that the agency was required to ensure CDWG's compliance with the TAA prior to making award to that firm, and that this failure resulted in the delivery of products that apparently do not comply with the TAA. Consequently, we sustain Wyse's protest on this basis.

Where a bidder or offeror represents that it will furnish end products of the United States or designated countries, it is obligated to comply with that representation. Leisure-Lift, Inc., B-291878.3, B-292448.2, Sept. 25, 2003, 2003 CPD ¶ 189 at 8. That is, where a bidder or offeror leaves the certificate blank and does not exclude any end product from the certificate, and does not otherwise indicate that it is offering anything other than a TAA-compliant end product, acceptance of the offer will result in an obligation on the offeror's or bidder's part to furnish a TAA-compliant end product. See Aesculap Instruments Corp., B-208202, Aug. 23, 1983, 83-2 CPD ¶ 228 at 3 (involving similarly worded Buy American certificate). Under such circumstances, the agency can rely upon an offeror's representation/certification of compliance with the TAA unless the agency has reason to believe, prior to award, that the offeror will not provide a compliant product. See Leisure-Lift, Inc., *supra*.

In this case, CDWG expressly declined to provide the required certification and thus did not expressly bind itself to provide a TAA-compliant end product as required by the solicitation. That is, as noted above, CDWG stated on the ORCA, which it incorporated by reference in its proposal, that it had "elected not to complete" the Trade Agreements Certification and that it was required to provide information regarding this provision with its proposal. AR, Tab I, CDWG ORCA Public Certification, at 19. However, CDWG did not supplement this certification in its proposal, or otherwise, with regard to this acquisition. Moreover, FPI did not ask

⁹ The agency references a Wyse protest of a predecessor FPI procurement of another Hewlett Packard thin client model, which we dismissed as untimely. In that procurement, FPI proposed to buy on a brand-name-only basis, and Wyse protested, among other things, the brand name nature of the acquisition and the TAA-compliance of that brand name. FPI contends that this prior protest shows that Wyse was cognizant at that time of the basis for its belief that the Hewlett Packard's thin clients were not TAA-compliant end products. However, the acquisition that is the subject of this protest was conducted on a brand-name-or-equal basis, for a different thin client model, and, for the reasons explained above, Wyse could assume that the agency would ensure compliance with the TAA in making award.

CDWG to supplement this uncompleted certification at any time prior to award, even though it affected CDWG's obligation to provide a TAA-compliant end product; nor did the agency ask whether CDWG's offered product would comply with the TAA.¹⁰ Award may not be based upon a proposal, where, as here, the offeror declines to certify compliance, as required, with a material term of the solicitation, in this case the TAA, such that the proposal consequently fails to establish a legal obligation to comply with that material term. See *Automatics Ltd.*, B-214997, Nov. 15, 1984, 84-2 CPD ¶ 535 at 2. The prejudice in this case of not requiring this certification prior to award is obvious, given that CDWG delivered thin clients marked "Made in China" that apparently do not comply with the TAA.

Because we are advised by the agency that the performance under this contract has been completed,¹¹ we recommend that Wyse be reimbursed its proposal preparation costs as well as the reasonable costs of filing and pursuing the protest, including reasonable attorney's fees. 4 C.F.R. §21.8(d)(1), (2). Wyse should submit its

¹⁰ The agency states, with regard to CDWG's failure to certify compliance with the TAA, that in the future it will resolve TAA-compliance issues before award is made. AR at 4 n.9.

The agency nevertheless states that it took reasonable steps to ensure compliance with the TAA in issuing the solicitation when it noted that the HP t5520 thin client was being offered by a variety of vendors on the General Services Administration GSA Advantage website (listed products are included in vendor's Federal Supply Schedule (FSS) contracts). AR at 5; Tab N, GSA Advantage Printout for Thin Client, see http://www.gsaadvantage.gov/advgsa/advantage/main/start_page.do. As correctly noted by FPI, products and services offered under FSS contracts for information technology items are required to be compliant with the TAA. AR at 5; see <http://www.fbo.gov/spg/GSA/FSS/FCI/FCIS%2DJB%2D980001%2DB/Attachments.html> (contract provisions for Multiple Award Schedule 70 General Purpose Commercial Information Technology Equipment, Software FSS Contracts, which include the Trade Agreements Clause (FAR § 52.225-5) that requires compliance with the TAA). After this protest was filed, the agency states it contacted the GSA Advantage customer service staff via telephone and was assured that the thin client was TAA-compliant, but that GSA later declined to provide this opinion in writing. AR at 5 n.13. Given the evidence in this record suggesting that this end product is not TAA-compliant, we are bringing this matter to GSA's attention to take appropriate action.

¹¹ We note, however, that the solicitation otherwise describes this as a "requirements" contract for 2005 and 2006. In view of our conclusion above, the agency should not place any further orders for t5520 thin clients under this contract. How FPI will deal with the thin clients already delivered is a matter of contract administration not subject to our Office's review under our Bid Protest Regulations, 4 C.F.R. § 21.5(a).

certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receiving this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel