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**Comptroller General
of the United States**

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

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Decision

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

File: B-298380.4

Date: June 11, 2007

Frederick W. Claybrook, Jr., Esq., David C. Hammond, Esq., and Mary Baroody Lowe, Esq., Crowell & Moring, for the protesters.

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DIGEST

Proposals submitted in response to a solicitation issued for a solution to automate the Department of Homeland Security's personnel recruitment and hiring processes that did not include an adequate explanation, as requested by the solicitation, of the proposals' compliance with the solicitation's minimum mandatory requirements concerning intellectual property/data rights were reasonably found unacceptable by the agency.

DECISION

Avue Technologies Corp. and Carahsoft Technology Corp. protest the rejection of their proposals under 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 because the proposals failed to comply with the RFP's minimum mandatory requirements regarding intellectual property/data rights.¹

We deny the protest.

The RFP was issued for a commercial-off-the-shelf, "web-based, automated e-Recruitment solution, including all software, software documentation,

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

implementation support, and services to support the full life cycle of an enterprise-wide hiring/recruitment system.” RFP at 4. This acquisition is intended to fulfill the agency’s objective of acquiring and implementing “an enterprise solution to automate recruitment and hiring processes” in DHS, which the RFP explains “is necessary to meet the mission critical needs” of DHS. RFP at 19-20. The RFP lists a number of activities that “[a]utomated and paperless hiring systems” can support, such as the management of human capital and workforce planning, providing agency officials with the best-qualified candidates, tracking the applicants throughout the recruitment and hiring process, the evaluation of the candidates’ characteristics and diversity, the mining of applicant databases, as well as decreasing the time and effort for applicants seeking employment, and decreasing the time and overall effort involved in the recruitment and hiring process. Id.

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 will 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 agency considers the protection of its existing data pertaining to its recruitment and hiring processes, as well as data pertaining to its hiring and recruitment processes that it will create and process through the recruitment and hiring system it acquires through this RFP, as critical. In order to accomplish this, the RFP (at 53-54) includes, among other things, a “Licenses/Programs” clause that 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.²

The RFP includes detailed proposal preparation instructions, requesting, among other things, the submission of a technical capability proposal, a price proposal, and an experience, past performance, and key personnel proposal. The RFP states that proposals are to include completed “Security Requirements” and “Functional Requirements” matrices, and that these matrices are to be completed by providing “[f]or each requirement listed . . . a description of how the proposed solution meets the requirements stated, using the format provided.” RFP at 69. The solicitation instructs offerors that they are to complete the matrix by stating whether their proposal meets the specified requirement, and providing “[c]omments” including “a description of how the proposed solution meets the requirements stated.” Id.

Under the RFP, offerors are cautioned that their proposed solutions “must fully meet or exceed the mandatory requirements stated in the Functional Requirements” matrix. RFP at 69. Specifically, the RFP states that “[t]he government will conduct a preliminary evaluation of the written technical proposal submission during which the government will evaluate the offerors’ responses to the minimum mandatory requirements of the RFP,” and that “[a]ll proposals that do not meet the minimum mandatory requirements or are deemed excessively deficient will be eliminated from further consideration and the offeror so notified.” RFP at 74.

Among the requirements on the functional requirements matrix, with which compliance needed to be demonstrated by the offerors and that would be evaluated as part of the “preliminary evaluation,” are various “mandatory” intellectual property/data rights requirements. RFP at 53; app. B, Functional Requirements Matrix §§ 8.1-8.4. For example, one of these requirements, that reflects the Licenses/Programs clause requirements, provides that:

All data and information developed by, entered into and processed through the contractor’s information system(s) under this contract shall be considered Government property. All electronic files of all data entered into the system throughout the performance period of this contract shall be returned to DHS at the end of the contract so that it can be reused by the government.

RFP app. B, ¶ 8.1.1.

Prior to the closing date for receipt of proposals, Avue and Carahsoft filed a protest with our Office arguing that certain provisions set forth in the solicitation were “in

² The solicitation contained other provisions pertaining to data rights, including the standard clauses at FAR §§ 52.227-14 and 52.227-19.

open disregard of the FAR concerning data rights in a commercial item procurement.” Protest (B-298380.3) at 1. The protesters argued that while the data rights provisions set forth in the solicitation “work[] for ‘software-only’ configurations,” the provisions should not “apply to Avue’s full-content configuration.”³ Protesters’ Comments (B-298380.3) at 7.

In response to Avue’s protest, the agency explained 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.” Contracting Officer’s Statement (B-298380.3) at 2. Accordingly, the agency stated that it viewed 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. *Id.* at 9. The agency added that it anticipated that during performance of the contract awarded here it would “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,” such as “existing position descriptions” and “applicant questionnaires,” and that it anticipated that it would “create data, enter the data, and process it through the contractor’s information system” during the performance of the contract, and that it needed to protect this data as well.⁴ *Id.* at 10. The agency asserted that through the terms of the RFP it sought only 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 “Government property” to be “necessary for the Agency to carry out its workforce management functions related to recruitment and

³ The protesters explained that with their “full content configuration,” 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 (B-298380.3) 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.

⁴ Other agency examples of specific recruitment and hiring data categories included hiring evaluation criteria, position duty statements, job analyses, vacancy announcements, job assessments, test results, cumulative employee data, reports, analytics, workforce information, and assessment plans. Agency Report (AR) (B-298380.3) at 8.

hiring that support the Agency's critical mission to protect the Homeland, beyond the period of performance for this specific contract." Id.

We denied the protest, finding that the RFP's provisions pertaining to data rights were not inconsistent with the FAR as argued by the protester, and that the agency had reasonably explained its need to protect its existing data regarding its recruitment and hiring of personnel as well as any data regarding its recruitment and hiring processes the agency develops during the course of the contract, and that the agency had reasonably explained the need for the RFP's carefully tailored intellectual property/data rights provisions. Avue Techs. Corp.; Carahsoft Tech. Corp., B-298380.3, Nov. 15, 2006, 2006 CPD ¶ 172 at 6.

The agency subsequently received 10 proposals from 7 offerors, including Avue and Carahsoft, by the solicitation's closing date.⁵ AR, Tab 6, Technical Evaluation Interim Report, at 1. The agency, consistent with the terms of the solicitation, evaluated the proposals for compliance with the RFP's "minimum mandatory requirements," and determined that seven of the proposals, including each of the proposals submitted by Avue and Carahsoft, failed to comply with one or more of the RFP's minimum mandatory requirements. Id. at 2-3. Specifically, the agency found that the proposals submitted by Avue and Carahsoft failed to evidence compliance with the mandatory minimum requirements concerning intellectual property/data rights as set forth in the RFP, including the functional requirements matrix. Id. at 6-39. After requesting and receiving a debriefing, Avue and Carahsoft filed this protest.

The protesters argue that DHS "improperly excluded" the protesters' proposals from the competition based upon "an incorrect and unreasonable application of the intellectual property rights provisions in those proposals and in the RFP." Protest at 1.

Where a protester challenges an agency's preliminary evaluation resulting in the rejection of its proposal as unacceptable, our review is limited to considering whether the evaluation is reasonable and consistent with the terms of the RFP and applicable procurement statutes and regulations. Nat'l Shower Express, Inc.; Rickaby Fire Support, B-293970; B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 4. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. CAE USA, Inc., B-293002; B-293002.2, Jan. 12, 2004, 2004 CPD ¶ 25 at 6.

The agency's preliminary evaluation found, and the record confirms, that the primary and alternate proposals submitted by Avue and Carahsoft "provided the same

⁵ Three of the offerors, including Avue and Carahsoft, submitted both a principal and alternate proposal.

response to each of the four requirements related to Intellectual Property” in the functional requirements matrix. See AR, Tab 6, Technical Evaluation Interim Report, at 6. That is, the protesters’ proposals were each completed by inserting “[y]es” in the column of the functional requirements matrix asking whether the proposal complied with the intellectual property/data rights requirements referenced, and stating under the “[c]omments” column of the matrix that the “[d]ata rights are governed by the applicable provisions of the Avue Master Subscription Agreement.” The proposals then provided in the comments column, without further explanation, quotes of certain sections of the Avue Master Subscription Agreement. AR, Tab 6, Technical Evaluation Interim Report, attach. B; e.g., Tab 20, Avue Primary Proposal, app. B, at 146.

The sections of the Avue Master Subscription Agreement included in the protesters’ proposals provided Avue’s definitions of “Client Data” and Avue Digital Services (ADS) material, and then used those terms in explaining which parties hold rights to what intellectual property/data under the Avue Master Subscription Agreement.⁶ Specifically, the proposals define “Client Data” as “[i]ndividual historical data elements relating to specific individuals that are customarily contained in an individual employee record” (such as name, date of birth, social security number, education and “similar data”); “[i]ndividual historical data elements that are quantitative or otherwise arise from one or more specific transactions so long as these data elements can be downloaded in the course of authorized use by the Subscriber from a report generated from the ‘Online Reports’ interface embedded in Avue” (such as individual performance ratings, transaction processing cycle time metrics, employee complaint proceeding outcomes, and “similar data”); and “[d]ocuments, solely in their original form, provided to Avue by Subscriber,” including, “for example, position descriptions and performance plans produced by or for Subscriber prior to the relevant Subscription Period.” AR, Tab 20, Avue Primary Proposal, app. B, at 146. The protesters’ proposals define ADS material as including “any and all of the following aspects of [ADS], whether owned by Avue and/or third parties—databases, data, services, functions, content, functionality, rules, documents, reports, and associated Avue-provided interfaces—which exist at any time during the Subscription period except for data and documents that constitute Client Data.” AR, Tab 20, Avue Primary Proposal, app. B, at 146.

The agency determined in its consideration of the protesters’ proposals that “‘Client Data’ is very limited by the Agreement,” commenting that because the definition of Client Data includes “Documents, solely in their original form, provided to Avue by the Subscriber . . . DHS would not be permitted to retain ownership of its pre-existing documents unless such documents were provided to Avue prior to the

⁶ In interpreting the proposals, the parties consider “client data” to be that to which the agency has unlimited rights and ADS material to be that to which the agency has limited rights.

relevant subscription period.” The agency also concluded from its reading of the Avue Master Subscription Agreement that “**any** modification to a subscriber document that occurs during the subscription period becomes Avue’s, not the subscriber’s data when it is developed by, entered into or processed through Avue’s system.” As an example, the agency noted that “if the subscriber uses the Avue system to modify one of its position descriptions that preceded the subscription period, the position description then becomes Avue’s data, not the subscriber’s.” The agency further noted that the provisions of the Avue Master Subscription Agreement, as set forth in the protesters’ proposals, place numerous restrictions as to how data or material defined as “ADS Material” could be used. The agency concluded this aspect of its evaluation by again pointing out that, as set forth in the RFP, “DHS requires unlimited and unrestricted use of its data both during and after the contract period,” and that because “Avue’s proposal prohibits the unlimited use of this data” it failed to comply with the RFP’s minimum mandatory requirements regarding intellectual property/data rights.⁷ AR, Tab 6, Technical Evaluation Interim Report, at 6-9.

The protesters raise numerous arguments and provide detailed explanations in their protest submissions in support of their position that, contrary to the agency’s interpretation of the provisions of the Avue Master Subscription Agreement set forth in their proposals, their proposals did comply with the RFP’s intellectual property/data rights provisions. As explained below, we find that the protesters’ arguments and explanations, as well as their proposals, represent a fundamental misunderstanding of the solicitation’s requirements and the respective roles of the offerors and agency in the acquisition process here.

Our Office has long recognized that, as a general matter, it is an offeror’s responsibility to submit an adequately written proposal with sufficient information for the agency to evaluate and determine compliance with the solicitation’s requirements. Interstate Gen. Gov’t Contractors, Inc., B-290137.2, June 21, 2002, 2002 CPD ¶ 105 at 5; Better Serv., B-256498.2, Jan. 9, 1995, 95-1 CPD ¶ 11 at 2. With regard to the role of the agency, our Office has held that in evaluating a proposal, an agency is under no obligation “to decipher a poorly organized proposal,” Shumaker

⁷ The record reflects that the agency found that the terms of the Avue Master Subscription Agreement as set forth in the protesters’ proposals did not comply with the RFP’s intellectual property/data rights provisions for a number of other reasons, including restrictions imposed by the Agreement on the transferring of certain data to other government agencies. AR, Tab 6, Technical Evaluation Interim Report, at 8-12. We do not discuss these other issues as identified by the agency during its evaluation because they result from the definitions of “Client Data” and “ADS Material” in the Avue Master Subscription and are thus related to the issues we do discuss, and because our finding that the agency’s rejection of the protesters’ proposal was unobjectionable based upon the issues specifically discussed here.

Trucking and Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 5, or to reach favorable conclusions regarding the merits of a proposal or the compliance of the proposal with a solicitation's requirements where the information supporting such conclusions is "not readily apparent," DATEX, Inc., B-270268.2, Apr. 15, 1996, 96-1 CPD ¶ 240 at 6, "not clearly delineated," Joint Mgmt. & Tech. Servs., B-294229; B-294229.3, Sept. 22, 2004, 2004 CPD ¶ 208 at 5, or not set forth with the requisite degree of precision required by the RFP. Ace Info. Sys., B-295450.2, Mar. 7, 2005, 2005 CPD ¶ 75 at 8; United Def. LP, B-286925.3 *et al.*, Apr. 9, 2001, 2001 CPD ¶ 75 at 19. Nor is an agency required to "deduce[]" that a proposal meets certain requirements where the proposal lacks the level of detail the RFP requires, SOS Interpreting, Ltd., B-287505, June 12, 2001, 2001 CPD ¶ 104 at 11-12, or accept a proposal that the agency finds is unclear or ambiguous regarding its merits or compliance with the solicitation's requirements. Ace Info. Sys., *supra* at 7; Innovative Commc's Techs., Inc., B-291728; B-291728.2, Mar. 5, 2003, 2003 CPD ¶ 58 at 5-7; JAVIS Automation & Eng'g, Inc., B-290434; B-290434.2, Aug. 5, 2002, 2002 CPD ¶ 140 at 6 (it is not the agency's obligation to fill in gaps in an offeror's proposal during the evaluation process).

As indicated above, the RFP advised that in completing the functional requirements matrix, which included the solicitation's provisions regarding intellectual property/data rights, offerors were to "provide a description of how the proposed solution meets the requirements stated." RFP at 69. As recognized by the agency in evaluating the protesters' proposals, the protesters did not do this. That is, the protesters, rather than providing "a description" of how their proposals evidenced compliance with the solicitation's provisions regarding intellectual property/data rights, chose to state simply that "[d]ata rights are governed by the applicable provisions of the Avue Master Subscription Agreement," and then set forth certain provisions of the Avue Master Subscription Agreement. This approach left it to the agency to "deduce" whether the Avue Master Subscription Agreement evidenced compliance with the solicitation provisions regarding intellectual property/data rights.

As set forth above, the agency found that the provisions of the Avue Master Subscription Agreement included in the proposals were unclear in a number of areas with regard to data rights, or too narrowly defined the intellectual property/data that would be considered the agency's, and that it appeared from the Master Subscription Agreement that the intellectual property/data rights provisions in the RFP would not be met.⁸ Although the protester clearly disagrees with the agency's determinations, based upon our review of the record, we have no basis to question the

⁸ In addition, we note that the proposals did not even include a complete copy of the Avue Master Subscription Agreement, even though they indicated that the agreement would govern the protester's and government's respective obligations under the contract.

reasonableness of the agency's evaluation. Simply put, it was the protesters' obligation to submit proposals with adequately detailed information in such a manner as to allow for a meaningful review by the agency, Shumaker Trucking and Excavating Contractors, Inc., supra, and the protesters, who did not provide any explanation in their proposals regarding the proposals' compliance with the solicitation's intellectual property/data rights provisions, failed to do so.

With regard to the more specific arguments raised by the protesters, we note, for example, that the protesters explain and provide considerable detail in their protest submissions as to [DELETED], and how those differences should have been considered by the agency in determining whether the proposals—all of which stated that “[d]ata rights are governed by the applicable provisions of the Avue Master Subscription Agreement” (e.g., Tab 20, Avue Primary Proposal, app. B, at 146) and included identical language concerning data rights—met the intellectual property/data rights provisions set forth in the RFP. As Avue and Carahsoft frame this aspect of their protest, “[t]he issue is not that the same language from the [Avue Master Subscription Agreement] was used in responding” to the intellectual property/data rights provisions set forth in the RFP's functional requirements matrix, but rather “[t]he issue is the Agency's unreasonable failure to recognize that the [DELETED] and that the different data are subject to different rights in the [Avue Master Subscription Agreement].” Protesters' Supplemental Comments at 8.

As indicated above, the agency was not obligated to conduct this type or level of review. That is, under the protesters' arguments, in order to conclude whether each of the protesters' proposals complied with the solicitation's intellectual property/data rights provisions, the agency would have to review the terms of the Avue Master Subscription Agreement; determine from the descriptions set forth in the particular technical capability proposals which aspects of the Avue Master Subscription Agreement were relevant to the particular proposal under review based upon the technical capabilities described and which aspects of the Agreement, even though included in the proposal, were not; and from this analysis determine whether the Avue Master Subscription Agreement evidenced compliance with the solicitation's intellectual property/data rights provisions.

We also note that the detailed explanations regarding the technical capabilities of the solutions proposed by Avue and Carahsoft, and the relation of the Avue Master Subscription Agreement to those solutions, appear for the first time in the protester's submissions submitted as part of the protest process. That is, the protest, comments, and supplemental comments each include to varying degrees explanations regarding the technical capabilities of the solutions in the protesters' primary and alternate proposals, and how those technical capabilities affect whether data would be considered “client data” or “ADS material” under the Avue Master Subscription Agreement. However, since an agency's evaluation is dependent upon the information furnished in a proposal, the explanations provided by the protesters in their submissions to our Office do not, under the circumstances here, render the

agency's determinations, made during the evaluation process based upon the proposals submitted by the protesters unreasonable. GEC-Marconi Elec. Sys., Corp., B-276186; B-276186.2, May 21, 1997, 97-2 CPD ¶ 23 at 7.

In sum, the record reflects that the agency, based upon its review of the protesters' proposals, including the terms of the Avue Master Subscription Agreement as set forth in the proposals, reasonably determined that the proposals failed to show compliance with the RFP's mandatory intellectual property/data rights provisions. Contrary to the protesters' arguments, the agency was not obligated to perform the type or level of evaluation of this aspect of the protesters' proposals advocated by the protesters, but rather, offerors were required to provide clear explanations as to how they would meet these requirements for evaluation purposes. Nor is the agency's evaluation of the protesters' inadequately written proposals rendered unreasonable by the protesters' explanations of their proposals provided for the first time in their submissions in response to this protest. Thus, the agency reasonably rejected the protesters' proposals as unacceptable.

The protest is denied.

Gary L. Kepplinger
General Counsel