



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: COMARK Federal Systems

File: B-278343; B-278343.2

Date: January 20, 1998

Joseph P. Hornyak, Esq., Sonnenschein Nath & Rosenthal, for the protester.

Keith L. Baker, Esq., and Jeffrey E. Weinstein, Esq., Eckert Seamans Cherin & Mellott, LLC, for Sytel, Inc., an intervenor.

Kenneth E. Patton, Esq., and Ada E. Bosque, Esq., Department of Health and Human Services, for the agency.

Andrew T. Pogany, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under request for quotations which asked vendors to identify a configuration of computer systems and related hardware and services on Federal Supply Schedule, where agency intended to conduct a technical evaluation and cost/technical trade-off, agency improperly failed to advise vendors of the basis for selection.

DECISION

COMARK Federal Systems protests the issuance of a delivery order to Sytel, Inc. under request for quotations (RFQ) No. 0008, issued by the Health Care Financing Administration, Department of Health and Human Services, for computer desktop workstations. COMARK principally argues that the agency improperly failed to advise vendors of the agency's actual needs and evaluated quotations in a manner that was inconsistent with the solicitation.

We sustain the protest.

BACKGROUND

In June 1997, the agency announced that it would issue multiple blanket purchase agreements (BPAs) covering a variety of computer hardware, software, associated equipment and services pursuant to the General Services Administration (GSA) Federal Supply Schedule (FSS). The agency tentatively identified six vendors to receive for review BPA "packages," which included, among other things, a sample personal computer specification, a document entitled "BPA Evaluation Requirements Criteria," and the agency's terms and conditions for future delivery orders to be

issued under the BPA. The BPA package required the submission of a demonstration workstation to undergo a benchmark test and specified that the proposed unit have a hard drive capable of storing 1 gigabyte (GB) of data. In July, question and answer sessions were conducted and based on these sessions, as well as past performance evaluations, the agency selected four vendors, including COMARK and Sytel, to receive BPAs. On August 6, the agency revised the BPA specifications to require a hard drive capable of storing a minimum of 2 GB of data. Benchmark demonstrations were performed by the agency from mid-August through mid-September. As relevant here, COMARK's "Plus Data" unit, which it proposed to meet the BPA specifications, successfully passed the benchmark demonstration, as did two models from Sytel and two from another vendor, BTG, Inc. These three firms signed and accepted the BPAs on September 4.

On September 18, the agency issued RFQ No. 0008 to the three firms via electronic mail. The RFQ called for a quantity of 1,950 desktop workstations and specifically stated that it was being issued "under [the agency's] BPA." The BPA, in turn, specified that it was issued "[p]ursuant to GSA Federal Supply Contract[s]." The RFQ contained numerous specifications, some of which were followed by the parenthetical designation "(minimum)." Among the latter, the RFQ included a requirement for a "2 GB Hard Disk (minimum)." The RFQ also required a 3-year on-site warranty for all items. The RFQ did not contain any evaluation criteria.

From September 23 through September 29, the agency received quotes, which were rated on a 1,000-point system with eight categories, including system design, features, performance, and price (which accounted for [deleted] percent of the total score). COMARK submitted two quotes; the chart below reflects its lower-priced quote. The evaluation results contained a pricing error that significantly reduced COMARK's rating; we show below the total scores and prices, as the agency has corrected them in its post-protest calculations. The total evaluated points includes both technical and price factors--that is, the scores reflect a combination of technical merit and price in a composite rating. The evaluation results, in relevant part, were as follows:

Vendor	Total Evaluated Score (Technical and Price)	Price
Sytel Dell	[deleted]	[deleted]
Sytel Opal	[deleted]	[deleted]
COMARK Plus Data	[deleted]	[deleted]
BTG Model A	[deleted]	[deleted]
BTG Model B	[deleted]	[deleted]

Based on the mistaken evaluation results (that is, results which, as noted above, assumed a significantly higher price and therefore a lower total evaluated score for COMARK), the agency's Project Officer made the following determination:

Based on the quotations and the evaluation criteria, I recommend the purchase of the [Sytel] Dell system as a 'best value' decision. The Dell ranked highest on the [agency's] evaluation test in system design, system configuration and performance, as well as in overall scoring. It has a newer chipset [deleted] than the cheaper, and closest technically acceptable competitor, [deleted]. In addition, the [Sytel] Dell system has a [deleted] GB hard drive [versus] the 2 GB drive found on the less expensive machines.

Accordingly, the delivery order was issued to Sytel on September 30, 1997. This protest followed.

The protester argues that the RFQ was silent as to what evaluation criteria the agency would follow, and that the agency nevertheless improperly engaged in a "best value" procurement instead of selecting the low, technically acceptable quote.¹ The agency responds that best value determinations are permitted under the FSS.

The RFQ specifically referred to the BPA, which, in turn, stated that it was issued pursuant to the GSA FSS. Accordingly, the provisions of Federal Acquisition Regulation (FAR) Subpart 8.4 apply. Those provisions anticipate agencies reviewing vendors' federal supply schedules--in effect, their catalogs--and then placing an

¹COMARK also alleges that it was orally advised by a contract specialist after the benchmark demonstrations that "price [would] now determine" the winner of this competition. The agency denies that such advice was given. In light of our resolution of the protest, we need not resolve this factual dispute or the other protest grounds raised by COMARK.

order directly with the schedule contractor that can provide the supply (or service) that represents the best value and meets the agency's needs at the lowest overall cost. FAR § 8.404(b)(2) (June 1997).² When agencies review competing vendors' schedule offerings, they are permitted to make a best-value determination that takes into account "[s]pecial features of one item not provided by comparable items which are required in effective program performance." FAR § 8.404(b)(2)(ii)(A).³ When agencies take this approach, there is no requirement that vendors receive any advance notice, regarding either the agency's needs or the selection criteria.

Agencies, however, may shift the responsibility for selecting items from schedule offerings to the vendors, by issuing solicitations (typically in the form of RFQs) that call on the vendors to select, from among the hundreds (or thousands) of possible configurations of the items on their schedules, a particular configuration on which to submit a quotation. It is certainly understandable that an agency would prefer for the vendors to construct these configurations; particularly in the area of information technology, the large number of possible combinations might make it difficult for agency personnel unfamiliar with the particular equipment or related technical issues to select one configuration by reviewing vendors' schedule offerings.⁴

Yet once an agency decides, by issuing an RFQ (a procedure not mentioned in FAR Subpart 8.4), to shift to the vendors the burden of selecting items on which to quote, the agency must provide some guidance about the selection criteria, in order to allow vendors to compete intelligently.⁵ Haworth, Inc.; Knoll N. Am., Inc.,

²The modification to this provision introduced by Federal Acquisition Circular (FAC) 97-01 deleted the reference in this paragraph to "lowest overall cost." This modification (which, in any event, was not yet in effect when the RFQ at issue in this protest was issued) would not change our analysis. We note, however, that the requirement that FSS purchases, in order to be exempt from the mandate for full and open competition, be made at the "lowest overall cost" has a statutory basis, and thus cannot be removed by a modification to the regulation. 41 U.S.C. § 259(b)(3)(B) (1994).

³FAC 97-01 slightly reworded the provision, but without changing its meaning in a way relevant here, and shifted its location to FAR § 8.404(b)(2)(i).

⁴The same may apply for furniture, another area where schedules are widely used. See, e.g., Design Contempo, Inc., B-270483, Mar. 12, 1996, 96-1 CPD ¶ 146.

⁵Where an agency uses the RFQ simply to request price quotations for items identified by the agency (for example, where the agency is seeking a price reduction), the concern discussed here does not arise, since the agency is asking
(continued...)

73 Comp. Gen. 283, 286 (1994), 94-2 CPD ¶ 98 at 5. Where the agency intends to use the vendors' responses as the basis of a detailed technical evaluation and cost/technical trade-off, the agency has elected to use an approach that is more like a competition in a negotiated procurement than a simple FSS buy, and the RFQ is therefore required to provide for a fair and equitable competition. See EMC Corp., B-277133, Sept. 4, 1997, 97-2 CPD ¶ 64 at 3; L.A. Sys., Inc., B-276349, June 9, 1997, 97-1 CPD ¶ 206 at 3-4. While an agency need not identify detailed evaluation criteria in an RFQ, even where it is asking vendors to select items from their schedules and where the agency intends to conduct a technical evaluation, it must indicate, at a minimum, the basis on which the selection is to be made, including whether the agency intends to select the low-cost technically acceptable quotation, or whether the agency is willing to consider paying a higher price for superior technical features (that is, whether it contemplates performing a cost/technical trade-off).

In the field of information technology, where schedule contractors typically have a wide spectrum of items--from cut-rate to cutting-edge--on their schedules, an FSS vendor needs guidance from the agency in order to rationally decide which products to select in responding to an RFQ. To use an example drawing on the facts of this protest, when the agency is asking a computer vendor to decide whether to submit a quotation for a hard drive with a 2 GB storage capacity for a lower price, or one with a [deleted] GB capacity at a higher price--where both possibilities are covered by the schedule contract--the vendor cannot intelligently make that choice without guidance about the basis on which the agency intends to make its selection.

In the multi-million dollar acquisition at issue in this protest, the agency intended to conduct a detailed technical evaluation and cost/technical trade-off, yet it asked vendors to submit quotations with less guidance than is required to be given in a solicitation for a far smaller purchase under the simplified acquisition procedures of Part 13 of the FAR. See FAR § 13.106-2(a)(1) ("Solicitations shall notify suppliers of the basis upon which award is to be made."). Specifically, the agency apparently viewed the specifications set out in the RFQ only as a statement of the minimum it was willing to purchase, and it was willing to pay a higher price for greater technical capabilities. It failed, however, to advise vendors of that critical fact.

The agency suggests that the protester's challenge to the RFQ's failure to set out evaluation criteria should be dismissed as untimely, pursuant to 4 C.F.R. § 21.2(a)(1) (1997). We believe that the defect in the RFQ only became apparent when the protester learned that the agency's needs were not for selection of the

⁵(...continued)

the vendors only to quote prices, not to choose the items on which to quote. See FAR § 8.404(b)(3) (FAC 97-01) (agency shall generally seek price reductions where the value of the purchase exceeds the maximum order threshold).

low-priced, technically acceptable quotation (as the protester reasonably expected, as explained below). Similarly, we reject the agency's contention that the RFQ made clear, through the use of the word "minimum" next to certain specifications, that a best-value determination might be the basis of the source selection here. In our view, the parentheticals in the list of specifications did not by themselves indicate the intended basis of selection, since they would have been consistent with either a lowest-price, technically acceptable approach or a best-value one.

The protester contends that, on one of the two technical factors on which the selection decision rested, the capacity of the hard drive, it could have quoted an item equal in capacity to that quoted by Sytel. The agency does not deny that the protester's FSS contract includes such an item.⁶ The protester contends that the reason that it did not quote a configuration with greater capabilities was that it understood the RFQ to mean that the agency's needs were for the low-priced, technically acceptable configuration. Such a reading of a solicitation that does not otherwise explain the agency's evaluation criteria was reasonable.⁷ See Vistron, Inc., B-277497, Oct. 17, 1997, 97-2 CPD ¶ 107 at 4 (where a solicitation does not contain evaluation factors other than price, general rule is that price is the sole evaluation criterion). We conclude that the RFQ did not accurately state the agency's requirements and that the protester was prejudiced by the agency's action in this regard.

Because the agency requested quotations from vendors without advising them that the agency did not require the low-priced, technically acceptable configuration, we sustain the protest. We recommend that the agency amend the RFQ to advise the firms holding BPAs of the agency's needs, including whether the agency is willing to conduct a cost/technical trade-off, if configurations are quoted that exceed the minimum specifications stated in the RFQ. If, upon reviewing quotations received in response to the amended RFQ, the agency selects other than Sytel, we recommend that the agency cancel that firm's purchase order and issue a purchase order to the vendor selected. We also recommend that the protester be reimbursed

⁶While the hard drive benchmark tested by the protester did not have a [deleted] GB capacity, there was apparently no requirement that vendors quote configurations that had been benchmark tested. Similarly, the protester contends that it could offer, apparently through its FSS contract, the chipset that the agency preferred.

⁷The agency argues that, since the protester did not submit the lowest technically acceptable quotation, it is not an interested party for purposes of pursuing this protest. (The protester contends that the only quote which was lower than its own was ineligible for selection.) Since the agency's needs were apparently not for the low-priced, technically acceptable solution and we are recommending that the agency amend the solicitation accordingly, we conclude that the protester is an interested party. See 4 C.F.R. § 21.0(a).

the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

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