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Decision

Matter of: NikSoft Systems Corporation

File: B-406179.2

Date: August 14, 2012

Ron R. Hutchinson, Esq., Doyle & Bachman LLP, for the protester.
Rafael A. Madan, Esq., John L. Pensinger, Esq., and Rhonda M. Craig, Esq.,
Department of Justice, for the agency.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a procurement conducted under Federal Supply Schedule procedures, where a statement of work is included, protest that an agency improperly made upward adjustments to the protester’s level of effort as part of its analysis to establish a blanket purchase agreement and to issue an order under it, is sustained where the record provides no basis for the agency’s determination that the protester’s level of effort was insufficient or that the protester’s level of effort should be increased to the same level of effort proposed by the successful vendor.

DECISION

NikSoft Systems Corp., of Reston, Virginia, protests the establishment of a blanket purchase agreement (BPA) and placement of an initial “call” or task order to LS3 Incorporated, of Odenton, Maryland, under request for quotations (RFQ) No. 2011Q_049, issued by the Department of Justice (DOJ), Office of Justice Programs (OJP), for federal identity, credential and access management (FICAM) services to support the Office of the Chief Information Officer. NikSoft challenges the agency’s evaluation of quotations and source selection decision.

We sustain the protest.¹

¹ This is NikSoft’s second protest of DOJ’s evaluation and selection decision. Many of the facts set forth here were also included in our earlier decision in this procurement. See NikSoft Sys. Corp., B-406179, Feb, 29, 2012, 2012 CPD ¶ 104. In fact, the record for this protest includes the agency’s report in response to

(continued...)

BACKGROUND

The RFQ, issued under Federal Acquisition Regulation (FAR) subpart 8.4, Federal Supply Schedule (FSS) procedures, sought quotations from 10 vendors holding contracts under schedule 70, information technology equipment, software, and services. The RFQ provided for the establishment of a BPA for a base year and four option years, against which time-and-materials calls (that is, task orders) would be issued as needed, to acquire software and services to support OJP's FICAM framework. The RFQ provided a statement of work (SOW) for the BPA's general requirements, and for an initial call that would be awarded concurrently with the BPA. Vendors were informed that, under the initial call, the successful firm would select and purchase commercial software for the FICAM framework, provide detailed design for various interfaces, develop source code, and conduct system testing.² Agency Report (AR), Tab 13, BPA Call SOW, at 387-91.

Vendors were informed that the BPA would be issued on a best value basis, considering price and the following non-price evaluation factors (listed in descending order of importance): corporate experience, past performance, technical qualifications of proposed personnel, and technical understanding and approach. RFQ at 44. The RFQ stated that technical merit was more important than price. Id.

Under the corporate experience evaluation factor, vendors were required to demonstrate a minimum of 3 years of experience providing FICAM support and implementation services. Id. at 46. Vendors were also to provide a narrative demonstrating relevant technical ability and experience related to the migration of data, implementation, maintenance, and training related to a FICAM system.

Under the past performance evaluation factor, vendors were required to submit a minimum of three past performance questionnaires that reflected the firm's experience in FICAM implementation, operability and support.³ The RFQ required vendors to submit completed and signed questionnaires with their quotations.

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NikSoft's first protest, as well as its report in response to this second protest. The agency's second report follows sequentially the tabs and BATES numbers used in the first report. Our citations are to the reports' BATES numbers.

² The SOW for the first call described the services to be provided by the vendor in designing and implementing various FICAM tasks, and required that at a minimum the vendor would provide a technical project manager and one subject matter expert. AR, Tab 13, BPA Call SOW, at 387-91. Vendors were free to propose their own technical approaches, including labor hours and labor mixes.

³ The questionnaires were provided in an attachment to the solicitation.

Vendors were informed that “the burden of providing current, accurate and complete past performance information rests with the offeror.”⁴ RFQ at 47. Furthermore, vendors whose experience included performance as a subcontractor were permitted to submit past performance questionnaires that had been completed by representatives from a prime contractor. RFQ amend. 1, at 97.

Vendors were instructed to submit separate technical and price volumes. The vendors’ costs were to be based on the firm’s current GSA contract labor rates, including any discounts. Vendors were also requested to submit pricing for the first call. RFQ at 50. The RFQ stated that the agency’s price evaluation would consist of evaluating the vendor’s “budget submission.”⁵ RFQ at 52. Further, although the SOW for the task order stated that vendors were to select and purchase software, the RFQ did not require firms to include this price in their quotation.

The agency received three quotations, including NikSoft’s and LS3’s. Both NikSoft’s and LS3’s quotations included various labor categories and labor rates to perform the work under the BPA. With regard to the call, NikSoft identified [DELETED] labor categories and total of [DELETED] hours (at a price of \$374,423) to accomplish the work. AR, Tab 4, NikSoft Quotation, at 138. LS3 identified [DELETED] labor categories and a total of [DELETED] hours (at a price of \$494,122) to accomplish the call work. AR, Tab 5, LS3 Quotation, at 204-205.

After evaluating the quotations,⁶ the agency’s source evaluation board (SEB) initially rated NikSoft’s and LS3’s quotations as follows:⁷

⁴ Vendors without relevant past performance would not be evaluated favorably or unfavorably; rather, they would receive a “neutral” rating. RFQ at 47.

⁵ The RFQ did not explain this phrase.

⁶ The RFQ provided for rating quotations as exceptional, acceptable, marginal, or unacceptable. RFQ at 44, 45. The RFQ’s standard for an exceptional rating was a quotation that contains significant strengths and no weaknesses; exceeds the SOW’s performance and technical capability requirements; offers value-added methodologies; provides no doubt that the vendor can achieve the SOW requirements, and identifies and mitigates risks. The standard for an acceptable rating was a quotation that contains strengths that outweigh any weaknesses; meets the SOW’s performance and technical capability requirements, and provides confidence that the vendor can achieve the SOW requirements. RFQ at 44.

⁷ The third vendor was found to be technically unacceptable. AR, Tab 9, Consensus Evaluation Report, at 251.

	NikSoft	LS3
Corporate Experience	Acceptable	Exceptional
Past Performance	Acceptable	Acceptable
Technical Qualifications of Proposed Personnel	Acceptable	Exceptional
Technical Understanding and Approach	Exceptional	Exceptional
Overall Rating	Acceptable	Exceptional

AR, Tab 9, SEB Consensus Report, at 251.

Based on LS3's overall exceptional rating, the SEB recommended award to that firm. The agency then evaluated LS3's pricing, and found LS3's hourly rates were "below or above and well within 10% of the Independent Government Estimate (IGE)." AR, Tab 7, CO's Recommendation Memorandum, at 247. The CO noted that technical merit was more important than price and recommended establishment of the BPA and issuance of the call to LS3 in an amount not to exceed \$844,122 (that is \$494,122 for LS3's labor plus \$350,000 for software).⁸ The source selection authority agreed with the recommendation.

NikSoft protested this initial selection decision to our Office in late 2011. Among other things, NikSoft argued that the agency's source selection decision failed to meaningfully consider whether LS3's higher-priced quotation merited the associated cost premium. NikSoft also argued that the agency's evaluation of the firms' past performance was unreasonable. In this regard, NikSoft complained that DOJ rated its past performance as acceptable, even though NikSoft had received only exceptional ratings from its prime contractor evaluators. NikSoft also complained that LS3 received an acceptable rating, even though LS3 failed to provide three past performance questionnaires, as required by the RFQ.

We sustained NikSoft's protest because the record did not show that the agency meaningfully considered NikSoft's lower price in its selection decision, and because the agency's evaluation of NikSoft's past performance was unreasonable and inconsistent with the solicitation. With regard to past performance, we found that the agency's rationale for assigning a lower rating to NikSoft's past performance (that is, that NikSoft had provided evaluations only from prime contractors for work it had performed as a subcontractor) was inconsistent with the terms of the RFQ, which specifically allowed firms to provide references for which the vendor was a subcontractor on a prime contract. In sustaining the earlier protest, we

⁸ The solicitation failed to include a not-to-exceed amount of \$350,000 for purchase of the software, and thus the agency asked LS3 to revise its quotation to include the cost of the software prior to award.

recommended that DOJ perform and document a new best value selection decision.⁹ NikSoft Sys. Corp., B-406179, Feb, 29, 2012, 2012 CPD ¶ 104 at 9.

DOJ reevaluated the vendors' quotations in response to our recommendation as follows:

	NikSoft	LS3
Corporate Experience	Acceptable	Exceptional
Past Performance	Acceptable	Neutral
Technical Qualifications of Proposed Personnel	Acceptable	Exceptional
Technical Understanding and Approach	Exceptional	Exceptional
Overall Rating	Acceptable	Exceptional

AR, Tab 24, SEB Consensus Report, at 787. The SEB's reevaluation was documented in a new consensus report that provided a narrative discussion of the vendor's respective strengths, weaknesses, and deficiencies under the non-price evaluation factors.

During the reevaluation, DOJ changed LS3's rating under the past performance factor from acceptable to neutral. The SEB acknowledged that LS3 had not provided three past performance questionnaires, as required by the RFQ. The agency also determined, however, that LS3's quotation should not be considered unacceptable, because, in addition to the two questionnaires that LS3 submitted, DOJ was able to obtain other past performance information for LS3 from the Past Performance Information Retrieval System (PPIRS). The agency concluded that, under these circumstances, LS3's quotation warranted a "neutral" rating under this factor. AR, Tab 24, Consensus Report, at 793.

DOJ also reconsidered its rating of NikSoft's quotation under the past performance factor. The agency found that, although the firm had submitted three past performance questionnaires showing excellent performance by NikSoft as a subcontractor, NikSoft had not provided past performance information where it was the prime contractor. Id. at 800. As a result, the agency concluded that its earlier rating of acceptable, rather than a higher rating, was appropriate.

DOJ also evaluated the firms' price quotations. In this regard, the agency examined each firm's labor rates for the BPA's base year and escalation rates for each option year. The agency noted that, although LS3 had not identified a discount from its FSS rates and NikSoft provided a [DELETED] discount, LS3's labor rates were

⁹ We also recommended that the agency reconsider its rationale for the awardee's past performance rating.

“significantly lower than the discounted rates proposed by Nik[S]oft (on average, approximately [DELETED] less).” AR, Tab 26, Price Analysis, at 808-09. The agency also noted that LS3’s rates were in line with the IGE’s estimated rates, and that NikSoft’s rates were “significantly higher” than the IGE’s rates. Id. The agency recognized that LS3 had only submitted labor rates for the base year, and had failed to identify an escalation rate for the option years.¹⁰ Id. In its price evaluation, DOJ escalated LS3’s labor rates in the option years using the firm’s yearly escalation rate from its current FSS contract. Id.

The agency also examined the vendors’ labor hours and total labor cost to perform the first call. After noting that LS3’s total labor hours were 12 percent lower than the hours estimated by the IGE,¹¹ the agency nonetheless concluded that, given LS3’s technical approach, LS3’s [DELETED] labor hours were sufficient to perform the first call. AR, Tab 26, Price Analysis, at 813-14. In contrast, the DOJ concluded that NikSoft’s total labor hours [DELETED] were not sufficient to perform this requirement. As a result, the agency’s price evaluation increased NikSoft’s labor hours for performing the first call to the same level as LS3 (from [DELETED] to [DELETED]), which resulted in NikSoft’s evaluated price increasing from \$374,423 to approximately \$550,202.¹² 2nd CO’s Statement at 904.

At the conclusion of the agency’s review, the CO again recommended that the BPA be established, and that the call be issued to LS3, noting that, after adjusting NikSoft’s quotation to include additional hours to perform the call, NikSoft’s price was approximately \$56,000 higher than LS3’s. AR, Tab 28, Award Recommendation, at 826-29. In this regard, the CO further noted that the labor mix proposed by LS3 presented the greatest probability of success. Id. at 827. The SSA concurred, and this protest followed.

DISCUSSION

The protester raises a number of objections to the agency’s reevaluation of proposals and selection decision. Among other things, the protester objects to the agency’s decision to upwardly adjust its proposed labor hours to perform the first call, which resulted in NikSoft’s evaluated price being higher than LS3’s. In this regard, NikSoft complains that DOJ ignored NikSoft’s individual technical approach and improperly assumed that NikSoft would perform the first call in the same manner

¹⁰ LS3’s FSS contract expires in March of 2013. The agency concluded that it would renegotiate the contract at that time.

¹¹ The IGE was 4,525 hours to complete the first call order.

¹² To calculate NikSoft’s overall evaluated price, the agency added 1,500 hours to NikSoft’s least expensive hourly labor rate.

as LS3, which had a different technical approach to providing these services. See Comments at 15-16.

Where, as here, an agency issues an RFQ to FSS contractors under Federal Acquisition Regulation (FAR) subpart 8.4 and conducts a competition, we will review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the solicitation. See Digital Solutions, Inc., B-402067, Jan. 12, 2010, 2010 CPD ¶ 26 at 3-4; GC Servs. Ltd. P'ship, B-298102, B-298102.3, June 14, 2006, 2006 CPD ¶ 96 at 6. With regard to the establishment of BPAs under FSS procedures, the FAR requires that the agency establish the BPA with the contractor that provides the best value, considering price and other identified factors. FAR § 8.405-3(a)(1), (2). In this regard, FAR § 8.405-2(d) requires the agency to evaluate all responses received using the evaluation criteria provided in the solicitation, and to consider the level of effort and the mix of labor in evaluating the offered prices. See Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 9-10.

While we are mindful that, when an agency places an order under a BPA, limited documentation of the source selection is permissible, the agency must at least provide a sufficient record to show that the source selection was reasonable. FAR § 13.303-5(e); see also FAR § 8.405-2(e) (minimum documentation requirements include documenting the rationale for any tradeoffs when establishing a BPA or placing an order); e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 8 (even for procurements conducted under simplified acquisition procedures, an agency must have a sufficient record to allow for a meaningful review).

The record here provides no basis to support the agency's determination that NikSoft's level of effort or labor mix was insufficient to perform the first call, or to support its determination that NikSoft's level of effort should be increased to the same level of effort proposed by LS3. Specifically, apart from the agency's conclusion that NikSoft's level of effort is insufficient and that LS3's level of effort is sufficient, there is no analysis or explanation in the agency's price evaluation and source selection decision to support these determinations. Nor has the agency provided any explanation or support for these conclusions in response to NikSoft's protest. This is particularly problematic given DOJ's recognition that the two vendors had differing approaches to performing the call.¹³

¹³ As noted by DOJ, the level of effort and labor mix in NikSoft's and LS3's quotations to perform the call are dramatically different. For example, LS3 identified [DELETED] of its total [DELETED] labor hours for two administrative labor categories that needed no FICAM experience, while NikSoft's quotation identified no administrative labor categories. DOJ has not addressed whether these labor categories are necessary to perform the call.

FAR § 8.405-2(d) does not elaborate on the precise method of analysis, or the extent of consideration an agency must give to a vendor's proposed level of effort and labor mix. In our view, agencies are not required to conduct a formal evaluation of the kind typically performed in a negotiated procurement under FAR Part 15. However, in light of the significant differences between NikSoft's and LS3's levels of effort and labor mixes, the conclusory statements in the record simply are not adequate to demonstrate that DOJ reasonably considered whether NikSoft's level of effort and labor mix were sufficient to perform the call, or to explain the agency's decision to upwardly adjust NikSoft's level of effort to that of LS3's. We, therefore, sustain the protest on this basis.

RECOMMENDATION

We recommend that DOJ evaluate the vendors' level of effort and labor mix and make a new best value selection decision. If LS3's quotation is not found to reflect the best value, the agency should cancel LS3's BPA and establish a BPA with NikSoft. We further recommend that the protester be reimbursed its reasonable costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protesters' certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.¹⁴

Lynn H. Gibson
General Counsel

¹⁴ NikSoft also challenges the agency's technical evaluation of its and LS3's quotations, as well as the agency's evaluation of the past performance of both vendors. We have considered all of NikSoft's arguments, and find that they provide no basis to challenge the agency evaluation.