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

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Decision

Matter of: Sytronics, Inc.

File: B-297346

Date: December 29, 2005

Charles W. Mahan, Esq., and Richard L. Carr, Jr., Esq., Dunlevey, Mahan & Furry, for the protester.

J. R. Cohn, Esq., and Julius Rothlein, Esq., United States Marine Corps, for the agency.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the agency did not reasonably evaluate in accordance with the terms of the solicitation the quotation of the selected vendor in the areas of technical approach and past performance, where the agency conducted price discussions that improperly favored the selected vendor over the protester (whose higher priced quotation received a higher technical score), and where the protester was competitively prejudiced by the agency's conduct of the procurement.

DECISION

Sytronics, Inc. protests the issuance of a task order to Jenkins Electric Company, d/b/a Nexjen Systems, under request for quotations (RFQ) No. M00146-05-T-9031, issued by the United States Marine Corps for the upgrade of all hardware and software for two T58 test cells at the Naval Air Depot, Marine Corps Air Station, Cherry Point, North Carolina. Sytronics challenges the agency's decision to issue a task order to Nexjen, a vendor submitting a lower technically rated, lower priced quotation.

We sustain the protest.

BACKGROUND

The RFQ was issued as a total small business set-aside on May 18, 2005, and contemplated the issuance of a fixed-price task order to the responsible vendor whose quotation, conforming to the terms of the RFQ, was determined to be most advantageous to the government, technical evaluation factors and price considered.

The RFQ listed the following technical evaluation factors and the total number of points available for each factor: (1) technical approach (45 points); (2) past performance (25 points); (3) corporate experience (20 points); and (4) key personnel (system engineer and software developer, each worth 5 points for a total of 10 points). With respect to price, the RFQ required vendors to provide a fixed price for the upgrade of the two test cells, as well as a fixed price for a quantity of pressure transducers.¹ The RFQ provided that all technical evaluation factors, when combined, would be considered significantly more important than price.

For the technical approach evaluation factor, a vendor was required to include in its quotation a plan of action and milestones which detailed significant development and implementation events. As relevant here, the RFQ stated as follows:

4.3 REQUIRED DELIVERY DATES

- a. Clin 0001—Test Cell Upgrades: Delivery, installation, testing, acceptance, and training required for upgrade of Test Cells #1 and #3 shall be completed no later than seven (7) months after date of contract award in accordance with the schedule established by the contractor's Government approved Plan of Action and Milestone Report (CDRL [Contract Data Requirements List] A001 [which required the final plan to be supplied to the government within 30 calendar days after award]).

RFQ ¶ 4.3; RFQ attach. 1, ¶ 3.7.5.1.

For the past performance evaluation factor, the RFQ required a vendor to submit a list of at least five contracts completed within the past 3 years, and a list of all contracts currently in progress, which were similar in technical complexity² and dollar value to the requirement of this procurement. The RFQ further stated that if a vendor had completed fewer than five contracts, the vendor should include any contracts completed within the past 3 years. The RFQ advised that in evaluating a vendor's past performance, the agency would consider information provided by the vendor's references and information obtained from other sources. The RFQ stated that a vendor with no relevant past performance, or for whom information on past performance was not available, would be evaluated neither favorably nor unfavorably for the past performance evaluation factor.

¹ Prices for the transducers are not at issue in this protest.

² The RFQ defined the phrase "similar in technical complexity" as the "development of test systems in an industrial environment." RFQ at 20.

For the corporate experience evaluation factor, the RFQ stated that corporate experience would be evaluated in total and preference would be given to the vendor with experience in doing the type of business that is the subject of the RFQ and in projects of similar technical complexity and dollar value to that specified in the RFQ.

Seven vendors, including Sytronics and Nexjen, submitted quotations by the stated closing time. As relevant here, the quotations of Sytronics and Nexjen were included in the competitive range. Following written discussions, Sytronics and Nexjen submitted final revised quotations, which were evaluated as follows:

	Sytronics	Nexjen
Technical Approach	27	27
Past Performance	20	25
Corporate Experience	20	12
Key Personnel	9	6
TOTAL	76	70

Agency's Final Revised Score Sheet.

Sytronics' final task order price (\$[deleted]) was approximately [deleted] percent higher than Nexjen's final task order price (\$[deleted]). Id.

The contracting officer, who served as the source selection authority, determined that although Sytronics' quotation offered a technical advantage over Nexjen's quotation, this advantage was not sufficient to warrant the price premium associated with Sytronics' quotation. Accordingly, the contracting officer determined that Nexjen's lower technically rated, lower priced quotation offered a better value than did the higher technically rated, higher priced quotation submitted by Sytronics. Source Selection Determination at 12.

ISSUES AND ANALYSIS

Sytronics challenges the agency's evaluation of Nexjen's quotation in the areas of technical approach and past performance. Sytronics also challenges the agency's conduct of price discussions with the two vendors.

In the context of an RFQ, when an agency chooses to employ competitive procedures similar to those used in a Federal Acquisition Regulation (FAR) Part 15 negotiated procurement, and when a protest is filed challenging the outcome of the competition, we will review the record to ensure that the agency's evaluation of the vendors' submissions was reasonable and consistent with the terms of the RFQ. Computer Assocs. Int'l, Inc.--Recon., B-292077.6, May 5, 2004, 2004 CPD ¶ 110 at 3; COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5. While the provisions of FAR Part 15, which govern contracting by negotiation, do not directly apply here, we will analyze Sytronics' contentions by the standards applied

to negotiated procurements. Labat-Anderson, Inc., B-287081 *et al.*, Apr. 16, 2001, 2001 CPD ¶ 79 at 5-6; Digital Sys. Group, Inc., B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50 at 6.

Technical Approach

As stated above, the RFQ required a vendor to submit a plan of action and milestones. Nexjen failed to submit the required plan in its initial quotation. While noting as the only weakness in Nexjen's initial quotation the vendor's failure to submit the required plan, the agency, in assigning 27 points for the technical approach evaluation factor, stated that it had little concern about the risk of unsuccessful performance by Nexjen due to a lack of an acceptable technical approach. In response to a written discussion question, Nexjen submitted the required plan in its final revised quotation. In evaluating Nexjen's plan, the agency stated that the plan "was considered adequate"; however, Nexjen's "response to this issue was not sufficient to warrant an increase in [its] score," *i.e.*, more than 27 points, for the technical approach evaluation factor. Source Selection Determination at 3. Accordingly, Nexjen's score for this evaluation factor remained unchanged. The agency repeated that it had little concern about the risk of unsuccessful performance by Nexjen due to a lack of an acceptable technical approach.

After reviewing Nexjen's plan of action and milestones, which was included in the agency report, Sytronics pointed out in its comments two areas in Nexjen's plan where this vendor's proposed milestones deviated from the delivery terms of the RFQ. First, as stated above, the RFQ required completion of the two upgrades not later than 7 months after the date of award. Sytronics states that, according to Nexjen's plan, Nexjen will complete the project in 7 months and [deleted] days, which is [deleted] days more than permitted by the terms of the RFQ. Second, as stated above, the RFQ required the vendor's final plan to be supplied to the government within 30 days after award. Sytronics states that, according to Nexjen's plan, Nexjen will submit its final plan [deleted], not 30, days after award, which is [deleted] days ([deleted] percent) more than permitted by the terms of the RFQ.

In response to Sytronics' comments, the agency does not dispute that Nexjen, based on its plan of action and milestones, exceeded the delivery terms of the RFQ with respect to the time to complete the upgrades and the time to submit the final plan after the date of award. In this respect, the agency states that Sytronics

complains that Nexjen's [plan of action and milestones] displayed a [deleted]-day variance in the project completion date and a [deleted]-day variance in the due date for an approved Plan of Action. The [technical evaluation board] and the [source selection authority] found that these discrepancies caused little concern about the risk of unsuccessful performance. . . . Their judgments about these minor

variances were reasonable and in accord with the selection criteria in the solicitation.

Supplemental Agency Report at 5; see also Supplemental Contracting Officer's (CO) Statement at 22.

As an initial matter, we point out that material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the required goods or services offered. Muddy Creek Oil and Gas, Inc., B-296836, Aug. 9, 2005, 2005 CPD ¶ 143 at 2; Logitek, Inc., B-238773, July 6, 1990, 90-2 CPD ¶ 16 at 3-4, recon. denied, B-238773.2, B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401 at 2-3. Here, we conclude that the RFQ's delivery terms, which the agency concedes Nexjen did not comply with, are material terms. A quotation that fails to conform to material terms and conditions of a solicitation should be considered unacceptable and may not form the basis for the issuance of a task order. Muddy Creek Oil and Gas, Inc., supra.

While the agency now states that the technical evaluation board and the source selection authority found that the discrepancies in the delivery terms of Nexjen's plan of action and milestones, when compared to the requirements of the RFQ, caused little concern about the risk of unsuccessful performance by Nexjen, we note that there is no evidence in the contemporaneous evaluation and source selection record that at the time the agency evaluated Nexjen's final revised quotation it even recognized that Nexjen's plan deviated from the delivery terms of the RFQ as described above. In this respect, there are no written narratives in the contemporaneous record addressing the deviations in Nexjen's plan and their potential impact on Nexjen's ability to timely complete the upgrade in accordance with the terms of the RFQ. Furthermore, to the extent the agency now argues that the deviations in Nexjen's plan were "minor" and did not prejudice Sytronics, we accord little or no weight to evaluation conclusions reached by an agency after a protest has been filed, that is, in the heat of litigation. KEI Pearson, Inc., B-294226.3, B-294226.4, Jan. 10, 2005, 2005 CPD ¶ 12 at 8 n.13; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

Given the deviations in Nexjen's plan of action and milestones, and given the fact that Sytronics agreed to comply with the RFQ's delivery terms, we question whether the agency, in the first instance, could properly issue a task order to Nexjen based on its non-compliant quotation. See, e.g., Haworth, Inc., B-297077, B-297077.2, Nov. 23, 2005, 2005 CPD ¶ ___ at 8; Armour of Am., B-237690, Mar. 19, 1990, 90-1 CPD ¶ 304 at 4. In any event, we find no reasonable basis in the record for the agency's conclusion that the final revised quotations of Sytronics and Nexjen merited the same rating as represented by the point scores for the technical approach evaluation factor where Nexjen's quotation deviated from the material delivery requirements of the RFQ.

Past Performance

As stated above, the RFQ required a vendor to submit a list of at least five contracts completed within the past 3 years that were similar in technical complexity and dollar value to the requirement of this procurement.

Nexjen submitted past performance information on five contracts, respectively valued at \$49,775, \$55,000, \$72,405, \$262,420, and \$612,070. The agency considered one past performance reference for Nexjen. The reference was from a company for which Nexjen “design[ed] and buil[t] high power DC charging equipment for NiCad battery production.” Past Performance Reference for Nexjen at 1. In its supplemental report, the agency explained that the reference completed a past performance survey based on Nexjen’s performance of one purchase order valued at \$384,000; the agency states that this purchase order was one of two purchase orders completed by Nexjen under the contract valued at \$612,070. Supplemental CO Statement at 23-24.³ For this one purchase order, the reference rated Nexjen’s performance as excellent in all areas (i.e., quality of product or service, cost control, schedule, business relationships, customer satisfaction, and key personnel).⁴ In assigning the maximum score (25 points) to Nexjen’s quotation for the past performance evaluation factor, the agency states that it considered this single reference to be relevant and within the past 3 years and noted that the reference rated Nexjen’s performance as excellent in all areas. Based on the information received from the reference, the agency concluded that there was no potential risk anticipated with respect to timely delivery of a quality product by Nexjen and no expectation of degradation of performance or lack of customer satisfaction based upon Nexjen’s past performance. Competitive Range Determination at 2.⁵

³ Nexjen reports that its performance of these purchase orders took place from February through August, 2004.

⁴ The ratings available for the past performance evaluation factor were excellent, good, satisfactory, marginal, and poor.

⁵ In contrast, Sytronics submitted past performance information on 11 contracts, 5 of which were determined by the agency to be similar in both technical complexity and dollar value to the current requirement. The relevant contracts ranged in value from \$451,719 to \$1,287,191 and were performed within the past 3 years. Sytronics included a reference from the Marine Corps Air Station, Cherry Point, North Carolina, for the upgrade of test cells for which its performance was rated good in all areas; three references for the upgrade and/or development of test stands for which its performance was rated good in all areas; and one reference for the upgrade of test stands for which its performance as a subcontractor was rated satisfactory in all areas. Based on the information received from these references, the agency assigned Sytronics’ quotation 20 points for the past performance evaluation factor, i.e., Sytronics’ score for this evaluation factor was 20 percent less
(continued...)

Sytronics objects to the agency's assignment of the maximum number of points to Nexjen's quotation for the past performance evaluation factor based simply on one reference corresponding to Nexjen's performance of one purchase order which Sytronics argues was not similar in dollar value to the current requirement.⁶ In response, the agency states that the purchase order, valued at \$384,000, was similar in dollar value to the current requirement because the government estimate for this procurement was \$[deleted] and the value of the purchase order for which the agency received a reference was "[deleted]% of the independent Government estimate." Supplemental CO Statement at 24.

Here, we conclude that the agency has not provided a reasonable basis for assigning Nexjen's quotation a perfect score under the past performance evaluation factor based on its performance of only one purchase order. In this regard, it is clear that Nexjen did not furnish, as required by the RFQ, five contracts that were similar in both technical complexity and dollar value to the current requirement. More specifically, it appears, and the agency does not argue otherwise, that four of the five contracts listed by Nexjen were not similar in dollar value to the current requirement and, therefore, were not considered in the evaluation of Nexjen's past performance. In addition, the one purchase order performed by Nexjen had a dollar value that was significantly below the value of the task order at issue here ([deleted] percent less than the government estimate for the current requirement and approximately [deleted] percent less than the final task order price of \$[deleted]).⁷ In light of Nexjen's submission of only a single purchase order that even approached the government estimate, along with the fact that this single purchase order was significantly smaller than the dollar value of the current requirement, we conclude that the agency has not reasonably justified its decision to assign a perfect score to Nexjen's quotation under the past performance evaluation factor.

(...continued)

than Nexjen's score, and concluded that there was very little potential risk anticipated with respect to timely delivery of a quality product by Sytronics and no expectation of degradation of performance or lack of customer satisfaction based upon Sytronics' past performance. Id. at 3.

⁶ Sytronics also questions whether this purchase order was similar in technical complexity to the current requirement.

⁷ To the extent that Sytronics complains that the agency's evaluation of Nexjen's quotation for the corporate experience evaluation factor was similarly flawed, i.e., that Nexjen did not have projects of technical complexity and dollar value similar to the current requirement in accordance with the terms of the RFQ, it appears that the agency recognized this as it downgraded Nexjen's quotation for the corporate experience evaluation factor.

Price Discussions

The RFQ required vendors to submit fixed prices for the upgrade of the two test cells. In its initial quotation, Sytronics submitted a price of \$[deleted] and Nexjen submitted a price of \$[deleted] for the required upgrade. Both vendors received a written discussion question concerning their proposed prices. Sytronics, whose upgrade price was approximately [deleted] percent higher than the government estimate, was told that its proposed price for the upgrade “appears high” based on a comparison with the government estimate. Discussion Question to Sytronics at 2. Nexjen, whose upgrade price was approximately [deleted] percent higher than the government estimate, was told that its proposed price for the upgrade “appears excessive” based on a comparison with the government estimate. Discussion Question to Nexjen at 1. In its final revised quotation, Sytronics lowered its price for the upgrade by approximately 4 percent to \$[deleted], while Nexjen lowered its price for the upgrade by approximately 8 percent to \$[deleted].

Sytronics argues that by telling it that its high price was “high,” while telling Nexjen that its low price was “excessive,” the agency improperly favored Nexjen in terms of eliciting a much lower price from this vendor. Sytronics points out that during discussions, FAR § 15.306(e)(1) prohibits an agency from engaging in conduct that favors one offeror over another. In response, the agency states that the contracting officer’s “unintentional use of ‘excessive’ in one [discussion] letter and ‘high’ in another [discussion] letter was harmless.” Supplemental Agency Report at 7. The contracting officer explains that she “was not aware that [she] had used different words in the two letters” until she read Sytronics’ comments and that she did not believe that FAR § 15.306(e)(3) restricted her to using the words “high” and “low” during discussions. Supplemental CO Statement at 24. The contracting officer states that her “use of two synonyms was not intended to favor one proposal over another. [Her] motivation was to obtain, through discussions, the offer most advantageous to the government.” Id.

An agency may not conduct discussions in a manner that favors one vendor over another. Martin Elecs., Inc., B-290846.3, B-290846.4, Dec. 23, 2002, 2002 CPD ¶ 6 at 9. The issue here is whether during discussions the agency improperly favored Nexjen to the detriment of Sytronics when it advised Sytronics that its high price “appeared high,” while it advised Nexjen that its low price “appeared excessive.” We conclude, based on the record, that the agency conducted price discussions which improperly favored Nexjen over Sytronics, even if that was not the agency’s intention.

In this regard, where Sytronics’ price for the required upgrade was significantly higher than Nexjen’s price, the agency has provided no reasonable explanation for why, if it viewed Nexjen’s lower price as “excessive” in comparison to the

government estimate, it similarly did not view Sytronics' higher price as "excessive," as opposed to merely "high." While we accept the agency's explanation that the use of different words was unintentional, we agree with the protester that a vendor would reasonably view the term "excessive" as sending a stronger message than the term "high." This distinction in the message is consistent with the larger price reduction made by the vendor told that its price appeared excessive (Nexjen). On this record, we conclude that the agency conducted price discussions in a manner that unreasonably favored Nexjen over Sytronics.

Prejudice

We will not sustain a protest absent a showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Here, the RFQ stated that all technical evaluation factors, when combined, would be considered significantly more important than price. The contemporaneous source selection determination states that Sytronics' quotation offered a technical advantage over Nexjen's quotation based on the point scores assigned to these quotations. As discussed above, we conclude that the agency may have understated the non-price advantages of Sytronics' quotation and the conduct of the price discussions may have led to a greater price advantage for Nexjen. Accordingly, we find that Sytronics has been competitively prejudiced by the agency's conduct of this procurement because, but for the flaws in the conduct of the procurement, Sytronics would have had a substantial chance for award.⁸

RECOMMENDATION

The agency's position appears to be that the delivery requirements of the RFQ overstate the agency's needs. In these circumstances, we recommend that the agency review its needs, revise the RFQ to reflect its needs as appropriate, and solicit new quotations to ensure that all vendors are afforded an equal opportunity to compete based upon the same set of requirements. The agency should then evaluate the quotations in accordance with the terms of the RFQ, hold proper discussions if needed, and make a new decision regarding the issuance of a task order. If the task order is issued to a vendor other than Nexjen, the agency should cancel Nexjen's

⁸ Where an agency conducts discussions in a manner that favors one vendor over another, we will not speculate about the results had the agency conducted proper discussions and we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester; a reasonable possibility of prejudice is a sufficient basis for sustaining the protest. Martin Elecs., Inc., *supra*, at 9.

task order. In addition, we recommend that the agency reimburse Sytronics for the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. Sytronics' certified claim for costs, detailing the time expended and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (2005).

The protest is sustained.⁹

Anthony H. Gamboa
General Counsel

⁹ Sytronics has raised a number of collateral issues that we have considered and find to be without merit; these collateral issues do not warrant detailed analysis or discussion.