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Comptroller General
of the United States

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Decision

Matter of: Computer Products, Inc.

File: B-284702

Date: May 24, 2000

Ira E. Hoffman, Esq., Alan M. Grayson, Esq., and Brian T. Scher, Esq., Grayson & Kubli, for the protester.
Pamela J. Mazza, Esq., Philip M. Dearborn III, Esq., and Antonio R. Franco, Esq., Piliero, Mazza & Pargament, for Tessada & Associates, Inc., an intervenor.
Joseph Boggs, Esq., Department of the Navy, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a competitive procurement under the Federal Supply Schedule program in which the solicitation announced that award would be made on a best value basis and that technical factors were more important than price, the agency improperly selected the awardee to receive the order based upon the awardee's technically acceptable, lowest-priced quote.

DECISION

Computer Products, Inc. (CPI) protests the award of an order to Tessada & Associates, Inc. under its Federal Supply Schedule (FSS) contract, pursuant to request for quotations (RFQ) No. 3-GR-2553, issued by the Naval Air Warfare Center. CPI complains that the Navy selected Tessada for award as the lowest-priced, technically acceptable quote, but that the RFQ stated that technical merit was more important than price and the Navy did not credit CPI for its technically superior quote.

We sustain the protest.

The Navy issued the RFQ on January 13, 2000 to [DELETED] FSS vendors, including CPI and Tessada, seeking quotes for financial reconciliation and prevalidation of obligations services. RFQ Cover Letters. The vendors were informed that 11,955 staff hours were required to perform the RFQ requirement and that they should quote a mix of labor categories from their FSS schedule contracts. Id. A statement

of work was provided that described the services to be provided, including that the contractor would be required to use “the Computer Optimized Batch Reconciliation Application (COBRA) in order to efficiently perform the required work.” RFQ at 2.

The RFQ stated that award would be made to the “responsible GSA [General Services Administration] vendor who proposes the **best value** to the Government, cost and other factors considered” and listed the following evaluation factors in descending order of importance: past performance, personnel, and cost. RFQ at 3.

Quoters were informed that the evaluation of past performance factor would be based upon the vendor’s “experience and past performance on contracts and subcontracts currently on-going or completed within the last five years that are directly similar in scope, magnitude, and complexity to the requirements in the [RFQ’s statement of work].” *Id.* The evaluation would include assessing the vendor’s knowledge and ability to perform the statement of work tasks, including mechanization of contract administration services, standard accounting and reporting systems, negative unliquidated obligations, unmatched disbursements, official undistributed disbursements, COBRA, and Defense Finance and Accounting Service working relationships. *Id.*

With respect to personnel, the RFQ stated that the evaluation would be based on the availability of personnel to perform the requirements and on the vendor’s hiring plan to meet the government’s immediate needs. The RFQ did not provide for any consideration of quoters’ offered labor skill mix.

Vendors were also informed in the RFQ’s cover letter that the Navy would follow the “new procedures established by GSA.” Although not provided with the RFQ, the “new procedures” are “ordering procedures for services” that GSA has published on its Internet site.¹ *See* Agency Report, Tab 2, GSA Ordering Procedures for Services.

¹ *See* <http://pub.fss.gsa.gov/schedules/ordinssv.cfm>. This guidance states that the special ordering procedures take precedence over the procedures in Federal Acquisition Regulation (FAR) § 8.404. The special ordering procedures are apparently designed to address the concern that, when a schedule contains services priced at hourly rates, merely comparing competing vendors’ hourly rates, without regard to the number of hours or mix of labor categories the different vendors would use, is an inadequate indicator of which vendor represents the lowest price. We note that the procedures call for vendors to be provided a performance-based statement of work, which presumably would allow vendors to propose differing levels of effort and labor category mixes. In this regard, it is unclear why, in this case, the Navy dictated a level of effort of 11,955 labor hours, which limited vendors’ ability to craft innovative solutions, or why, given that it dictated the level of effort, it did not provide for the evaluation of the labor categories that would be employed under this order. As indicated below, we find this to be a fundamental defect in the solicitation.

Among other things, this guidance provides that agencies when ordering services should prepare RFQs that “notify contractors what basis will be used for selecting the contractor to receive the order.” Id. at 1. It also provides as follows:

After responses have been evaluated against the factors identified in the request for quotes, the order shall be placed with the schedule contractor that represents the best value and results in the lowest overall cost alternative (considering price, special qualifications, administrative costs, etc.) to meet the Government’s needs.

Id. at 2. For requirements that exceed micro-purchase threshold (\$2,500), agencies are directed to document the evaluation of quotes that formed the basis for the selection of the vendor receiving the order and to document the rationale for any tradeoffs made in making the selection. Id. at 3.

The Navy received and evaluated quotes from the [DELETED] vendors. Agency Report, Tab 11, Technical Evaluation.

With respect to the evaluation of CPI’s quote under the past performance factor, the evaluator found, among other things, that the protester had numerous contracts with the [DELETED] performing the work sought by the RFQ and that [DELETED]. With respect to the personnel factor, the evaluator noted that CPI already had a trained staff ready to perform, that no hiring or realignment would be required, and that CPI owned the COBRA software.² Id. at 3.

With respect to the evaluation of Tessada’s quote under the past performance factor, the evaluator found that Tessada had extensive experience in [DELETED], but that Tessada had [DELETED]. Agency Report, Tab 11, Technical Evaluation, at 2. The evaluator also noted that Tessada [DELETED]. With respect to the personnel factor, Tessada [DELETED]. Id.

The evaluator concluded that “[a]ll quotes were found to be technically acceptable.” The firm’s quoted prices (Tessada quoted \$350,686, and CPI quoted \$[DELETED]) were then reviewed by the evaluator who “recommended that award be issued to Tessada Associates who offers the technically acceptable quote with the lowest price.” Agency Report, Tab 11, Evaluation Document, at 1. Tessada’s lower quoted price is attributable to [DELETED]. Compare Agency Report, Tab 10, Tessada’s Quote, at 8, with Agency Report, Tab 8, CPI’s Quote, at 4. The evaluator did not evaluate the firms’ labor skill mix.

² CPI developed the COBRA software, which it licenses for use. Protest at 6.

The contracting officer accepted the evaluator's recommendation as follows:

It was determined that all quotes satisfied the stated evaluation criteria and were essentially equivalent. There were no qualitative advantages that would warrant a cost/technical tradeoff. Therefore, in accordance with the RFQ which stated that the degree of importance of price/cost would increase commensurably with the degree of equality among technical quotes, it is determined that it is in the best interest of the Government to award to the low price quote.

Agency Report, Tab 12, Contracting Officer's Memorandum For File, at 3.

Award was made to Tessada on February 8, 2000, and CPI protested to our Office after receiving a debriefing from the Navy. Performance of Tessada's order has been stayed pending our decision in this matter.

CPI protests that the Navy selected Tessada to receive award based upon its low price even though the RFQ provided that the technical evaluation factors were more important than price. Protest at 4-5; Comments at 15-20. In this regard, CPI complains that the evaluation record demonstrates that CPI offered material advantages under the past performance and personnel factors that the Navy ignored in selecting Tessada's lower-priced quote. Comments at 19.

The Navy states that the RFQ did not provide for a cost/technical tradeoff or qualitative ranking of quotes in determining which firm would be selected to receive the order. Agency Report at 7-10. Rather, the Navy argues that, as the RFQ informed quoters, GSA's special ordering procedures were applicable and that this meant that award would be made to the lowest cost alternative and not based upon a cost/technical tradeoff. Agency Report at 7-8. The Navy also cites the decision of the U.S. Court of Federal Claims in Ellsworth Assocs., Inc. v. United States, 45 Fed. Cl. 388 (1999), for the proposition that the procedures of FAR Part 15 are inapplicable to FSS procurements.

We agree with the Navy that the procedures of FAR Part 15, governing contracting by negotiation, do not govern competitive procurements under the FSS program. This does not mean, however, that the agency can announce one basis for award and then make award on another basis. Under the FSS program, agencies are not required to conduct a competition before using their business judgment in determining whether ordering supplies or services from an FSS vendor represents the best value and meets the agency's needs at the lowest overall cost. FAR § 8.404(a); Amdahl Corp., B-281255, Dec. 28, 1998, 98-2 CPD ¶161 at 3. However, where an agency conducts a competition, we will review the agency's actions to ensure that the evaluation was

reasonable and consistent with the terms of the solicitation. Id.; COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5.³ Selecting a vendor on an award basis different than that announced in the solicitation is not consistent with the agency's obligation to treat vendors fairly. See FAR § 1.102-2(c)(3).

The Navy contends that vendors were informed that the agency would be using GSA's "new procedures" in conducting the procurement and that these special ordering procedures require that an order be issued based on the lowest overall cost quote. We do not agree that the Navy, by reference to these procedures, informed vendors that award would be made to the technically acceptable, lowest-priced quote. To the contrary, GSA's ordering procedures for services provide that agencies should notify vendors of the basis upon which orders will be awarded, evaluate quotes against the factors identified in the RFQ, and document the rationale for any tradeoffs made in the award decision. See Agency Report, Tab 2, GSA Ordering Procedures for Services, at 1-3.

Here, the RFQ stated that an order would be issued to the firm that offered the government the best value, price and other factors considered. RFQ at 3. By identifying evaluation factors in descending order of importance, the RFQ informed vendors that technical quality would be more important than price in determining which vendor would receive the order. Accordingly, under the evaluation scheme presented by this solicitation, where one vendor offers superior technical merit and another offers a lower-price, the agency must perform a cost/technical tradeoff to determine which offers the government the best value.⁴

The Navy alternatively argues that a cost/technical tradeoff was not required in any event because there were no qualitative advantages between the quotes that would

³ This is consistent with the standard of review announced by the Court of Federal Claims in Ellsworth Assocs., Inc., which cites our decision in COMARK Fed. Sys., supra. See 45 Fed. Cl. at 394-96.

⁴ The Navy argues that the term "best value," which was used in this solicitation, does not necessarily require that award be based upon a cost/technical tradeoff. Agency Report at 7-8. We agree that, as defined by the FAR, "best value" simply "means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement." FAR § 2.101. This definition would encompass a solicitation providing for selection of the low-cost, technically acceptable proposal, as well as one calling for a cost/technical tradeoff. Thus, the term "best value" does not itself inform vendors how offers or quotes will be evaluated and the award decision made. Whether a cost/technical tradeoff is required is dependent upon the evaluation criteria and their weighting, as stated in the solicitation, and upon the facts presented in the procurement, for example, whether one vendor presents greater technical merit while another presents a lower price.

warrant a cost/technical tradeoff. Agency Report, Tab 20, Declaration of Contracting Officer, Mar. 15, 2000, at 2. This post-protest assertion is not consistent with the contemporaneous evaluation documentation.

As noted above, the technical evaluator noted a number of differences between CPI's and Tessada's quotes that appear to be meaningful discriminators under the stated evaluation factors. For example, CPI appeared to have greater and more specific experience than did Tessada. Also, the evaluator noted that CPI owned the COBRA software, the use of which is required to perform the RFQ requirements, while Tessada did not indicate whether it had access rights to the software. Moreover, CPI had a trained staff ready to perform, while Tessada [DELETED]. Agency Report, Tab 11, Technical Evaluation, at 2-3.

The record does not evidence that these evaluation findings were meaningfully considered by the contracting officer in her selection decision. Specifically, there is no documentation in the record that reflects that the agency considered whether these apparent evaluated discriminators were meaningful or not. We recognize that the contracting officer states that she consulted the technical evaluator and was informed that the evaluator saw no technical differences between the two firms' quotes that would justify paying a price premium. See Agency Report, Tab 20, Declaration of Contracting Officer, Mar. 15, 2000, at 2. However, the agency provides no explanation from the contracting officer or technical evaluator as to why this is the case, given the evaluated differences between the two firm's quotes. In the absence of persuasive evidence that the agency considered the relative evaluated technical merits of the firms' quotes, as reflected in the contemporaneous evaluation documentation, we conclude that the agency selected Tessada for award, as the firm with the technically acceptable, lowest-priced quote, and not on the basis of announced evaluation criteria that provided that technical merit would be accorded more weight than price. We sustain CPI's protest on this basis.⁵

In crafting our recommendation, we must address the fact that the RFQ is fundamentally defective. We see no rational basis for dictating a level of effort of 11,955 hours while allowing vendors to propose different labor mixes, nor do we believe that the agency can rationally select a vendor without evaluating the different labor mixes or assessing whether the vendors' proposed solutions satisfy the agency's needs. This is true regardless of whether the solicitation calls for a cost/technical tradeoff or selection of the low-cost, technically acceptable solution.

⁵ CPI also protests that Tessada's quote was unacceptable because it did not demonstrate knowledge of the COBRA software. Protest at 6. However, Tessada's quote specifically states that [DELETED]. Agency Report, Tab 10, Tessada Quote, at 5.

Accordingly, we recommend that the Navy amend the RFQ to clarify the basis upon which award will be made (for example, to specify that award will be based upon the lowest-priced, technical acceptable quote, if that is the basis upon which the agency wishes to make award). Regardless of the basis of award selected, if the agency chooses to allow vendors to propose different solutions, then the RFQ should allow the submission of different numbers of labor hours and different labor mixes, both of which should be evaluated by the agency. The Navy should obtain new quotes and make a new source selection decision. If a quote from another firm is selected, we recommend that the Navy terminate the order issued to Tessada and place an order with the other firm. We also recommend that the protester be reimbursed 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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of the United States