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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: ACCESS Systems, Inc.

File: B-400623.3

Date: March 4, 2009

Katherine S. Nucci, Esq., and Timothy Sullivan, Esq., Thompson Coburn LLP, for the protester.

Christopher M. Johnson, Esq., and Brian C. Caney, Esq., Centre Law Group, LLC, for Avineon, Inc., the intervenor.

Lisa L. Baker, Esq., United States Marine Corps, for the agency.

Christina Sklarew, Esq., and Guy R. Petrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained in a competition for the issuance, on a best-value basis, of a task order to a higher-priced vendor under 8(a) Streamlined Technology Acquisition Resources for Services (STARS) government-wide acquisition contract, where the record does not show meaningful consideration of price in the agency's selection of the higher-price quotation, nor identify the superior capabilities of the awardee's quotation that would justify paying the price premium associated with that quotation.

DECISION

Access Systems, Inc., of Reston, Virginia, protests the issuance of a task order to Avineon, Inc., of Alexandria, Virginia, under request for quotations (RFQ) No. M67854-08-Q-4969, issued by the U.S. Marine Corps for information technology (IT) services for the Office of the Command Information Officer (OCIO), Marine Corps Systems Command. Access challenges the Marine Corps's technical evaluation, source selection decision, and conduct of discussions.

We sustain the protest.

The RFQ provides for the issuance of a fixed-price task order under the General Services Administration's 8(a) Streamlined Technology Acquisition Resources

(STARS) government-wide acquisition contract.¹ Vendors were informed that the agency sought on-going technical and management support of the IT operations of the Marine Corps Systems Command. RFQ amend. 1, Statement of Work (SOW), at 1. At the time the RFQ was issued, Access had been performing these services for 6 years.

The RFQ stated that the task order would be issued on a “best value” basis and that “overall technical merit [was considered] to be of significantly greater importance than evaluated price.” In this regard, the RFQ provided that

[w]hile the evaluated price to the government is a substantial area of consideration in the integrated assessment of offers, the overall technical merit is significantly greater than evaluated price. Therefore, the government may select other than the lowest price, acceptable offer if it is determined that the superior capability is worth the additional price. However, the government will not make an award at a significantly higher price to achieve only **slightly** superior performance capability.

RFQ amend. 3, at 16-17 (emphasis in original). The following three technical evaluation factors and subfactors were identified:²

- Understanding and Approach
 - Management Approach
 - Understanding of Requirements
 - Technical Approach

¹ The 8(a) STARS contract is a multiple-award, indefinite-delivery/indefinite-quantity contract set aside for section 8(a) small disadvantaged business concerns. Although the Marine Corps has stated it issued an order to Avineon in accordance with the Federal Supply Schedule procedures of Federal Acquisition Regulation (FAR) Part 8.4, orders under the 8(a) STARS contract are required to be issued in accordance with FAR § 16.505, which governs orders under indefinite-delivery contracts. See 8(a) STARS Contract Ordering Guide, April 2007, available online at www.gsa.gov/8astars.

² The RFQ also identified a number of “primary elements” under the technical evaluation subfactors. For example, under the technical approach subfactor, the RFQ informed vendors that the agency would evaluate the firm’s service desk experience and application of that experience to the requirement. RFQ amend. 3, at 18.

Personnel

- Key Personnel
- Non-key Personnel Staffing Plan

Past Performance

- Past Performance Referenced Projects
- Past Performance Interview Feedback

Vendors were informed that the understanding and approach factor was more important than the personnel factor, which was more important than the past performance factor. RFQ amend. 3, at 17-19.

The RFQ also stated that the understanding/approach and personnel factors would be adjectivally rated, as follows:

Rating	Definition
Exceptional	Exceeds the requirements of the solicitation and offers a distinct benefit to the USMC - No significant weaknesses.
Acceptable	Meets or exceeds the requirements of the solicitation; value of strengths is equal to or outweighs that of weaknesses.
Marginal	Meets the requirements of the solicitation; value of weaknesses outweigh strengths.
Unacceptable	Fails to meet all requirements of the solicitation.

Id. at 17. The RFQ further stated that relevant past performance would be evaluated for low, moderate, or high risk.

With respect to price, vendors were informed that price would not be rated but would be evaluated for reasonableness, realism, and completeness. Id. at 17-18.

Quotations were received from Avineon and Access. The technical quotations were evaluated by the agency's source selection evaluation board (SSEB), while the price quotations were evaluated by the contracting officer, who was also the source selection authority (SSA).³ Following the evaluation of initial quotations, discussions were conducted with the firms, and revised technical and price quotations were obtained.

³ The SSEB members individually evaluated the technical quotations, and then met as a group to arrive at a consensus evaluation for each quotation. See Agency Report (AR), Tab E14, Avineon's Initial Technical Evaluation; and Tab E15, Access's Initial Technical Evaluation.

In its evaluation of Access's and Avineon's revised technical quotations, the SSEB assigned the firms identical adjectival ratings of "acceptable" under the understanding/approach and personnel factors, reflecting the SSEB's conclusion that neither firm's quotation had exceeded the solicitation's requirements under any of the evaluation factors and subfactors, and both firms' past performance was assessed as low risk. The SSEB's adjectival ratings were supported by a narrative discussion of the firms' revised quotations that identified a number of strengths for each firm and found that neither firm's revised quotation had any weaknesses. For example, among the strengths noted under Avineon's revised quotation was that Avineon's corporate capabilities included certifications of Capability Maturity Model Integration (CMMI)⁴ level [deleted] and ISO [deleted].⁵ The SSEB also noted that Avineon had proposed [deleted] and provided for [deleted] for the service desk, and that a majority of the firm's proposed key personnel were "very well qualified (e.g. education, professional expertise)." AR, Tab 21, Avineon's Final Technical Evaluation, at 2, 4-5. With respect to Access's revised quotation, the SSEB noted, among other things, the firm's achievement of CMMI level [deleted] and ISO [deleted] certifications, its thorough understanding of the requirements (as the incumbent contractor), and its low transition risk. AR, Tab 22a, Access's Final Technical Evaluation, at 2, 4-5.

The firms' price quotations were evaluated by the SSA, assisted by two contract specialists. Access's total evaluated price was [deleted], and Avineon's total evaluated price was \$24,554,565, approximately [deleted] (or [deleted] percent) higher than Access's price.

Although it is not completely clear as to how the agency proceeded to the source selection decision, the record shows that, after the SSEB completed its consensus evaluation of the firms' revised technical quotations, the technical evaluators were provided with the firms' price quotations. Hearing Transcript (Tr.) at 32.⁶ Based upon their final consensus technical evaluation and the firms' total evaluated prices, the evaluators decided that Avineon's higher-priced quotation reflected the best

⁴ The CMMI was developed by the Carnegie-Mellon Software Engineering Institute and is a process improvement approach that provides organizations with the essential elements of effective processes. See www.sei.cmu.edu.

⁵ "ISO" refers to a family of standards for quality management systems, established by the International Organization for Standardization, a non-governmental organization. The word ISO is derived from the Greek word "isos," meaning "equal." See www.iso.org.

⁶ We conducted a hearing to receive testimony from the SSA and the SSEB chair to explain the basis of the agency's source selection decision and its concern with Access's billing rates. As is our regular practice, these issues were identified in a pre-hearing conference and confirmed in our written notice of hearing.

value to the government and that the SSEB would recommend that the task order be awarded to that firm.⁷ The SSEB chair met with the SSA to discuss the SSEB's technical evaluation and recommendation to issue a task order to Avineon.⁸ Tr. at 169. Following the meeting with the SSEB chair, the SSA decided that Avineon's quotation reflected the best value to the government and had the SSEB chair draft that portion of the Best Value Award Decision Memorandum (BVADM) that reflected the SSEB's technical evaluation.

The SSEB chair also drafted a section of the BVADM, entitled "SSEB Discussion," which compares the various strengths of the two firms' quotations. For example, this section recognizes Access's strengths as the incumbent contractor, but concludes that Avineon has a superior understanding and approach to the work (although, as noted above, each firm's quotation received identical adjectival ratings under the non-price evaluation factors). See AR, Tab E10, BVADM, at 5. This section also identifies, for the first time in the contemporaneous record, a concern that Access's labor billing rates are lower than Avineon's in **[deleted]** labor categories, which "may lead to even less employee retention and greater turnover, which could negatively impact the OCIO Network Operations Support Effort." Id. This concern with Access's billing rates was not identified in the agency's discussions with Access.⁹

The SSA drafted the final "Determination" section of the BVADM, which reflects her source selection decision and states in its entirety:

Given the criticality of the OCIO Network Operations Support effort, it is of the utmost importance that the offeror with the most comprehensive solution to our requirements be selected. To that

⁷ There is no contemporaneous documentation explaining the SSEB's best value analysis or its recommendation to issue a task order to Avineon.

⁸ Although the SSA testified that she met with the SSEB chair "one-on-one" to discuss the SSEB's evaluation, see Tr. at 185-87, the SSEB chair had no recollection of this meeting with the SSA. See Tr. at 58-59, 213.

⁹ Access objects that this concern is based on unsubstantiated assumptions that could have been refuted in discussions. In this regard, Access states that its labor billing rates "were carefully developed with due consideration for **[deleted]**, and other benefits aimed at retaining Access's [workforce]," and that other factors, "such as an **[deleted]**, enabled Access to **[deleted]**." Protester's Comments at 4; Protester's Supplemental Comments at 12. We do not address this matter in our decision, given the SSA's hearing testimony that she did not share the SSEB chair's concern with Access's labor billing rates and that this concern was not considered in her source selection.

end, the Marine Corps stated in the RFQ that the non-price factors (understanding and approach, personnel and past performance) when combined, were significantly more important than price. After full and complete consideration of the respective quotations and the evaluation reports, I find that the significant advantages and strengths of the Avineon proposal are of the greatest value to the Marine Corps than the lower priced proposal submitted by Access. Based on my review of the Offerors' submissions and the respective evaluation reports, I have determined that Avineon's quotation represents the best value to the U.S. Marine Corps by offering the most comprehensive solution, which provides the greatest degree of support for the OCIO effort.

Id. at 5-6 (emphasis in original).

A task order was issued to Avineon, and, following a debriefing, Access filed this protest.¹⁰ The agency has stayed performance of the task order pending our decision in this matter.

Access protests that the Marine Corps failed to meaningfully consider price in its evaluation and source selection decision. Further, Access contends that, while the BVADM identifies apparent advantages in Avineon's quotation, those advantages are illusory, either because Access offered comparable features, or because the advantages cited are not reflected in, and thus are inconsistent with, the evaluation criteria in the RFQ, so that they do not warrant paying the associated price premium.

As an initial matter, the agency argues that Access's complaint that the agency did not adequately document its cost/technical tradeoff analysis is untimely. However, Access specifically argued in its initial protest that the agency failed to meaningfully consider price in its decision to issue a task order to Avineon. See Protest at 7-8. We do not view Access's arguments regarding the adequacy of the agency's documentation of its cost/technical tradeoff to be a new basis of protest that was required to independently satisfy our timeliness rules; rather, the adequacy of the agency's documentation of its cost/technical tradeoff concerns the quality of evidence in the record as to whether the agency's judgment was reasonable. See

¹⁰ We dismissed Access's initial protest on the basis of an un rebutted statement by the agency that we believed indicated that Access had an impermissible organizational conflict of interest (OCI); on that basis, we concluded that Access was not an interested party. We granted the protester's request for reconsideration based upon the agency's acknowledgment that it had not, in fact, determined that Access had an OCI, and we informed the parties that we would decide Access's protest on the merits. A number of Access's original grounds of protest have been withdrawn and will not be discussed in this decision.

Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10 (where an agency fails to document its evaluation judgments, it bears the risk that its judgments may not be found reasonable). In this regard, Access's arguments merely provide additional support for an earlier, timely-raised protest basis. See, e.g., Oceaneering Int'l, Inc., B-287325, June 5, 2001, 2001 CPD ¶ 95 at 6; Litton Sys., Inc., B-256709, July 21, 1994, 94-2 CPD ¶ 60 at 8-9, n.5.

With respect to the merits of Access's protest, the Marine Corps contends that it gave due consideration to the firms' evaluated prices in determining that Avineon's quotation reflected the best value to the government. As explained below, we find that the record does not establish that the agency meaningfully considered Access's lower evaluated price in the agency's cost/technical tradeoff analysis and sustain Access's protest on this basis.

In reviewing protests of an agency's evaluation and source selection decision, even in a task order competition as here, we do not reevaluate proposals but examine the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. See Triple Canopy, Inc., B-310566.4, Oct. 30, 2008, 2008 CPD ¶ 207 at 6-7; Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. Where, as here, an agency selects a higher-priced solution that has been rated technically superior to a lower-priced one, the award decision must be supported by a rational explanation demonstrating that the higher-rated one is in fact superior, and explaining why its technical superiority warrants the additional cost. e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 7. Such judgments are by their nature often subjective; nevertheless, the exercise of these evaluation judgments must be reasonable and bear a rational relationship to the announced criteria upon which competing offers are to be selected. Hydraudyne Sys. and Eng'g B.V., B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88 at 4. In order for us to review an agency's evaluation judgment, the agency must have adequate documentation to support its judgment. See Southwest Marine, Inc.; American Sys. Eng'g Corp., *supra*, at 10; see also e-LYNXX Corp., *supra*, at 8 (it is a fundamental principle of government accountability, even when using simplified acquisition procedures, that an agency be able to produce a sufficient record to allow for a meaningful review where its procurement actions are challenged).

Here, the contemporaneous evaluation record shows that the agency qualitatively evaluated the firms' technical quotations, and based upon that evaluation identified differing technical strengths. While the firms' technical quotations received identical adjectival and risk ratings, the agency appropriately looked beyond the adjectival ratings to consider the significance of the firms' differing evaluated technical strengths. See Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 11 (ratings, be they numerical, color or adjectival, are merely guides for intelligent decision-making in the procurement process).

Although the record shows that the agency's evaluators considered the technical merit of the two firms' respective quotations, the contemporaneous record, as further explained by the agency in its response to the protest, did not demonstrate meaningful consideration of Access's lower evaluated price. That is, the BVADM, which is the only contemporaneous documentation of the agency's cost/technical tradeoff analysis, does not provide an explanation of why the evaluated technical superiority of Avineon's quotation warrants its additional cost. Rather, to the extent that Access's lower evaluated price is addressed at all in the BVADM, the firm's price advantage appears to be viewed as a technical disadvantage, based upon assumptions regarding the effect that Access's lower labor billing rates would have on the firm's ability to retain staff.¹¹

Because the contemporaneous record, as explained by the agency, did not provide us with a basis to review the reasonableness of the agency's cost/technical tradeoff analysis, we conducted a hearing to receive the testimony of the SSA and SSEB chair. That testimony, however, shows that neither witness accorded much weight, if any, to Access's **[deleted]** price advantage, nor could the SSA explain what evaluated strengths in Avineon's quotation justified the payment of this price premium.

Specifically, at the hearing, the SSA was asked how she would characterize the **[deleted]** difference in price, to which she replied "Insignificant" and "Not significant." Tr. at 176. She further explained:

Q. What weight did you give to the price?

A. We did not weight price.

Q. And that would be --

A. Because technical was significantly more important than price and we weren't looking at price realism.

Tr. at 176-77. When asked by the hearing official whether she had credited Access for the firm's price advantage in making her cost/technical tradeoff judgment, the SSA testified:

No. We discussed whether [the SSEB chairman] wanted to keep the same, you know, status quo. He's been doing it a long time with them and he was very comfortable with it. But again, pricing, it

¹¹ As noted above, the SSA did not share the SSEB chair's concerns with Access's billing rates and whether they would affect the firm's ability to retain staff. See Tr. at 175-76, 190-91.

wasn't a weight, so I didn't really - of course, we talked about technically - we were doing a best value, we weren't doing a technically acceptable low price.

Tr. at 198-99.

Similarly, the SSEB chair testified, in response to the hearing official's inquiry as to what extent he considered price in preparing the SSEB's selection recommendation, that "I think from our standpoint, the cost was not a big determinant. It was just another data point in many data points that we had," Tr. at 55, and that "I hate to say it, [the price differential] did not have a very large impact on our decision . . ." Tr. at 56-57. When asked whether he had considered Avineon's price premium in making his recommendation, the SSEB chair replied:

The price was discussed. Contracts, from what I remember, their statements were you don't have to jump to the lowest price/technically acceptable proposal. This is not [lowest-price, technically acceptable] procurement. This is a best value procurement. It may look like a lot of money, that **[deleted]** figure, but it's a five-year contract. That's a long period of time.

Tr. at 77-78.

In short, the testimony of the agency's witnesses did not demonstrate meaningful consideration of Access's price advantage in the selection decision. Moreover, the agency in its post-hearing comments repeatedly argued that Access's **[deleted]** lower price did not reflect a price advantage. See, e.g., Agency's Post-Hearing Comments at 24 ("Protester has continually asserted that its lower price represented a 'pricing advantage,' apparently simply due to the fact that it was lower."). Similarly, the agency argues as follows:

Accordingly, while agencies must consider an offeror's price, a lower price is not a price advantage if the agency does not consider it to result in the greatest overall benefit. While [Access] could, for its lower price, perform its proposal, in that its proposal was deemed less beneficial, no price advantage existed.

Id. Even in a competition where price is of less importance than the non-price factors, an agency must meaningfully consider cost or price in making its selection decision. See S.J. Thomas Co., Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73 at 3. Although the cost/technical tradeoff process allows an agency to accept other than the lowest-priced submission in such a competition, the perceived benefit of the higher-priced alternative must merit the additional price. See e-LYNXX Corp., supra, at 7. In other words, one firm's technical advantage must be determined to outweigh the other firm's price advantage.

Here, the SSA was unable to recall with any specificity the relative technical merit of the firms' quotations that would justify the payment of the price premium associated with Avineon's quotation. The SSA testified that she was "not a technical person," and "[knew] nothing about IT," and had not "read a proposal from beginning to end." See, e.g., Tr. at 153, 201. When asked to explain her assertion that she had made her "own independent determination to accept [the SSEB's recommendation]," the SSA testified, that "[w]hen we talked about this, I knew—I was very clear in what [the SSEB chair] was saying and what he meant. And I—once he laid it out, I saw where he was coming from and he was able to convince me that this was the best thing for the Marine Corps." Tr. at 201-02. Despite this assertion that at the time she made the selection decision she understood why the SSEB chair believed that Avineon's quotation was superior to Access's, the SSA was unable at the hearing to explain why Avineon's evaluated strengths indicated that firm's technical superiority. Under the circumstances, we have no basis to find reasonable the SSA's cost/technical tradeoff analysis (even assuming that price had been meaningfully considered).

The protest is sustained.

We recommend that the agency perform and document a new cost/technical tradeoff analysis that meaningfully considers Access's price advantage. If Avineon's quotation is not found to reflect the best value to the government, the agency should terminate Avineon's task order. We also recommend that Access be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Gary L. Kepplinger
General Counsel