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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: Glotech, Inc.

File: B-406761; B-406761.2

Date: August 21, 2012

Thomas K. David, Esq., and Kenneth D. Brody, Esq., David, Brody & Dondershine, LLP, for the protester.

R. René Dupuy, Esq., and William C. Buckhold, Esq., United States Agency for International Development, and Michael D. Tully, Esq., General Services Administration, for the agencies.

Paul N. Wengert, Esq., Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to meaningfully consider price in issuing blanket purchase agreements under Federal Supply Schedule program involving a maximum of \$900 million in orders is sustained where the record shows that the agency selected vendors only on the basis of their technical evaluation scores.

DECISION

Glotech, Inc., of Rockville, Maryland, a small business, protests the issuance of blanket purchase agreements under the Federal Supply Schedule (FSS) to seven firms¹ under request for quotations (RFQ) No. SOL-CIO-12-000002, issued by the United States Agency for International Development (USAID) for information technology supplies and services, known as “USAID IT Forward.” Glotech argues

¹ The seven successful vendors were identified as IBM Global Business Services--Federal, of Bethesda, Maryland; Digital Management Inc., of Bethesda, Maryland; HP Enterprise Services, of Herndon, Virginia; CGI Federal, Inc., of Fairfax, Virginia; Computer Sciences Corporation, of Chantilly, Virginia; Morgan Borszcz Consulting, of Arlington, Virginia; and AINS, Inc., of Gaithersburg, Maryland. Agency Report (AR) Tab 4, Unsuccessful Offeror Letter from USAID to Glotech, at 1; AR Tab 8, Award Explanation to Glotech, at 1. Glotech, a small business, focuses its protest on the two small businesses that received BPAs: Morgan Borszcz Consulting and AINS, Inc.

that USAID failed to evaluate vendors' prices or to meaningfully consider price in the source selection decision.

We sustain the protest.

BACKGROUND

USAID issued the RFQ on February 23, 2012, seeking quotations from firms holding FSS Schedule 70 contracts, which is the "general purpose commercial information technology equipment, software, and services" schedule.² RFQ at 1. The RFQ anticipated the issuance of multiple BPAs for a base year and four annual option periods, and specified a maximum value of \$900 million. Id. at 2. USAID explained that it anticipated establishing up to five BPAs on an unrestricted basis, and intended to set aside two more BPAs exclusively for small businesses. AR Tab 3, USAID Forward Information Session Briefing Slides, at 4; see also RFQ at 1.

The RFQ listed 38 categories of infrastructure, IT systems, and "cross-cutting activities" that could be ordered under the BPAs, and indicated that statements of work would be issued in connection with subsequent task orders. The RFQ provided that USAID would issue both fixed-price task orders and labor-hour task orders, but also noted that orders might include "cost-reimbursement items." Id. at 37-39; AR Tab 12, USAID Answers to Vendor Questions, at 8.

The RFQ specified that vendors would be selected on a best value basis, considering price and six non-price factors: demonstrated corporate capabilities and experiences, techniques for achievement of performance objectives, scenario, team composition and management, past performance, and socio-economic business strategy.³ RFQ at 12. These non-price factors were listed in descending order of

² Although the RFQ was issued under FSS Schedule 70, the RFQ also directed vendors to list any non-schedule items that might be necessary for performance, and to explain an approach to providing them, notwithstanding their absence from the vendor's FSS contract. RFQ at 16. The RFQ suggested asking the General Services Administration (GSA) to add special item number (SIN) 132-100 to the vendor's FSS contract, which purports to allow orders for supplies and services under Schedule 70 that are not within the scope of the existing FSS contract SINs, so long as the supplies and services are deemed "in conjunction with or in support of" supplies or services that the ordering activity is purchasing under another Schedule 70 SIN. Id.; see GSA, Schedule 70 Summary, available at www.gsaelibrary.gsa.gov/ElibMain/scheduleSummary.do?scheduleNumber=70 (last visited Aug. 7, 2012).

³ In response to several similar pre-quotation questions from potential vendors, USAID stated that the socioeconomic factor did not apply to small businesses. AR Tab 12, USAID Responses to Vendor Questions, at 1.

importance, except for techniques for achievement of performance objectives and scenario, which were equally important. Id. The RFQ provided that the non-price factors were significantly more important than the cost/price factor, and that the best value determination would make a trade-off between technical merit and cost/price. Id.

The RFQ then described the information that vendors should submit in response to each non-price factor. For the first factor (corporate capabilities and experiences), the RFQ listed nine types of experience that vendors should list, such as “maintaining IT Systems and Infrastructure in global and international environments, including changing and unstable environments” and “managing data and business services across multiple heterogeneous networks.” Id. Responses were to be evaluated on whether the vendor had experience in all nine areas. Id. at 13.

For the second factor (techniques for performance objectives), the RFQ identified four objectives: maintain and operate existing IT systems; design, engineer, and deploy future systems; create a public/private partnership with USAID; and enable USAID to leverage information and technology in delivering international aid. Id. at 9-10. Responses were to be evaluated on the vendor’s ability to achieve the four objectives. Id. at 13.

For the scenario factor, the RFQ stated that USAID expected that the agency’s future work would be handled “virtually and through cloud service over the Internet,” and directed vendors to answer several broad questions, such as how USAID could leverage cloud applications, how latency and bandwidth issues in remote areas of the world could be addressed, and what were the top five risks arising from total migration of service delivery to the Internet. Id. at 13-14. Answers to the scenario questions were to be evaluated on the vendor’s “vision,” “creativity,” “innovation,” and “practicality of the notional Concept of Operations.” Id. at 14.

For the cost/price factor, the RFQ directed vendors to submit a comprehensive list of all labor categories available under the vendor’s FSS contract, the applicable labor rates for each labor category, and any discounts.⁴ Id. at 16. The RFQ stated that the cost/price evaluation would “review and evaluate all information,” and would consider the vendor’s schedule contract, annual escalation, and burden rate applied to travel costs. Id.

In response to questions from vendors for a more specific explanation of the cost/price evaluation, USAID stated that it would not establish a total cost/price or level of effort, but rather, it stated that the quotations would allow the agency to

⁴ Nevertheless, the RFQ also provided that during performance a vendor was expressly permitted to increase its BPA prices “at any time,” up to its maximum schedule price. RFQ at 31.

“compare the value of individual labor categories based on the skills and level of experience described in [the vendor’s] GSA schedules” and the “final cost/price offered to USAID,” including labor rate discounts. AR Tab 12, Answers to Vendor Questions, at 5.

USAID received quotations from 13 firms, five of which were small businesses. A technical evaluation panel reviewed the quotations and assigned point scores for the non-price factors. As relevant to the protest, the evaluation results for the seven successful vendors and the protester are as follows:

Name	Technical Rank	Technical Score	Size
IBM US Federal	1	71.60	Large
Digital Mgmt. Inc.	2	64.20	Large ⁵
HP Enter. Servs.	3	62.50	Large
CGI Federal, Inc.	4	59.60	Large
Computer Sciences	5	58.70	Large
Morgan Borszcz	6	58.40	Small
AINS, Inc.	10	52.60	Small
Glotech, Inc.	11	48.90	Small

AR Tab 8, Basis of Award Decision Document for Glotech, at 4.

The contracting officer then reviewed the cost/price quotations, and concluded that direct comparison of quotations under the cost/price factor would not be possible because each vendor had its own technical approach, quoted different discounts, and could ultimately offer additional discounts when each task order was issued. Contracting Officer’s Statement at 3. The contracting officer therefore prepared an individual “cost/price proposal review” document for each of the vendors, which merely listed that vendor’s labor categories, its quoted discount, escalation, and the resulting hourly rate for each labor category for each year. E.g., AR Tab 9 (Glotech’s Cost/Price Proposal Review Document). The record contains no documentation reflecting any comparative analysis of the competing vendors’ pricing information.

The contracting officer then selected seven firms with whom to establish BPAs: five vendors--at least four of whom happened to be large businesses--and the two small businesses with the highest technical scores. AR Tab 8, Basis of Award Decision

⁵ During the redaction process, USAID pointed out that, although the record reflects that Digital Management received a BPA in the “unrestricted” category, the firm is a small business. The issue is not significant to our decision, and determination of size status is a matter over which the Small Business Administration has jurisdiction, not our Office.

Document for Glotech, at 3. Consistent with the fact that the agency performed no meaningful comparison of the competing vendors' prices, the agency acknowledges that it did not perform a cost/technical tradeoff in selecting recipients of the BPAs. AR at 10 n.7.

After Glotech received notice of the selections, and a brief explanation of the basis for the selections (which was, essentially, the table shown above), Glotech filed this protest.

TIMELINESS

USAID argues that Glotech's protest is an untimely challenge to the terms of the RFQ. Supplemental AR at 8 n.1. That is, even though the RFQ indicated cost/price was an evaluation factor, USAID argues that vendors were subsequently informed that the agency would not consider price in response to questions from vendors: "For purposes of this BPA competition, USAID will not evaluate a total cost/price or level of effort in determining best value. USAID may compare the value of individual labor categories [etc.]" AR Tab 12, USAID Answers to Vendor Questions, at 5; see also id. at 18. Our Bid Protest Regulations require that a protest based upon alleged improprieties in a solicitation that are apparent before the closing time for receipt of initial proposals (or quotations, as here) be filed before that time. 4 C.F.R. § 21.2(a)(1) (2012). Additionally, challenges to alleged improprieties that do not exist in the initial solicitation but which are subsequently incorporated into it must be protested not later than the next closing time for receipt of proposals following the incorporation. See Cessna Aircraft Co., B-261953.5, Feb. 5, 1996, 96-1 CPD ¶ 132 at 16.

Glotech does not dispute that the RFQ (as supplemented by the answers to vendor questions) notified vendors that USAID would not calculate a total cost/price for each vendor--that is, the orders valued at a total of \$900 million. Glotech argues, however, that the agency's answer did not say that the cost/price factor described in the RFQ was no longer to be meaningfully evaluated, or considered in the selection. Protester's Supp. Comments at 6-7.

We consider the issue of timeliness here to be a close question. In our view, a reasonable vendor would not have understood USAID's answer, quoted above, as a change to the evaluation scheme, meaning that cost/price would no longer be considered in any meaningful way, and would not be part of a tradeoff in the selection of vendors. Instead, it was USAID's explanation of the selection process, at the end of the competition, that led Glotech to conclude that no meaningful cost/price comparison had been made to select vendors here. Accordingly, we are not prepared to conclude that this protest was untimely filed.

DISCUSSION

Glotech principally argues that USAID failed to consider cost or price in the issuance of BPAs to vendors. In Glotech's words, the "cut and paste exercise" performed by the contracting officer (i.e., listing each vendor's labor categories and rates in a new document), did not constitute a valid consideration of price. Protester's Supp. Comments at 2.

In addition, Glotech argues that it was competitively prejudiced by the agency's actions. Glotech argues that if the agency had properly performed the cost comparison described in the RFQ, and had directly compared Glotech's labor rates with those of the other small business vendors, USAID would have seen that Glotech's labor rates were lower. In fact, Glotech argues that its rates for comparable labor categories were more than [DELETED] percent below the next-higher-ranked small business vendor, AINS. Protester's Supp. Comments at 2. As a result, Glotech also argues that the agency did not perform the best value tradeoff required in the establishment of BPAs. Protest at 9; Protester's Comments at 9-10.

USAID responds that the requirement to conduct a best value tradeoff is not applicable to the issuance of multiple BPAs. Instead, the agency argues that there is insufficient information upon which to base a price comparison among vendors until there is a competition for the issuance of task orders. AR at 10. The contracting officer nevertheless asserts that he did "consider" cost/price by creating the "cost/price proposal review" document for each vendor. Contracting Officer's Statement at 6; AR at 9-10. In sum, the contracting officer concluded that the non-price evaluation (as he puts it, the "techniques proposed for achieving performance objectives") were "the best predictor of future price and overall best value for the Agency."⁶ Contracting Officer's Statement at 5-6.

Addressing Glotech's arguments, and USAID's response, requires not only a review of the agency's evaluation of these quotes, but a review of the procedures for establishing BPAs under FSS contracts. As to our review of the evaluation, while this process is not governed by the requirements that apply to a negotiated competition conducted pursuant to FAR Part 15, we will review the agency's evaluation of vendor submissions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. Mark G. Anderson Consultants, B-403250, B-403250.2, Oct. 7, 2010, 2010 CPD ¶ 241 at 5. Here, contrary to the RFQ's statement that USAID would make an evaluation under the cost/price factor as described above, and would include cost/price as a significant factor in a tradeoff

⁶ Nevertheless, USAID emphasizes that, in providing a "solution" to the statement of objectives, the agency did not request that vendors identify specific labor categories; rather, all vendors understood that they were simply to list all labor categories available under their FSS contracts. Supplemental AR at 2.

decision, the record reflects neither an evaluation nor a tradeoff. Thus, the selection of vendors was inconsistent with the terms of the RFQ.

As to our review of the procedures for establishing BPAs under FSS contracts, FAR § 8.405-3 provides express guidance on these procedures. Paragraph (a) under FAR § 8.405-3, entitled “Establishment,” begins with an enumeration of the requirements applicable to each and every BPA established under the FSS. The subsection then describes the required competitive procedures applicable to BPAs for supplies and for services that do not require a statement of work (§ 8.405-3(b)(1)), and the required competitive procedures applicable to BPAs for services requiring a statement of work, because the services are “priced at hourly rates” (§ 8.405-3(b)(2)).

Within the over-arching principles set forth at the beginning of the FAR’s guidance applicable to establishing BPAs under the FSS, agencies are required to “establish the BPA with the schedule contractor(s) that can provide the supply or service that represents the best value.” FAR § 8.405-3(a)(1). Moreover, price is the one common element that must always be part of any best value determination in establishing a BPA. FAR § 8.405-3(a)(2) (“[i]n addition to price (see 8.404(d) and 8.405-4), when determining best value, the ordering activity may consider” various other enumerated factors); See also Cyberdata Techs., Inc., B-406692, Aug. 8, 2012, 2012 CPD ¶ ___ at 4 (protest sustained where agency eliminated protester’s quotation from consideration--and subsequently issued FSS BPAs--without meaningfully considering prices). Finally, the FAR requires that agencies “shall, to the maximum extent practicable, give preference to establishing multiple-award BPAs, rather than establishing a single-award BPA.” FAR § 8.405-3(a)(3)(i). As a result, we find that USAID’s arguments are at odds with the clear requirements for these instruments set forth in the FAR.

To be meaningful, a best value determination requires a weighing of the value and benefits associated with a firm’s approach against their associated cost to the government. See TtEC-Tesoro, JV, B-405313, B-405313.3, Oct 7, 2011, 2012 CPD ¶ 2 at 9. In a best value procurement, it is the function of the source selection authority to perform a tradeoff between price and non-price factors, that is, to determine whether the superiority of one proposal (or as here, quotation) under the non-price factor(s) is worth a higher price. Even where, as here, price is stated to be of less importance than the non-price factors, an agency must meaningfully consider cost or price to the government in making its selection decision. See e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 7. Thus, before an agency can select a higher-priced proposal that has been rated technically superior to a lower-priced but acceptable one, the decision must be supported by a rational explanation of why the higher-rated proposal is, in fact, superior, and explaining why its technical superiority warrants paying a price premium. See Coastal Env’ts, Inc., B-401889, Dec. 18, 2009, 2009 CPD ¶ 261 at 4.

In contrast to these requirements and the terms of the RFQ, the contracting officer acknowledged here that “there were no direct comparisons on evaluated prices between vendors.” Contracting Officer’s Statement at 3. That is, notwithstanding the purported “consideration” of vendors’ pricing submissions, the agency did not (and indeed, takes the position it could not) draw any conclusion about vendors’ prices--not even whether the costs to the government associated with any given vendor’s quotation were likely to be higher than, lower than, or equal to the costs of any other vendor.

In explaining why it could not comply with the general requirements applicable to the establishment of all BPAs--i.e., the requirements to consider price and consider best value in selecting BPA recipients--USAID argues that these considerations would have been inappropriate in a competition where the agency was not required to have a statement of work. In this regard, USAID contends that this was a procurement conducted under the authority of § 8.405-3(b)(1).

As set forth above, after the “Establishment” paragraph (§ 8.405-3(a)), the FAR guidance on establishing BPAs under the FSS turns to the competition requirements that apply to different BPA types. As also set forth above, there are separate competition requirements applicable to BPAs for supplies and for services that do not require a statement of work (§ 8.405-3(b)(1)), and to BPAs for services requiring a statement of work, because the services are “priced at hourly rates” (§ 8.405-3(b)(2)).

Of relevance here, paragraph 8.405-3(b)(1) explains:

The procedures of this paragraph apply when establishing a BPA for supplies and services that are listed in the schedule contract at a fixed price for the performance of a specific task, where a statement of work is not required (*e.g.*, installation, maintenance, and repair).

USAID argues that this provision is applicable to its competition despite the fact that the record shows that this competition does not involve services that are listed in the FSS at a fixed price for the performance of a specific task; rather, the prices listed in the vendors’ schedules are plainly priced at hourly rates.

During the course of this protest, our Office sought the views of the GSA as to whether USAID had followed the rules applicable to establishing BPAs under the FSS. GSA expressed its view that USAID’s requirement was for services requiring a statement of work, and that FAR 8.405-3(b)(2)(vi) thus applied.⁷ Once GSA noted

⁷ FAR § 8.405-3(b)(2)(vi) states:

The ordering activity contracting officer shall ensure that all quotes received are fairly considered and award is made in accordance with

(continued...)

that this competition required the use of a statement of work, it noted that this “implies more is required . . . than relying on the base pricing in a GSA Schedule as being fair and reasonable.”⁸ Letter from GSA to GAO, July 18, 2012, at 2. GSA further stated that it would defer to our Office’s views as to whether USAID had met the applicable legal standard. Id.

For our purposes--as a forum limited to resolving the disputes raised by protesters--we need not address whether USAID was required to develop a statement of work before holding this BPA competition. Instead, we are able to conclude, on this record, that the agency gave no meaningful consideration to cost/price in selecting the BPA recipients, in violation of the requirement at FAR § 8.405-3(a)(2) that price be meaningfully considered in establishing BPAs. We reach this conclusion because the requirements of FAR § 8.405-3(a) apply to all BPAs established under the FSS, regardless of the BPA type--and regardless of the competition requirements that apply to each BPA type. In addition, USAID failed to make a proper best value decision before it excluded Glotech from consideration for a BPA.

RECOMMENDATION

We recommend that USAID reevaluate these quotations to meaningfully consider cost or price, as required by FAR § 8.405-3(a)(2), and perform a best value analysis, as required by FAR § 8.405-3(a)(1). At the conclusion of this reevaluation, we recommend that the agency make a new selection decision as to which of these vendors represent the best value to the government. We also recommend that USAID reimburse Glotech’s costs of filing and pursuing its protest. 4 C.F.R. § 21.8(d)(1). Glotech’s certified claim for costs, detailing the time expended and costs incurred, must be submitted to USAID within 60 days after this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel

(...continued)

the basis for selection in the RFQ. The ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform, and for determining that the proposed price is reasonable.

⁸ GSA’s conclusions are consistent with those reached by GAO’s audit teams who have looked at this issue. Contract Management: Agencies are not Maximizing Opportunities for Competition or Savings under Blanket Purchase Agreements despite Significant Increase in Usage, (GAO-09-792, Sept. 2009), at 6, 17-18.