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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: AINS, Inc.

File: B-400760.4; B-400760.5

Date: January 19, 2010

Lawrence J. Sklute, Esq., Sklute & Associates, for the protester.

Peter F. Garvin, III, Esq., and Grant H. Willis, Esq., Jones Day, for Privasoft Corporation, an intervenor.

John R. Caterini, Esq., and Kristen E. Bucher, Esq., Department of Justice, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency failed to conduct meaningful discussions with protester where it did not reasonably advise the protester of agency's real concern with protester's quotation--that evaluators considered its project schedule to be too short. Agency's request during discussions that protester submit a new project schedule as part of its final revised quotation did not reasonably convey to the protester that the evaluators viewed its proposed schedule as too aggressive, particularly given that a period of over a year had elapsed between submission of initial quotations and submission of final revised quotations.

2. Protest challenging agency evaluation of quotations received in response to solicitation for establishment of a blanket purchase agreement for an automated Freedom of Information Act system and associated services is sustained where record fails to demonstrate that the evaluation was reasonable and even-handed.

DECISION

AINS, Inc. of Rockville, Maryland protests the establishment of a blanket purchase agreement (BPA) with, and issuance of a first call for services to, Privasoft Corp. of Ottawa, Canada under request for quotations (RFQ) No. DJJR-08-F-0536, issued by the Department of Justice (DOJ) for an automated Freedom of Information Act (FOIA) system and associated services. The protester argues that the agency's evaluation of quotations was unreasonable and lacking in even-handedness and that the evaluators failed to conduct meaningful discussions with it.

We sustain the protest.

BACKGROUND

This is AINS's third protest of the agency's selection of Privasoft as the company with which to establish the BPA. We dismissed AINS's first protest, which objected to the technical evaluation of its quotation and to Privasoft's eligibility to enter into a BPA, as academic on November 21, 2008, after the agency notified us that it intended to take corrective action in response to the protest.¹ By decision dated June 12, 2009, we sustained AINS's second protest, filed after the agency again selected Privasoft as the successful vendor; we found that some aspects of the agency evaluation of quotations were not supported by the record and indicated an unequal treatment of competing vendors. AINS, Inc., B-400760.2, B-400760.3, June 12, 2009, 2009 CPD ¶ 142. We recommended that the agency reevaluate quotations and make a new source selection determination. The agency responded to our recommendation by furnishing each of the vendors with a list of technical issues and questions and inviting each to submit a final revised quotation, due on August 28, 2009. After receiving and evaluating the revised quotations, the agency for the third time selected Privasoft to receive the BPA. The agency notified AINS of its decision on September 30 and furnished it with a written debriefing on October 5. On October 13, AINS protested to our Office.

As noted in our previous decision, the RFQ in question contemplates the establishment of a single BPA against the successful vendor's Federal Supply Schedule (FSS) contract for a base and four option years. Work under the BPA is to be accomplished through the issuance of "calls" for services, the first of which, for implementation of an automated FOIA system of DOJ's Office of Information Policy,² was described in the RFQ. Vendors were to furnish a self-assessment of their proposed software's capabilities (i.e., whether the software complied with a series of over 250 functional and technical requirements); a description of the vendor's methodology for performing the work described in the first call; a staffing plan for the first call; a description of the company's corporate experience; past performance references; and prices for the software products to be furnished and the work to be performed under the first call. The solicitation provided for establishment of the BPA with the vendor whose quotation represented the best overall value to the government, with technical merit--to be determined on the basis of the first five

¹ Specifically, the agency advised us that it intended to reopen negotiations, hold discussions with vendors regarding weaknesses and deficiencies, allow vendors to submit revised quotations, reevaluate the revised quotations, and make a new source selection decision.

² At the time the RFQ was issued, the Office of Information Policy was named the Office of Information and Privacy.

factors in the preceding sentence, in descending order of importance--of significantly greater importance than price.

Of relevance to this protest, three of the technical issues raised in the agency's August 13 request to AINS for a final revised quotation were as follows:

Explain how your product satisfies the OPEN Government Act requirement that amends the commencement of the twenty-day response time period, as further discussed in OIP's FOIA Post article "OIP Guidance: New Requirement to Route Misdirected FOIA Requests," and as addressed in part in item 4.2 of the Requirements Matrix.

Does your product prevent users from assigning more than one disposition/closing code to describe the final disposition of a FOIA request? Explain.

Provide a new project schedule.

Agency Report, Tab 13. AINS furnished responses to these, as well as the other agency questions, in its August 28 final quotation. The protester also reduced its proposed level of effort and its proposed price in its final quotation.

After reviewing the final quotations, the evaluators assigned the following scores:

FACTOR	Possible Points	AINS Score After 1st Reevaluation	AINS Final Score	Privasoft Score After 1st Reevaluation	Privasoft Final Score
Product Evaluation	35	21	[deleted]	35	[deleted]
Technical Approach	25	20	[deleted]	25	[deleted]
Staffing/ Key Personnel	20	16	[deleted]	12	[deleted]
Corporate Experience	10	10	[deleted]	10	[deleted]
Past Performance	10	9.6	[deleted]	8.6	[deleted]
Total Points	100	76.6	67.6	90.6	93.8

Final Technical Evaluation Report, Sept. 29, 2009, Attach. A.³ In their report, the evaluators explained that AINS's score under the product evaluation factor had decreased in the final evaluation "because although AINS remedied several prior weaknesses, their final revised proposal continues to reflect other weaknesses in the product, and it also reveals new weaknesses."⁴ *Id.* at 4. The evaluators noted as weaknesses that "AINS still exhibit[ed] a lack of understanding about certain critical aspects of FOIA law and the government's requirements"—elsewhere in their report, the evaluators clarified that the aspect of FOIA law to which they were referring pertained to commencement of the 20-day period for an agency response to a FOIA request—and that in responding to the agency question asking it to verify that its software would prevent the assignment of more than one final disposition code to a FOIA request, AINS had furnished examples in which the system had automatically inserted a disposition code that was incorrect.

The evaluators further explained that AINS's score under the technical approach factor had decreased because in its final quotation the protester had proposed a "dramatic and unexplained [deleted] reduction" in its level of effort; according to the evaluators, the reduction exacerbated concerns over AINS's project schedule, which they already considered to be overly aggressive. In support of their finding that AINS's project schedule was overly aggressive, the evaluators observed that it did not appear to take into account the time required for the product to undergo Certification and Approval testing. The evaluators also explained that AINS's score under the staffing/key personnel factor had decreased due to the significant reduction in the protester's level of effort. The evaluators concluded that while AINS's proposed price was substantially lower than Privasoft's (\$373,590 versus \$489,226), the superiority of Privasoft's product and technical approach outweighed the price differential; accordingly, they again selected Privasoft's quotation as representing the best value to the government.

³ As noted in our previous decision, the evaluators assigned point scores to the quotations by rating them under each of the evaluation factors on a scale of [deleted] (with [deleted] corresponding to an adjectival rating of excellent, [deleted] to a rating of very good, [deleted] to a rating of fair, [deleted] to a rating of marginal, and [deleted] to a rating of poor), and then multiplying the ratings by factor weights. AINS was assigned a score of [deleted] and Privasoft a score of [deleted] under the product evaluation factor, which had a weight of [deleted], for example; thus, AINS's weighted score under the factor was [deleted] and Privasoft's score was [deleted]. In other words, the scoring of proposals was not nearly as fine-tuned as the availability of a maximum possible score implies—the only possible scores that a quotation could have received under the product evaluation factor were [deleted].

⁴ The reference to a decrease in score under the product evaluation factor is erroneous; AINS's score under the factor did not decrease, but instead remained constant.

ANALYSIS

Lack of Meaningful Discussions

The protester argues that the evaluators failed to conduct meaningful discussions with it by failing to advise it that they considered its schedule to be overly aggressive. We agree.

When an agency engages in discussions with a vendor, the discussions must be “meaningful,” that is, sufficiently detailed to lead the vendor into the areas of its quotation requiring amplification or revision. Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 10.

Here, we do not think that the request for a new schedule reasonably conveyed to the protester that the evaluators viewed its proposed schedule as too aggressive; given that a period of over a year had elapsed between submission of the vendors’ initial quotations and submission of their final quotations, we think that vendors could reasonably have understood the request to be nothing more than a request for updated information. We note in this connection that the evaluators furnished precisely the same request for a new schedule to Privasoft, and in its case, the request was not intended to convey a concern over the duration of the schedule. We think that by failing to advise the protester in discussions that they considered its project schedule to be too short, the evaluators failed to conduct meaningful discussions with it. Moreover, we think under these circumstances that the advice given at the debriefing did not obviate the need to raise this concern when the agency reopened discussions.

Evaluation Challenges

AINS argues that the agency’s evaluation of its quotation was unreasonable and that the agency was not even-handed in its assessment of the two quotations.

Where an agency conducts a formal competition for the establishment of a BPA, we will review the agency’s actions to ensure that the evaluation was reasonable and consistent with the solicitation and applicable procurement statutes and regulations. AINS, Inc., supra, at 5-6. One of the factors that we will consider in assessing the reasonableness of the agency’s findings is whether the agency was even-handed in its assessments—that is, whether it gave offerors similar credit for similar strengths in their proposals, and, along the same lines, whether it was consistent in its attribution of weaknesses to the proposals. See Tidewater Homes Realty, Inc., B-274689, Dec. 26, 1996, 96-2 CPD ¶ 241 at 3-6. Based on our review of the record here, we agree with the protester that several aspects of the agency’s evaluation were unreasonable and lacking in even-handedness.

Technical approach and staffing

The protester argues that the fact that it reduced its level of effort (LOE) in its final quotation was not, in and of itself, a reasonable basis for the evaluators to have found its final proposed LOE inadequate; the protester maintains that the evaluators should have, but did not, consider whether its staffing level, as reduced, was appropriate. The protester points out that, for example, while the evaluators criticize it for having reduced the hours for its [deleted] in the [deleted] phase from [deleted] hours to [deleted] hours without a reasonable explanation, its total proposed LOE for the [deleted] phase was significantly higher than Privasoft's even after the reduction (i.e., [deleted] versus [deleted] hours). (We also note in the foregoing connection that [deleted] hours was more than Privasoft had proposed for its comparable position during the [deleted] phase.) We agree with the protester that the fact that the protester reduced its LOE in its final quotation is not by itself evidence that the LOE was inadequate, and since there is no evidence in the record that the evaluators looked at anything else in reaching their conclusion, we find the evaluation panel's conclusion that AINS had not proposed an adequate LOE in its final quotation to be unsupported.⁵

Product Evaluation

The protester takes issue with the weaknesses attributed to its proposal under the product evaluation factor. AINS argues that the evaluators treated the two vendors unequally in finding that its response to the discussion question asking it to clarify how its product satisfied the OPEN Government Act requirement amending the commencement of the 20-day period for agency response to a FOIA request revealed a lack of understanding of the requirement, while finding that Privasoft's response to the same question demonstrated an understanding of the requirement. In addition, AINS argues that the evaluators engaged in unequal treatment by downgrading its software for failing to automatically insert a correct disposition code, while failing to downgrade Privasoft's software, which does not have the capability to automatically insert any final disposition codes.

The OPEN Government Act of 2007 added the following language to 5 U.S.C. § 552(a)(6)(A), the FOIA provision that sets the time period for agency response to a FOIA request as 20 days after receipt:

⁵ We recognize that the agency claims that the record is "replete with support that the TEP did, in fact, consider the level of effort and labor hour mix." Supplemental Agency Report, Dec. 16, 2009, at 25. We reviewed the record and found only references to the previously mentioned reductions in AINS's LOE and conclusory statements regarding the adequacy of Privasoft's proposed LOE.

The 20-day period . . . shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency’s regulations under this section to receive requests under this section. . . .

Pub. L. No. 110-175, § 6(a)(1). Prior to this amendment, a request that was not directed to the proper FOIA office within the agency was not considered “received” and the receiving FOIA office could merely advise the requester that he/she needed to make a request directly to the proper FOIA office; now, a FOIA office that receives a misdirected request may no longer merely advise the requester as above, but must instead forward the misdirected FOIA request to the proper FOIA office within the agency. OIP Guidance: New Requirement to Route Misdirected FOIA Requests (posted 11/18/2008).

AINS responded to the discussion question asking it to explain how its product satisfied the new statutory language concerning commencement of the 20-day response period in relevant part as follows:

Our understanding of the new FOIA law for the 20-day clock is that requests are tracked from the received date. The number of working days between the received date and the date a request is logged-in and the 20-day clock begins should be a part of the record. FOIAXpress™ [the protester’s software] automatically does the following:

- Configures the “Set Target Date From” value to “Received Date.”

* * * * *
- Enables “Transfer Case”, which is available as a new “action” to transfer the request from one action authority to another action authority allowing for the 10 day transfer period.
- Requests can be transferred as many times as necessary. However, if the action authority fails to route the misdirected request within ten working days, and the request is a proper FOIA request, the twenty-day response time period commences on the tenth day nonetheless.

AINS Final Response, Aug. 28, 2009, at 11.

Privasoft responded to the same question as follows:

AccessPro [Privasoft's software] provides all of the functionality required to correctly route misdirected FOIA requests. AccessPro Case Management correctly (and transparently to the user) manages the 10 day "routing" period for a request. It ensures that the clock starts either on the tenth day from the reception by any component, or on the date perfected, whichever is sooner. . . .⁶

Privasoft Final Revised Quotation, Aug. 28, 2009, at 4-7.

The evaluators analyzed AINS's response to the above question as follows:

The TEP is very troubled by AINS' response to this question, as it reveals a significant lack of understanding of this OPEN Government Act requirement. . . .

The proposal on page 11 states, "Our understanding of the new FOIA law for the 20-day clock is that requests are tracked from the received date." This reflects an inaccurate understanding of what is new in the Open Government Act (OGA) relating to the 20-day clock. The 20-day clock is the time period within which agencies must respond to FOIA requests. AINS's statement suggests that the OGA designates "received date" as a new commencement event for the 20-day clock. This is incorrect. Requests have always been tracked by the received date. Rather, the new rule states that the twenty-day clock begins the day the request is first received by the appropriate office of the agency (that is, the office where the agency determines the requested records are likely to be located), but in any event not later than ten days after the request is first received by any office within the agency that is designated by the agency's regulations to receive FOIA requests. In other words, the OGA creates a ten-day limit of the buffer period for misdirected FOIAs. It does not create "received date" as the new point from which requests are tracked. AINS' statement, however, suggests that the change introduced by the OGA is that requests are now tracked from the received date.

⁶ Privasoft then explained the information that would be entered into its software system by the office that initially receives a request and by the office to which an initially misdirected request is forwarded in three scenarios: (1) where a request must be re-routed between two components on the same AccessPro database; (2) where a request must be reassigned between two components using AccessPro on separate database instances; and (3) where a request is received by a component using AccessPro and must be reassigned to a component using manual methods or another software system.

AINS states on page 11 of its proposal that “The number of working days between the received date and the date a request is logged-in and the 20-day clock begins should be a part of the record.” The TEP does not understand what AINS is attempting to convey in this statement, or how it relates to any changes introduced by the OGA. The statement appears to relate to the OGA’s new 10-day buffer limit for misdirected FOIA requests referred to above. AINS, however, does not explain what they mean by “logged-in,” and the term is not self-explanatory. As important, nowhere in the OGA or in any of OIP’s guidance on the OGA is the term “logged in” used. Indeed, legally, the FOIA’s requirements are not dependent on when a request is “logged in,” to the extent this term is used to mean recording of receipt. Rather, the dispositive event in the FOIA law in general is “receipt.” Even if AINS is using the term “logged-in” as shorthand for “receipt,” the answer still reflects a lack of precision and lack of knowledge of the law, and is problematic when precise legal requirements are at issue. In short, this statement, in addition to being confusing, reflects misunderstanding regarding the FOIA and therefore is of serious concern to the panel.

* * * * *

Bullet point #3 (. . .), which refers to the “10 day transfer period,” reveals AINS’ lack of understanding of the law because the law does not affirmatively provide agencies with a “10-day transfer period.” Rather it provides that if a request is misdirected to the wrong office, then that office must route it to the correct office, and that the 20-day time period for responding to the request will begin as soon as the request arrives at the correct office, *but no later than* 10 days after the original office received it. This is not the same thing as being given a blanket “10-day transfer period.”

Final Technical Evaluation Report at 12.⁷

In contrast, the evaluators summarized Privasoft’s response as follows:

Privasoft’s response reflects an extensive understanding of the OPEN Government Act, OIP’s related written guidance, and requirement

⁷ In the section of the agency analysis that we do not quote above, the evaluators explained that they also had concerns regarding the protester’s understanding of language added to FOIA by the OGA pertaining to tolling of the 20-day period. Based on our review of the language in AINS’s final quotation, we think that AINS’s choice of wording could have been better, but that it did not reflect a lack of understanding of the tolling requirements.

number 4.2. This understanding is demonstrated by Privasoft's statement that its product meets the routing requirement related to misdirected FOIA requests with, ". . . software [that] contains the correct logic to process the request clock," . . . by "ensur[ing] that the clock starts either on the tenth day from reception by, any component, or on the date perfected, whichever is sooner." . . . It is clear from Privasoft's response that it understands the OPEN Government's amendment to the commencement of the twenty-day response time period, which provides that the twenty-day clock begins the day the request is first received by the appropriate office of the agency, but in any event not later than ten days after the request is first received by any office within the agency that is designated by the agency's regulations to receive FOIA requests. . . .

Id. at 19.

First, while the evaluators criticize the protester for implying that the tracking of requests from initial date of receipt is a new requirement, it is clear from OIP guidance that the tracking of requests originally sent to the wrong FOIA office from the initial date of receipt at the wrong office is in fact a new requirement. In this connection (and as previously noted), prior to the effective date of the OGA, a request that was not directed to the proper FOIA office within the agency was not considered "received," and "the receiving FOIA office could merely advise the requester that he needed to make a request directly to the proper FOIA office." OIP Guidance: New Requirement to Route Misdirected FOIA Requests. Along the same lines, while the evaluators criticize the protester for stating that the number of days between receipt of a request and its logging in "should be part of the record," questioning what the protester meant and how it related to the changes introduced by the OGA, OIP guidance concerning the new routing requirement in fact includes a section entitled "Documenting the Date of Receipt(s)," which explicitly instructs agency FOIA offices as follows:

. . . In order to ensure that all offices involved in the handling of FOIA requests can accurately calculate the response times available to them, all FOIA offices should note, directly on the request letter, the date of receipt in their office. For any request that was misdirected and so needs to be routed, the receiving FOIA office should note its date of receipt, and then the proper FOIA office will, in turn, note a second or subsequent date memorializing when the request was received by the proper FOIA office. These actions will enable the proper FOIA office to assess when the twenty-day time period for responding to a FOIA request begins. . . .

Id. Clearly, one of the requirements associated with the new language pertaining to the routing of misdirected requests is that the agency maintain a record of the date

that the request is originally received and the date that it is received by the proper FOIA office; thus, we fail to see a reasonable basis for the evaluators' professed concern over how the excerpted statement in the protester's quotation relates to any of the changes introduced by the OGA.

Further, we agree with the protester that to the extent that (1) its use of the term "logged in" is imprecise and (2) its reference to a "10 day transfer period" incorrectly implies that the 10-day period applies even when the request is routed to the correct office in less than 10 days, Privasoft's use of the term "perfected" and its reference to a "10 day routing period" are equally imprecise and capable of being construed as reflecting a misunderstanding of the new requirement. The agency maintains that because OIP guidance includes a definition of the term "perfected request," it was clear what Privasoft meant when it used the term "perfected," but that it was unclear what the protester meant by the term "logged in" since that term is not defined in OIP guidance. We are not persuaded by the agency's argument given that OIP guidance does not define a "Perfected Request" as one that has arrived in the proper FOIA office, which is apparently what Privasoft intends by the term; rather, it defines a "perfected request" as "a request for records which reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed." 2008 Guidelines for Agency Preparation of Annual FOIA Reports (posted 5/22/2008; supplemented 10/16/2008) at 7. Indeed, given that OIP guidance instructs that "if the request is not reasonably described, . . . , or if the requester has failed to provide a required verification of identity, or fails to satisfy any other procedural requirement set out in the agency's regulations, the proper FOIA office should communicate with the requester directly to clear up those procedural deficiencies with the request," and "[u]ntil the request meets the remaining requirements for being a proper request, the twenty-day response period does not begin to run," OIP Guidance: New Requirement to Route Misdirected FOIA Requests, Privasoft's statement that "the clock starts either on the tenth day from reception by any component, or on the date perfected, whichever is sooner," is not entirely correct. That is, if a request were forwarded to the proper FOIA office 8 days after its receipt at another FOIA office, and it then took 10 days for the agency to obtain additional information from the requester required to clear up procedural deficiencies with the request, application of the foregoing OIP guidance would dictate that the 20-day period not begin to run until the 18th day--and not on the 10th day, as Privasoft's response indicates.

We also note that receipt of a request by "any component" is not sufficient to start the routing clock running, as the above statement by Privasoft implies; rather, OIP guidance clarifies that the "ten-day routing requirement only applies to requests that are received by a component of the agency that is designated in the agency's FOIA regulations to receive requests." *Id.* Along the same lines, we are not persuaded by the agency's argument that Privasoft's reference to a "10 day routing period" may reasonably be understood as a reference to a routing period of up to 10 days, whereas AINS's reference to a "10 day transfer period" implies a blanket period of 10

days; both appear to be shorthand references by the vendors to the period of up to 10 days for forwarding of a FOIA request to the proper office.

In sum, given the discussion above, we think that the evaluators treated the two vendors unequally in finding that AINS's response revealed a significant lack of understanding of the requirement, while Privasoft's response reflected an extensive understanding.

We turn then to the protester's argument that it was unfair for the evaluators to cite as a weakness under the product evaluation factor the failure of its software to automatically insert a correct disposition code, while failing to attribute such a weakness to Privasoft's software, which does not have the capability to automatically insert any final disposition codes. We agree. In response to the protester's argument that while its software might occasionally default to an incorrect disposition code, this was not a significant problem because the user could override the default selection, the agency maintained that requiring the user to take the time to select the correct disposition was inconsistent with its purpose in procuring an automated system. Agency Report, Nov. 13, 2009, at 29. As the protester points out, however, Privasoft's software, which does not automatically insert any codes (but instead requires the user to select a disposition from a drop-down menu) is also inconsistent with the agency's goal of acquiring an automated system. Again, we think that the evaluators' treatment of the two quotations was disparate.

CONCLUSION AND RECOMMENDATION

In sum, we conclude that the agency failed to conduct meaningful discussions with AINS regarding its project schedule. We also conclude that a number of aspects of the agency's evaluation are not supported by the record and indicate an unequal treatment of competing vendors. Accordingly, we sustain the protest. We recommend that the agency reopen discussions as appropriate, request and reevaluate revised quotations, and make a new source selection decision. If AINS is selected as the vendor whose quotation represents the best value to the government, we recommend that the BPA established with Privasoft be terminated and that a BPA be established with AINS. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2009). The protester's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Lynn H. Gibson
Acting General Counsel