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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Lakota Technical Solutions, Inc.

File: B-298297

Date: August 4, 2006

Keith W. Fitch for the protester.

Andrew C. Saunders, Esq., and Ellen Lynch, Esq., Naval Sea Systems Command, 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. Protest alleging that firm that developed technical data package (TDP) for item to be procured has an unfair informational advantage over other competitors is denied where record establishes that TDP contained sufficient information to permit prospective offerors to formulate proposals.

2. A competitive advantage that derives from an offeror's previous performance under a government contract is not an unfair competitive advantage that agency is required to neutralize.

DECISION

Lakota Technical Solutions, Inc. protests the terms of request for proposals (RFP) No. N00024-06-R-5112, issued by the Naval Sea System Command for Signal Data Processor (SDP) assemblies. Lakota objects to the unwillingness of the agency to warrant the quality and completeness of certain items in the RFP's technical data package (TDP).

We deny the protest.

BACKGROUND

In 2004, the Navy issued a task order to Science Applications International Corporation (SAIC) for the design and development of an improved (i.e., smaller,

lighter, and less costly) version of its Cooperative Engagement Capability (CEC) system, of which the SDP assembly is a core component.¹ The order required SAIC to provide “all of the necessary information to fully describe the hardware product and to support life cycle maintenance of the hardware product by the Government.” SAIC Task Order, § 3.3.4.3. In addition, the order required SAIC to build and deliver four production representative terminal units to the government for test and evaluation. Id. § 3.3.4.1.

In 2005, SAIC completed the design and development of the SDP assembly (which, according to the agency, consists of a rectangular box containing 13 circuit card assemblies) and delivered to the Navy documentation consisting of schematics, block diagrams, parts lists, unit specifications, wiring diagrams and what the agency describes as “other information necessary to conduct a ‘build to print’ competition for the fabrication, assembly and test of the CEC SDP assembly.” Agency Report at 4. In November of 2005, the Navy conducted a physical configuration audit of the SAIC design. According to the agency, a part of that review was to ensure that the TDP adequately described the equipment to be built under the RFP at issue in this protest. The audit resulted in the Navy’s requiring multiple corrections to the documentation, which SAIC furnished over the course of the next few months.

The Navy issued the RFP on March 23, 2006. The solicitation contemplated award of a fixed-price contract to the offeror whose proposal represented the best value to the government, with proposals to be evaluated on the basis of the offeror’s production and engineering capabilities, past performance, and price. The RFP’s statement of work required fabrication of the data processors in accordance with the TDP provided as government-furnished information (GFI). The RFP, as amended, set the closing date for receipt of proposals as June 15. Amend. 2 at 2.²

¹ The Navy explains that the CEC system greatly enhances the air defense capabilities of Navy ship, aircraft and land-based units by sharing radar and other data among participating units in a manner that improves situational awareness and enables longer range engagements. The agency notes that, for example, the CEC system allows a ship to fire on a hostile target before it crosses that ship’s radar horizon, thereby enabling the ship to intercept a target at the maximum possible range of its weapons.

² At the time Lakota filed its protest, closing was set for May 22; on May 17, following receipt of the protest, the agency amended the RFP to extend the closing date to June 15.

DISCUSSION

Lakota protested to our Office on May 10, objecting to the agency's failure to furnish as part of the TDP certain information generated by SAIC in its development of the improved SDP. In particular, the protester objected to the agency's failure to furnish "electronic formats of schematics and computer aided design artifacts." Protest at 2. Lakota complained that the failure of the agency to furnish this information would result in an unequal competition because competitors of SAIC would be required to include the cost of developing this information in their proposed prices, whereas SAIC had already developed the information at government expense. Similarly, the protester objected to the agency's failure to provide equations or software for programmable devices, arguing that competitors of SAIC would be required to develop this information, whereas SAIC would not be. Lakota further objected to the agency's failure to furnish as part of the RFP vendor information obtained by SAIC in its performance of its task order. The protester also complained that while the agency had permitted prospective offerors to view the components of a sample SDP, the components had been placed in heavily tinted electrostatic packaging that had prevented prospective offerors from seeing component information, part numbers, mechanical layout, and custom fabrication.

The Navy updated the TDP in response to Lakota's protest. As explained below, the updated version included the "native" versions of "gerber files," as well as all available information regarding vendors used by SAIC. The Navy also amended the RFP to include field programmable gate array software as GFI and improved visual access to the sample assembly by removing the circuit cards from the electrostatic packaging.

With regard to the gerber files, the agency explained that a gerber file is a standard file format used by printed circuit board (PCB) fabrication firms to, among other things, drill holes, mill, and cut the PCBs. The Navy further explained that the gerber files released in the original TDP were in a PDF "read only" format, whereas the updated TDP provided the gerber files in a "native format" that manufacturers using the same software format as SAIC could use to program their machines for manufacture of the PCBs. In other words, as we understand the agency's explanation, the gerber files released in the original TDP defined the required characteristics of the circuit boards, whereas the native gerber files described the particular manufacturing process that SAIC had used to create them.

In its report, the Navy argued that it had produced all relevant documentation in its possession regarding the SDP assembly and that the TDP was adequate to manufacture the item. In support of its position, the agency submitted a declaration from the Navy engineer responsible for the CEC Pre-Planned Product Improvement (P3I) project, which advised that he was not aware of any defects in the TDP and associated government-furnished equipment and information that would "negatively impact an offeror's ability to provide a bid on [RFP] N00024-06-R-5112 and ultimately build the Signal Data Processor assembly." Declaration of the Deputy Director for

Systems Engineering, Integrated Warfare Systems, June 8, 2006. The agency asserted that the real crux of Lakota's protest was not that the TDP was inadequate, but rather that SAIC would have a competitive advantage over other offerors based on its prior experience in developing and manufacturing the item; such an advantage, the agency maintained, was not an advantage that the agency was required to neutralize.

In responding to the agency report, Lakota conceded that the agency had addressed two of its initial complaints by making the field programmable gate array software available as GFI and by improving visual access to the sample assemblies through removal of the electrostatic packaging. The protester maintained that the agency had not released all appropriate schematics and drawings, however, and that, as a consequence, the RFP remained defective. Lakota cited as evidence that the agency had not released all available documentation the following offeror question and agency response from the RFP:

QUESTION 74: As the RFP is described as a "build-to-print" solicitation, the gerber files and any other electronic design material associated with the TDP must be provided to the organizations interested in this solicitation. Otherwise, the solicitation is defective, because SAIC has an unfair competitive advantage. SAIC was paid for engineering services to develop the P3I terminal (i.e., the CEC SDP which is on display . . .) under [the preceding task order]. Thus, they alone have the information in order to build-to-print. . . . it is clear that the government's intent is to have the contractor build CEC SDPs that are identical to the ones produced under the P31 Terminal effort. Without the gerber files and any other electronic design material that provides the details for how each circuit card assembly was manufactured for the unit on display, all vendors other than SAIC will be forced to incur [non-recurring engineering] charges to redevelop this material, which may result in the produced units not being "built-to-print."

ANSWER 74: The Government will release available Gerber files and vendor list with the updated TDP (Library Set). The Government does not warrant the quality or completeness of the Gerber files or the vendor list. These files and the list are being provided for guidance only. The government will provide any available electronic design information with the updated TDP (Library Set). The government does not warrant the quality or completeness of the available electronic design information.

Question and Answers Set #5, Agency Report, Tab 7. According to the protester, the agency's unwillingness to warrant the quality and completeness of the gerber files,

vendor list, and electronic design information demonstrates that the agency is aware that SAIC has documentation that it is not furnishing.³

We see no basis to conclude that the agency's refusal to warrant the quality and completeness of the native gerber files and the electronic design information pertaining to manufacture of the circuit cards demonstrates that the agency is aware of the existence of documentation that it is not providing or otherwise casts doubt on the adequacy of the TDP. As the agency explains, the requirement here was that the item produced conform to the schematics, block diagrams, parts lists, specifications, wiring diagrams, and other information in the TDP; the Navy did not require offerors to use a specific manufacturing process to produce the item. As a result, given that the native gerber files and the electronic design information relate to the specific manufacturing software SAIC used to build the assembly, and would not ordinarily be included in a TDP of this type, the fact that the Navy did not "warrant" this information has no bearing on the adequacy of the TDP. Moreover, even assuming that SAIC is in possession of information pertaining to manufacture of the SDPs that it has not furnished to the agency (and that, accordingly, has not been made available to other prospective offerors), the record nonetheless establishes that the TDP contained sufficient information to permit prospective offerors to formulate proposals. In this regard, as noted above, the Navy engineer responsible for the CED P3I project attested that he is unaware of any defects in the TDP that would impair the ability of prospective offerors to prepare proposals and build the item, and the protester has offered no specific evidence to question the

³ To the extent that in its comments on the agency report, the protester alleged a conflict of interest on SAIC's part in competing under a solicitation for which it had prepared the TDP, a protester's allegation that another firm has an impermissible conflict of interest, and thus must be precluded from competing under a solicitation, is generally premature when filed before an award has been made. REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2. In any event, the Federal Acquisition Regulation (FAR) does not require the exclusion of a contractor that has developed an item from a competition for production of the item. See FAR § 9.505-2(a)(3) ("In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed."). See also FAR § 9.508(c) ("Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.")

agency's position. Also, the agency reports that more than one offer was received in response to the RFP.⁴

There remains the question of whether the Navy's unwillingness to warrant the quality and completeness of the information furnished in the TDP regarding SAIC's process for manufacturing the circuit boards gives SAIC an unfair competitive advantage over other prospective offerors who will have to incur the expense of verifying the correctness and completeness of the information furnished and/or developing their own process for manufacture of the circuit boards. In our view, while SAIC's access to information that other offerors will have to develop gives it a competitive advantage, it is not an unfair competitive advantage and thus is not one that the agency is required to neutralize. See Government Bus. Servs. Group, B-287052 et al., Mar. 27, 2001, 2001 CPD ¶ 58 at 10.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁴ Because the procurement is still ongoing, information regarding the specific number and identity of the offerors was not furnished to the protester and is not discussed in this decision.