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Decision

Matter of: Synergetics, Inc.

File: B-299904

Date: September 14, 2007

Charles R. Lucy, Esq., Holland & Hart LLP, for the protester.
John E. Jensen, Esq., Daniel S. Herzfeld, Esq., and Kelly E. Buroker, Esq., Pillsbury Winthrop Shaw Pittman LLP, for Vistrionix, Inc., an intervenor.
Heather M. Self, Esq., Department of Agriculture, and Kenneth Dodds, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.
Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation allowed for consideration of past performance of services the same or similar to those being procured, agency reasonably gave approximately equal evaluation credit to protester for its incumbent performance as subcontractor and to non-incumbent awardee based on contracts of similar size with procuring agency and other federal agencies, and proposal of key personnel with relevant technical expertise and knowledge.
2. In unrestricted competition under Federal Supply Schedule (FSS), vendor considered to be small disadvantaged business (SDB) at time of its FSS contract award did not misrepresent itself as SDB—even though it had since exited from SDB program and had an application pending for recertification—where solicitation only contemplated consideration of SDB status at the time of award of its FSS contract.
3. Price evaluation was unobjectionable where agency did not consider protester's proposal of additional, but undefined, discounts that were not in accordance with solicitation pricing requirements.
4. Where underlying evaluation record confirms agency's finding of no significant difference in technical quality between protester's and awardee's equally-rated quotations, source selection authority reasonably concluded that awardee's lower-priced quotation represented "best value" to the government.

DECISION

Synergetics, Inc. protests the establishment of a blanket purchase agreement (BPA) with Vistronix, Inc. under request for quotations (RFQ) No. AG-3144-S-07-0012, issued by the Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS), for information systems development, support, and maintenance services. Synergetics challenges the technical and price evaluations and the award determination.

We deny the protest.

The RFQ contemplated the establishment of a single BPA against the successful vendor's Federal Supply Schedule (FSS) contract for a base year, with 4 option years. Work under the BPA was to be accomplished through issuance of task orders for technology, operations, and management support services, primarily in the areas of software and database analysis, design, development, integration, deployment, support, and maintenance at NRCS in Fort Collins, Colorado and other locations across the country.

Quotations were to be evaluated under five factors--technical approach, past performance, socioeconomic business status (small business preference), socioeconomic business status of the overall contractor team arrangement, if proposed, and price. Under the technical approach factor, quotations were to be evaluated on the vendor's BPA master management plan, draft task order management and quality control plans, transition plan, and technical experience, including key personnel. Past performance was to be evaluated on the basis of how well vendors had performed the same or similar work, as described in the statement of work (SOW). Price was to be evaluated for completeness, realism, and reasonableness based on each vendor's BPA skill category listing and a lump sum, fixed-price, level-of-effort price for a draft task order.

The RFQ did not identify the order of importance of the technical factors, and warned that there was to be no formal quantitative ranking or scoring of quotations. The RFQ also notified vendors that the agency contemplated making a "best value" award, that it was more concerned with obtaining a superior technical approach than with making an award at the lowest price, and that the importance of price would increase with the equality of the quotations under the non-price factors.

The agency received nine quotations, five of which--including Synergetics's and Vistronix's--were evaluated as strong, and were included in the competitive range. The competitive range vendors were invited to make an oral presentation which was evaluated along with final proposal revisions (FPR). Synergetics, Vistronix, and a third offeror's quotations were evaluated as "strong proposal, few weaknesses." Based on its review and the consensus technical strengths and weaknesses of these three quotations, the technical evaluation board (TEB) concluded that they were

technically equal and recommended award to any of the three vendors. In making the best value recommendation, the administrative contracting officer (ACO) noted that Synergetics had proposed the highest prices of any vendor and that the third vendor had proposed the second highest prices. She concluded that Vistronix's quotation represented the best value based on its technical strength and low pricing, and thus recommended it for award. Based upon her own review of the evaluation record and the ACO's recommendations, the contracting officer, as source selection authority (SSA), awarded Vistronix the BPA. After a debriefing, Synergetics filed this protest.¹

Synergetics asserts that the agency's technical and price evaluations, as well as the source selection, were conducted contrary to the RFQ's provisions. In considering a protest of an agency's proposal evaluation, our review is confined to determining whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 10-11. The evaluation here was unobjectionable.

PAST PERFORMANCE EVALUATION

Synergetics asserts that the agency improperly evaluated Vistronix's quotation as equal to its own in the area of past performance. In the protester's view, the awardee's lack of incumbent experience and its "lukewarm at best" past performance references should have resulted in a technical rating lower than Synergetics's in these areas.² Synergetics Initial Comments at 8.

Synergetics' assertion that its quotation should have been found significantly superior to Vistronix's is not supported by the record. The RFQ provided that under the past performance factor, evaluation of both a vendor's technical experience and technical accomplishment would be based on consideration of all available and relevant facts and circumstances concerning projects that were the same as or

¹ Synergetics has raised a number of arguments, all of which we have reviewed and found to be without merit or non-prejudicial. This decision will address only the more significant arguments.

² Synergetics also asserts that the agency should have taken into consideration a 2006 Dun & Bradstreet report on Vistronix's net losses and stated failure to submit an updated financial statement. This assertion concerns Vistronix's responsibility and is without merit. The initial responsibility determination made by the General Services Administration in connection with the award of Vistronix's underlying FSS contract satisfies the requirement for a responsibility determination regarding that vendor; there is no requirement that an ordering agency perform separate responsibility determinations when placing orders under Vistronix's contract. Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 5-6.

similar to the work described in the SOW. RFQ § 24.2. In evaluating Synergetics's quotation, the TEB noted that the firm was a current incumbent subcontractor with NRCS, with extensive working knowledge of agency programs, requirements, and relevant computing environments, and with a record of success. Agency Report (AR), Tab 11, at 00354. In evaluating Vistronix's past performance, the TEB noted that the Vistronix team had been a USDA prime contractor since 1999, with some large dollar value contracts; had experience in core NRCS technologies; had proposed key personnel and technical experts with significant technical knowledge and experience; and had received excellence awards from other federal and state agencies in similar work. AR, Tab 10, at 00346. Thus, although Synergetics's quotation received "additional consideration" for its incumbent past performance, the TEB also found that Vistronix's past performance was "strong" based on these considerations. TEB Report at 00569.

While Synergetics characterizes the Vistronix team's past performance references as "lukewarm," both references stated that the firms provided qualified, experienced, and skilled employees, met or exceeded requirements, and would be hired again if the references were given the choice. AR, Tab 8, at 00326-328. The agency found the team's past performance ratings were uniformly positive and, moreover, noted that the past performance evaluation was based on more than the references; it included Vistronix's listed experience in NRCS core technologies, numerous awards and certifications applied to its experience, accomplishments, and schedule/cost savings. Contracting Officer's Supplemental Statement ¶ 9. Based on these and other considerations, the TEB and SSA concluded that the two vendors' quotations were essentially equal. In our view, the agency reasonably evaluated Vistronix under the past performance factor.

SMALL DISADVANTAGED BUSINESS STATUS EVALUATION

Synergetics asserts that the agency improperly gave Vistronix evaluation credit for being a small disadvantaged business (SDB). In the protester's view, because Vistronix is no longer an SDB, it was not entitled to represent itself as one and the agency should have discovered the awardee's misrepresented status in its evaluation.

The evaluation in this area was unobjectionable. The RFQ provided that, in making the best value determination, preference would be given to small business vendors, with "additional preference" given to small businesses that were also under additional socioeconomic preference programs. RFQ § 24.4. The RFQ included a form that requested information from vendors, including their business size status under their GSA FSS contracts and other socioeconomic programs. RFQ § 24.6. No other representations or certifications were required. RFQ Question Responses No. 9. Even though Vistronix is not currently certified as an SDB, it was in the SDB program at the time its FSS contract was awarded, and its completed quotation form

identified itself as a “small disadvantaged business, minority owned.”³ Vistronix Quotation at 00324. In conducting the evaluation, the agency relied on this information after verifying the awardee’s SDB status in its FSS contract. Contracting Officer’s Supplemental Statement ¶ 7. Since the RFQ did not require any new or additional recertification or representation apart from that contained in the vendors’ underlying FSS contracts, and Vistronix accurately reported its SDB status from its FSS contract, there is no basis to conclude that the awardee misrepresented its SDB status. Likewise, in view of the RFQ’s limited SDB representation requirements, the agency reasonably relied upon Vistronix’s representation and gave the firm the additional preference in the evaluation.⁴ (We note that the agency’s approach here is consistent with Federal Acquisition Regulation (FAR) § 19.301-1(b), which requires agencies to accept a vendor’s small business representation absent a challenge by another vendor, or where the contracting officer has a reason to question the representation, and FAR § 8.405-5, which provides that ordering activities should rely on small business representations made by schedule contractors at the contract level).⁵

³ In addition, although not reflected in its quotation, Vistronix has applied for re-certification as an SDB, and having a pending application entitled Vistronix to represent itself as an SDB under Small Business Administration (SBA) regulations. 13 C.F.R. § 124.1010; see also FAR § 19.304(a). While these regulations also require a contracting officer to seek an expedited SBA decision on the SDB eligibility of potential awardees with pending SDB applications, SBA states in its comments—in response to a request by our Office—that, since neither the agency nor Vistronix relied on its application in asserting its SDB status, the agency was not required to follow this procedure with SBA. SBA Comments at 3. We have no basis to question SBA’s assessment.

⁴ Our conclusion is consistent with SBA’s position. In this regard, SBA notes that, since the competition was not restricted to small or SDB vendors, and the agency intended to rely only on the vendors’ FSS contract status, Vistronix qualified as an SDB for purposes of this procurement. SBA Comments at 2-3.

⁵ To the extent Synergetics, in essence, is challenging Vistronix’s status as an SDB, the proper forum for such challenges is SBA, not our Office. See 4 C.F.R. § 21.5(b) (2007); Caltech Serv. Corp., B-234424, May 1, 1989, 89-1 CPD ¶ 414 at 2. Any protest of a firm’s SDB status must be filed with the contracting officer within 5 business days after receiving notice of the prospective awardee’s identity. 13 C.F.R. § 124.1020(b)(c). There is nothing in the record to indicate that Synergetics has filed any challenge with the contracting officer. In fact, SBA states that since this was not an SDB set-aside, it is doubtful that Synergetics could protest Vistronix’s SDB status at all. SBA Comments at 3-4.

PRICE EVALUATION

Synergetics asserts that the agency misevaluated its price quotation.⁶ In the protester's view, while its draft task order pricing included a flexible pricing plan that established a ceiling price, or cap, with the opportunity for additional agency price discounts built in, the agency improperly failed either to evaluate it or raise the matter in discussions.

This argument is without merit. The RFQ required vendors to provide a listing of fixed-price, fully-loaded, hourly labor rates for each of its proposed skill categories under the BPA, along with the minimum guaranteed discount for each. RFQ §§ 8.1 and 24.3.1. In addition, vendors were to provide a lump-sum, fixed level-of-effort price for a draft task order included as part of the solicitation. RFQ § 24.3.2. The draft task order pricing was intended to provide a comparison tool for the agency to evaluate the potential pricing that would result from different vendor decisions on labor category equivalents and resulting differences in task order pricing. Id.

In addition to submitting the required labor rates and draft task order pricing, Synergetics' quotation included the following statement regarding its task order pricing methodology: [deleted] Synergetics Quotation at 00247. As explained in the quotation, [deleted]⁷ However, the quotation did not include rates for [deleted] in the list of fully loaded hourly labor rates. While the agency determined that the firm's skill categories and draft task order pricing both were reasonable, it concluded that the added provision was not in accordance with the RFQ requirements, and thus could not be evaluated in accordance with the RFQ's submittal instructions which called for firm, fixed labor rates for all proposed skill categories.

We find nothing objectionable in the agency's evaluation decision. Since the protester's quotation merely promised a potential savings from use of [deleted] that were not even included in the firm's proposed hourly labor rates, the agency reasonably evaluated only the pricing actually quoted.

Synergetics asserts that the agency should have raised its concerns over this aspect of its pricing quotation during discussions. Here, since the agency found

⁶ Synergetics also asserts that the agency's price evaluation scheme--involving the evaluation of labor category prices and a lump sum, draft task order price--was internally inconsistent. The evaluation criteria were clearly stated in the RFQ. As this issue concerns a solicitation impropriety and was not raised prior to the closing time for receipt of proposals, it is untimely. 4 C.F.R. § 21.2(a)(1).

⁷ For example, the Synergetics draft task order called for hours for [deleted] and [deleted], both of which were [deleted], but the [deleted] was paid at a [deleted] rate.

Synergetics's pricing to be complete and reasonable as submitted, and had no pricing concerns, it had no responsibility to seek additional information regarding the firm's pricing provision.⁸ Very simply, its total pricing was higher than the awardee's.

SOURCE SELECTION

Synergetics asserts that the agency improperly converted the source selection from one based on best value, as stated in the RFQ, to one based on the low, technically acceptable quotation. In support of this argument, it cites the source selection plan, which calls for the TEB to identify quotations as being technically acceptable or unacceptable; the ACO's statement at Synergetics's debriefing that "technically capable" was the highest level that the agency had; and the source selection determination that three of the quotations were technically equal. Synergetics Initial Comments at 4.

While an agency may not announce in the solicitation that it will use one evaluation plan and then follow another, American Guard Servs., Inc., B-294359, Nov. 1, 2004, 2004 CPD ¶ 225 at 6, there is no basis in the record for finding that the agency did so here. In this regard, the RFQ explicitly provided that in making its best value determination, the agency was more concerned with obtaining a superior technical approach than making the award at the lowest price. RFQ § 25.3. However, it also provided that the importance of price would increase with the degree of equality of the proposals in relation to all other selection factors. Id. In accordance with this evaluation scheme, the agency only considered the three highest-scored quotations for award, even though there were acceptable quotations with lower prices. Of the three that were considered, since all were evaluated as technically equivalent, the SSA made award to the vendor with the lowest price. In a negotiated procurement with a best value evaluation plan, where selection officials reasonably regard quotations as being essentially equal technically, price properly may become the determining factor in making award, notwithstanding that the solicitation assigned price less importance than technical factors. M-Cubed Info. Sys., Inc., B-284445,

⁸ In any event, the absence of price discussions does not appear to have prejudiced Synergetics. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (GAO will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions); see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). In this regard, Synergetics included its [deleted] in its draft task order pricing, which the agency accepted without question. Thus, Synergetics got the benefit of its [deleted] for evaluation purposes. The fact that its lump sum pricing, including these [deleted], resulted in the highest overall pricing of any vendor, was a result of the firm's own pricing methodology, and not due to any failure on the part of the agency in its evaluation. Moreover, Synergetics has provided nothing to indicate that it would have changed its pricing had the agency raised this matter during discussions.

B-284445.2, Apr. 19, 2000, 2000 CPD ¶ 74 at 8. Since the record shows that the agency determined that the quotations, although different in content, relatively were equal under the non-price factors, its decision to make low price the deciding factor was fully consistent with the RFQ award criteria, and we have no basis to find any error in the source selection.

Our conclusion is not changed by Synergetics's reliance on the wording in the source selection plan and the ACO's debriefing statements. First, while the plan mentions technical acceptability determinations, it also calls for a best value determination consistent with the language of the RFQ. In any event, the source selection plan is merely an internal agency guide that does not give the parties any rights; it is the RFQ evaluation scheme that the agency is required to adhere to. Islandwide Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9 at 4. With regard to the debriefing, the ACO explains that she referred to technical capability in the context of that being the highest rating achieved by the three technically equal quotations. Contracting Officer's Supplemental Statement ¶ 4. Since the ACO's explanation is consistent with the evaluation record, we have no basis to conclude that her debriefing statements indicate any violation of the evaluation scheme.

The protest is denied.

Gary L. Kepplinger
General Counsel