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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: Advanced Technology Systems, Inc.

File: B-296493.6

Date: October 6, 2006

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R. René Dupuy, Esq., Department of Housing and Urban Development, and Thedlus L. Thompson, Esq., General Services Administration, for the agencies.
Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An ordering agency is not required to perform a responsibility determination when placing a task or delivery order under a Federal Supply Schedule (FSS) contract, since the General Services Administration performed a responsibility determination at the time of award of the underlying contract.
2. When ordering services priced at hourly rates from vendors holding FSS contracts, and when a statement of work is required, an agency is required under Federal Acquisition Regulation § 8.405-2(d) to consider a vendor’s proposed level of effort and labor mix in its selection decision.
3. Protest challenging the agency’s evaluation of the awardee’s proposed level of effort and labor mix is sustained where the agency failed to sufficiently document its determination that the awardee’s proposed level of effort and labor mix were acceptable.

DECISION

Advanced Technology Systems, Inc. (ATS) protests the issuance of a task order by the Department of Housing and Urban Development (HUD) to Pyramid Systems Inc. (PSI) under that firm’s General Services Administration (GSA) Federal Supply Schedule (FSS) contract, pursuant to request for quotations (RFQ) No. R-OPC-23036 for operational support and corrective maintenance services in support of the HUD

Tenant Rental Assistance Certification System (TRACS). ATS argues that HUD's evaluation of PSI's quotation was unreasonable. In addition, ATS challenges the agency's affirmative determination of PSI's responsibility.

We sustain the protest in part and deny it in part.

BACKGROUND

TRACS is a computer system developed to help improve HUD's financial controls over agency-administered multifamily housing assistance programs by automating manual procedures and incorporating automated controls. TRACS represents HUD's official source of data on multifamily housing subsidy contracts, tenant rental assistance information, and voucher payments. TRACS is designed to collect tenant data, certify tenant eligibility for financial assistance under various project-based assistance programs, authorize payment, and then process requests for payment (vouchers) to project owners, management agents, and other third-party contract administrators. In fiscal year 2003, TRACS processed approximately 221,000 financial transactions worth approximately \$4.7 billion. Agency Report (AR), July 20, 2006, at 3-4.

The RFQ, issued on June 22, 2006, to ATS and PSI, contemplated the issuance of a fixed-price task order for a 2-month base period with two 1-month option periods.¹ The solicitation included a performance work statement (PWS), instructions to vendors regarding the submission of quotations, and the evaluation factors for award. The RFQ established two evaluation criteria of equal importance: qualifications of key personnel and price. With regard to the qualifications of key personnel factor, vendors were to submit the names and resumes for the five identified key personnel positions, demonstrating relevant knowledge of multifamily housing subsidy programs and funds control processes. RFQ attach. 1, Proposal Instructions, at 1. The RFQ also stated that vendors' price submissions were to include a complete pricing schedule with fixed prices for each contract line item number (CLIN), as well as "[s]upporting documentation of the breakout of each CLIN that identifies the labor categories proposed, the corresponding rates and the total number of hours proposed for each labor category." *Id.* at 3. The task order was to be issued to the vendor whose quotation was determined to be the "best

¹ On June 19, 2006, ATS filed a separate protest with our Office challenging HUD's decision to establish a blanket purchase agreement (BPA) with PSI for up to 5 years for TRACS operational support and corrective maintenance services (B-296493.5). HUD then stayed performance under the BPA and conducted a limited competition here pursuant to Federal Acquisition Regulation (FAR) § 8.405-6. The 4-month period of performance contemplated under the RFQ here was intended as a "bridge contract" to acquire the TRACS services during the pendency of ATS's June 19 protest. AR, Aug. 9, 2006, at 4.

value” to the government “in accordance with the [stated] evaluation criteria and FAR § 8.405-2, Ordering Procedures for Services Requiring a Statement of Work.” RFQ at 1.

ATS and PSI submitted quotations by the June 23 closing date. PSI’s total price was \$264,201.60, while ATS’s total price was \$529,626.76; both vendors’ price submissions also included the firms’ proposed labor categories, hours, and rates by CLIN as required by the solicitation. AR, Tab 3, PSI’s Quotation, Vol. II, Price Proposal, at 1-7; Tab 4, ATS’s Quotation, Vol. II, Price Proposal, at 2-2 to 2-9. An agency technical evaluation team (TET) evaluated vendors’ technical submissions and found the ATS and PSI quotations to be technically equal (both vendors had proposed key personnel with outstanding credentials and capabilities that exceeded agency requirements).² *Id.*, Tab 5, TET Report, at 11. The contracting officer subsequently accepted the TET’s finding that ATS’s and PSI’s key personnel qualifications were technically equivalent and determined that, because PSI’s price was substantially lower (more than 50 percent) than that submitted by ATS, PSI’s quotation represented the best value to the government.³ AR, Tab 6, Source Selection Decision, at 5. This protest followed.⁴

DISCUSSION

ATS first protests that the agency failed to properly evaluate the reasonableness of PSI’s price, contending that PSI’s proposed price for the fixed-price task order here was unreasonably low. Protest, July 3, 2006, at 2, 8-9. This argument is without merit. First, it is well-settled that price reasonableness concerns whether a price is unreasonably high, as opposed to unreasonably low. Cherry Road Techs.; Elec. Data Sys. Corp., B-296915 *et al.*, Oct. 24, 2005, 2005 CPD ¶ 197 at 18; Portfolio Disposition

² The TET limited its evaluation to vendors’ key personnel qualifications, and did not evaluate vendors’ price submissions. *See* AR, Tab 5, TET Report, at 1-11.

³ The contracting officer also determined that PSI’s history of observable performance on current contracts with HUD was good, and concluded that PSI was a responsible contractor in accordance with the standards set forth in FAR § 9.104. AR, Tab 6, Source Selection Decision, at 6.

⁴ HUD subsequently determined that, in accordance with FAR § 33.104(c)(2), it was in the best interests of the United States to authorize PSI’s performance of the bridge contract, notwithstanding ATS’s protest here. Letter from HUD to GAO, July 11, 2006, at 2-4. On September 26, 2006, we denied ATS’s June 19 protest of the long-term BPA that HUD established with PSI. Advanced Tech. Sys., Inc., B-296493.5, Sept. 26, 2006, 2006 CPD ¶ __. The agency then lifted the stay of performance under PSI’s BPA, and simultaneously terminated for convenience the task order issued here to PSI. Letter from HUD to GAO, Oct. 4, 2006.

Mgmt. Group, LLC, B-293105.7, Nov. 12, 2004, 2004 CPD ¶ 232 at 3. Second, ATS's allegation that PSI submitted an unreasonably low price provides no basis for protest because there is no prohibition against an agency accepting a below-cost quotation for a fixed-price task order.⁵ See First Enter., B-292967, Jan. 7, 2004, 2004 CPD ¶ 11 at 5.

ATS also protests that the agency failed to make a proper determination of responsibility for PSI. Specifically, the protester alleges that the contracting officer failed to consider available relevant information bearing upon PSI's responsibility. ATS maintains that a review of PSI's Dun and Bradstreet report indicates that "there is ample cause for grave concern regarding PSI's ability to finance a buy-in of this magnitude." Protest, July 3, 2006, at 11. ATS argues that the contracting officer was required to seek additional information showing that PSI had the requisite financial resources to perform the required work, or the ability to obtain them, in order to determine whether PSI should be found responsible.

HUD contends that although the contracting officer did in fact determine that PSI was a responsible contractor here, the agency was not required to make a responsibility determination because it was simply placing an order under PSI's FSS contract in connection with which GSA had already made a responsibility determination. Agency Dismissal Request, July 12, 2006, at 3.

The protester responds that GSA's responsibility determination, made at the time of the award of the FSS contract, is only as valid as the facts before GSA at the time, and that changes to the indicia of responsibility may exist at the time orders are actually placed. In support of its argument, ATS contends that the large discounts being offered by PSI for the task order here required the ordering agency to question whether GSA's initial responsibility determination was still valid. In such situations, the protester argues, the contracting officer cannot ignore such evidence and simply rely on GSA's previous determination. Protester's Response to Agency Dismissal Request, July 12, 2006, at 8.

Because GSA administers the FSS program, we solicited GSA's views on the responsibility determination issue. In its filing, GSA notes that the purpose of the FSS program, as set forth in FAR Part 38, is to provide federal agencies with a simplified process of acquiring commercial supplies and services. In furtherance of this goal, GSA states, it is responsible for awarding indefinite-delivery contracts in accordance with all applicable statutory and regulatory requirements, including

⁵ While an agency may elect to perform a realism analysis in connection with the issuance of a fixed-price task order, in order to assess a vendor's risk or to measure a vendor's understanding of the solicitation's requirements, it need not do so unless required by the solicitation, AST Env'tl., Inc., B-291567, Dec. 31, 2002, 2002 CPD ¶ 225 at 2, which is not the case here.

compliance with the requirements relating to contractor responsibility (see FAR § 38.101(d), (e)).⁶ GSA concludes that, because it is tasked with making determinations of responsibility pertaining to the award of FSS contracts, ordering agencies, while not precluded from doing so, are not required to make a responsibility determination prior to placing an FSS order. Letter from GSA to GAO, July 26, 2006, at 1-3. We agree.

Responsibility is a contract formation term that refers to the ability of a prospective contractor to perform the contract for which it has submitted an offer; by law, a contracting officer must determine that an offeror is responsible before awarding it a contract. See 41 U.S.C. § 253b(c), (d); FAR § 9.103(a), (b). The concept of responsibility expressly applies to “prospective contractors”—not “current” or “existing” contractors—a limitation that is repeated throughout the applicable statutes and regulations, and that indicates that the requirement for a responsibility determination applies before award of a contract. See, e.g., 41 U.S.C. § 403 (“As used in this Act . . . the term ‘responsible source’ means a prospective contractor”); FAR § 9.100 (“This subpart prescribes policies, standards, and procedures for determining whether prospective contractors . . . are responsible”); FAR § 9.102(a) (“This subpart applies to all proposed contracts with any prospective contractor”); and FAR § 9.103(c) (“A prospective contractor must affirmatively demonstrate its responsibility”).

Consistent with this statutory and regulatory framework, once an offeror is determined to be responsible and is awarded a contract, there is no requirement that an agency make additional responsibility determinations during contract performance. *E. Huttenbauer & Son, Inc.*, B-258018.3, Mar. 20, 1995, 95-1 CPD ¶ 148 at 2 (holding that a contracting officer was not required to make a new responsibility determination before deciding whether to exercise an option because the concept of responsibility has no applicability with respect to a contract once that contract has been awarded). Contrary to the protester’s position, the extent of the requirement for a determination of responsibility is not tied to the type of contracting vehicle that the government elects to use for an acquisition; thus, there is no basis to conclude that the requirement for a responsibility determination is broader for orders placed under FSS contracts. In this regard, we note that FAR § 8.405 and § 8.406 set forth the ordering procedures and ordering activity’s responsibilities, respectively, with regard to FSS contracts; there is no requirement in these provisions to make a

⁶ GSA also states that, in addition to making an initial responsibility determination, it reviews the responsibility of FSS contractors at each option period. Further, GSA monitors contractor performance on key aspects of contract compliance throughout the life of the contract. GSA states that, in instances where an ordering agency has information that may indicate a reason to question the responsibility of an FSS contract, the ordering activity should bring it to the attention of the GSA contracting officer. Letter from GSA to GAO, July 26, 2006, at 2.

responsibility determination.⁷ In sum, we conclude that the initial responsibility determination made by GSA in connection with the award of the underlying FSS contract satisfies the requirement for a responsibility determination regarding that vendor and that there is no requirement that an ordering agency perform separate responsibility determinations when placing orders under that contract. In view of our conclusion, ATS's challenge to HUD's consideration of PSI's responsibility here does not give rise to a valid basis of protest since HUD was not required to perform a responsibility determination.⁸

Lastly, ATS alleges that the agency failed to properly determine whether PSI proposed a sufficient level of effort and an appropriate staffing mix to adequately perform the PWS tasks, as required by FAR § 8.405-2(d). Protest, July 3, 2006, at 2, 9. In support of its position, ATS points to the fact that PSI's proposed labor hours here, on a monthly basis, were less than half of what PSI itself had proposed in response to the earlier solicitation for the same TRACS work requirements, and that PSI's staffing mix also indicated greater use of labor categories with less stringent minimum qualifications. Protester's Comments, Aug. 21, 2006, at 6.

FAR § 8.405-2, which the RFQ specifically applied to the selection decision here, sets forth the general procedures that agencies are to use when ordering services priced at hourly rates from vendors holding FSS contracts when a statement of work is required. Relevant to the protest here, when an agency issues an RFQ to vendors holding FSS contracts for the delivery of services at hourly rates, and, as here, a statement of work is required, the ordering agency must evaluate the quotations received consistent with the stated evaluation criteria. FAR § 8.405-2(d). Additionally, as part of its evaluation, "[t]he ordering activity is responsible for

⁷ Similarly, FAR § 16.505 sets forth the ordering procedures with regard to indefinite-delivery contracts generally; again, there is no requirement to make a responsibility determination.

⁸ The agency and intervenor also argue that ATS's challenge to HUD's responsibility determination regarding PSI should be dismissed because it does not satisfy our threshold requirement that the specific evidence identified raise serious concerns that the contracting officer may have failed to consider available relevant information in reaching the responsibility determination. As we conclude above, the agency was not required to perform a responsibility determination. Nevertheless, none of the information to which ATS refers (PSI's cash on hand and declining net worth as reflected in the firm's Dun & Bradstreet report) rises to the threshold level of specific evidence that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible as contemplated by our Bid Protest Regulations. See 4 C.F.R. § 21.5(c) (2006); Transcontinental Enters., Inc., B-294765, Nov. 30, 2004, 2004 CPD ¶ 240 at 3; Universal Marine & Indus. Servs., Inc., B-292964, Dec. 23, 2003, 2004 CPD ¶ 7 at 2.

considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable.”⁹ Id.

As set forth above, the RFQ here instructed vendors, as part of their price submissions, to identify the proposed labor categories, corresponding labor rates, and the total number of hours proposed by labor category for each CLIN. RFQ attach. 1, at 3. The solicitation also informed vendors that the agency’s determination would be based on overall best value to the government in accordance with the stated evaluation criteria (i.e., qualifications of key personnel and price) and FAR § 8.405-2. RFQ at 1.

Both ATS’s and PSI’s price submissions included proposed labor categories, corresponding labor rates, and hours by labor category for each CLIN, as required by the solicitation. PSI’s quotation proposed 2,000 hours for the base period and 3,840 hours total. AR, Tab 3, PSI’s Quotation, Vol. II, at 2-7. By contrast, ATS’s quotation proposed 2,400 hours for the base period and 6,576 hours total (a 41 percent difference between vendors’ total hours).¹⁰ AR, Tab 4, ATS’s Quotation, Vol. II, Price Proposal, at 2-6 to 2-9.

⁹ While GSA has already determined that the rates for services offered at hourly rates under FSS contracts are fair and reasonable (and, thus, ordering activities are generally not required to make a separate determination of fair and reasonable pricing), in situations where a statement of work is required, the ordering agency must perform a price evaluation and determine that the vendor’s total price is reasonable. FAR §§ 8.404, 8.405-2(d). We note that the regulatory requirement here that agencies consider the level of effort and the mix of labor proposed to perform specific tasks came after consideration of GAO audit report findings that reliance on labor rates alone did not provide agencies with a meaningful basis for assessing which vendor was providing the best and most cost-effective services. See 68 Fed. Reg. 19,294, 19,296 (Apr. 18, 2003); GAO Audit Report, Contract Management: Not Following Procedures Undermines Best Pricing Under GSA’s Schedule (GAO-01-125, Nov. 2000).

¹⁰ As ATS notes, in response to the earlier solicitation PSI had proposed a total of 1,717 hours per month—in comparison to a total of 736 hours per month here—for the same TRACS operations support CLIN (a 58 percent difference). AR, Tab 3, PSI’s Quotation, Vol. II, Price Proposal, at 2-3; Tab 10 (B-296493.5), PSI’s Quotation, Vol. II, Price Proposal, at 4. Additionally, 150 of the 736 (20 percent) of the monthly labor hours that PSI proposed here for TRACS operations support were for a “Network Administrator,” a labor category that PSI’s GSA schedule contract described as having “[t]wo (2) years experience in communications, including installation and administration of local and wide area networks using communications protocols.” AR, Tab 3, PSI’s Quotation, Vol. II, Price Proposal, at 2-3; Tab 10 (B-296493.5), PSI’s Quotation, Vol. II, Price Proposal, Attach. A, GSA Schedule Contract, at 27. By contrast, in response to the earlier solicitation, PSI did not utilize the Network

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The contracting officer reviewed the vendors' price submissions as part of the agency's best value determination and recognized that PSI's price was substantially less than that of ATS for both the base period and the total performance period. AR, Tab 6, Source Selection Decision, at 5. The contracting officer also concluded that, with regard to the PSI and ATS quotations, "[e]ach response had acceptable proposed level of efforts, mixture of labor categories & hours from their GSA Schedules, to meet the requirement." Id. Subsequent to the filing of ATS's protest here, the agency also submitted a statement from the contracting officer which provided as follows:

As a part of my consideration of the offeror's [sic] quotes, I considered the level of effort and the mix of labor proposed by both offerors to perform the stated requirement. In addition to confirming the accuracy of the quotes, I determined the proposed level of effort and mix of labor of both offerors to be acceptable.

* * * * *

As the Contracting Officer, I had discussions with relevant HUD program and technical personnel regarding the level of effort and the mix of labor proposed. HUD's technical personnel apprised me that each vendor proposed appropriate technical labor categories to meet the requirement and a sufficient number of personnel and hours to demonstrate an adequate understanding of the technical requirement. PSI's proposed mix of full and part-time personnel was deemed acceptable.

Contracting Officer's Statement, Aug. 8, 2006, at 2.

HUD does not dispute that, in accordance with FAR § 8.405-2(d), it was required to consider each vendor's proposed level of effort and labor mix, even if these factors were not specifically set out in the evaluation scheme.¹¹ Rather, the agency contends that it did reasonably consider (and contemporaneously document) that PSI's

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Administrator labor category, but instead proposed other labor categories with higher minimum qualifications. AR, Tab 10 (B-296493.5), PSI's Quotation, Vol. II, Price Proposal, at 4.

¹¹ The agency states that, "[a]lthough this is a firm fixed-price contract, FAR 8.405-2(d) directs that HUD is responsible for considering the level of effort and labor mix proposed by each vendor. Presumably this FAR provision was intended as an aid in determining whether the proposed resource mix raises technical capability or other performance issues." AR, Aug. 9, 2006, at 8-9.

proposed level of effort and labor mix were acceptable as part of its determination that PSI's quotation represented the best value to government. The agency points to both the source selection decision and contracting officer's statement in support of this conclusion. AR, Aug. 9, 2006, at 6-9.

ATS argues that the agency failed to reasonably evaluate vendors' quotations in these areas, as the record is totally devoid of any support for the agency's conclusion that PSI's proposed level of effort and labor mix were acceptable. The protester also contends that given the other information readily available to the agency on this matter, HUD could not in fact reasonably conclude that PSI's proposed level of effort and labor mix were acceptable. Protester's Comments, Aug. 19, 2006, at 4-6.

Given the clear language of FAR § 8.405-2(d)–“the [o]rdering activity is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered”–we conclude that HUD was required to consider each vendor's proposed level of effort and labor mix as part of its evaluation of quotations here. As explained below, however, while the record indicates that the agency did consider PSI's proposed level of effort and labor mix as part of its best value determination, the record also indicates a complete lack of support for the agency's conclusion that PSI's proposed level of effort and labor mix were sufficient to perform the specific tasks being ordered under this bridge contract.

In order for us to review an agency's evaluation of vendors' quotations, an agency must have adequate documentation to support its judgment. See Northeast MEP Servs., Inc., B-285963.5 et al., Jan. 5, 2001, 2001 CPD ¶ 28 at 7. Where an agency fails to sufficiently document its evaluation findings, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for the source selection decision. Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10.

The record here does not provide any basis to support the agency's determination that PSI's proposed level of effort and labor mix were sufficient to perform the PWS requirements. The agency's source selection decision provides no support for the contracting officer's determination–it is simply a conclusion without explanation.¹² Similarly, in the statement submitted after the filing of ATS's protest here, the contracting officer merely reiterates his conclusion that PSI's proposed level of effort and mix of labor were determined acceptable, again without providing an explanation of how this determination was made. The only additional information provided in the contracting officer's statement is that he spoke with other HUD

¹² As noted above, the contracting officer's decision simply stated that each vendor's “response had acceptable proposed level of efforts, mixture of labor categories & hours from their GSA Schedules, to meet the requirement.” AR, Tab 6, Source Selection Decision, at 5.

personnel who also concluded, again without explanation, that PSI had proposed an acceptable level of effort and labor mix.

FAR § 8.405-2(d) does not elaborate on the method or extent of consideration an agency is responsible for giving to a vendor's proposed level of effort and labor mix in the circumstances here. In our view, agencies are not required to conduct a formal evaluation of the kind typically performed in a negotiated procurement under FAR Part 15. However, here, in light of the significant differences both between PSI's and ATS's proposed levels of effort, and between PSI's own prior and current proposed levels of effort and labor mixes for the identical TRACS requirements, the conclusory statements in the record simply are not adequate to demonstrate that HUD reasonably considered whether PSI's level of effort and labor mix were sufficient to perform the specific tasks, as required by FAR § 8.405-2(d). We, therefore, sustain the protest on this basis.

RECOMMENDATION

In situations where, as here, an agency fails to sufficiently document its evaluation findings, such that there is not an adequate supporting rationale in the record on which we can conclude that the agency had a reasonable basis for its source selection decision, our Office ordinarily recommends that the agency reevaluate vendors' quotations and make a new source selection decision. See, e.g., Coastal Mar. Stevedoring, LLC, B-296627, Sept. 22, 2005, 2005 CPD ¶ 186 at 10. However, as mentioned above, the task order issued to PSI here as a bridge contract was terminated by HUD after our denial of ATS's June 19 protest permitted the agency to lift the stay of performance for the BPA that had been previously established with PSI. Given that there is no other relief available (HUD also does not now plan to issue another solicitation for the TRACS operational support and corrective maintenance services requirement), we recommend that the protester be reimbursed its quotation preparation costs. 4 C.F.R. § 21.8(d)(2). We also recommend that the agency reimburse the protester the costs of filing and pursuing the issue on which we sustain the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained in part and denied in part.

Gary L. Kepplinger
General Counsel