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United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Department of Justice--Modification of Recommendation

File: B-400760.6

Date: May 5, 2010

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

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

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

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

DIGEST

Request for modification of recommendation for corrective action is denied where agency fails to demonstrate that recommendation was not reasonable.

DECISION

The Department of Justice requests reconsideration of our recommendation in AINS, Inc., B-400760.4, B-400760.5, Jan. 19, 2010, 2010 CPD ¶ 32. In that decision, we sustained AINS's protest of the establishment of a blanket purchase agreement (BPA) with, and issuance of a first call for services to, Privasoft Corp. under request for quotations (RFQ) No. DJJR-08-F-0536, for an automated Freedom of Information Act (FOIA) system and associated services. We found that the agency had failed to conduct meaningful discussions with the protester and that it had treated the two vendors unequally in its evaluation of quotations. We recommended that the agency reopen discussions as appropriate, request and reevaluate revised quotations, and make a new source selection determination. We further recommended that in the event that AINS was selected as the vendor whose quotation represented the best value to the government, the agency terminate the BPA established with Privasoft and enter into a BPA with AINS.¹

¹ We also recommended that AINS be reimbursed its protest costs.

The agency contends that in making our recommendation, we failed to take into consideration that performance on the first call was not suspended during our consideration of the protest (due to the protester's failure to file within the statutory time period for obtaining an automatic stay) and that the agency thus has already incurred substantial expenses associated with Privasoft's performance. The agency notes in this connection that at the time it submitted its request for reconsideration on January 29, Privasoft had already furnished it with an invoice for \$56,991.72 and was scheduled to furnish it with a second invoice in the amount of \$47,347.46 on February 10; in addition, Privasoft was scheduled to incur training costs of \$7,232.40 during early February. Thus, according to the agency, it had already incurred costs of \$111,571.58 that would be lost if the call issued to Privasoft were terminated.

The agency further noted that its own personnel had invested approximately 600 hours in working with Privasoft on the requirements gathering and software configuration process; specifically, agency personnel had been meeting with Privasoft's business team and software developers on an ongoing basis to educate the Privasoft representatives regarding the Office of Information Policy's "specific business processes" because, "although Privasoft is supplying a [commercial off-the-shelf] product, Privasoft needs to configure the software to meet OIP's particular needs." Agency Request for Reconsideration, Jan. 29, 2010, at 7. According to the agency, none of the effort expended by the Department can be salvaged and applied to work by another vendor; rather, if a new vendor were selected, the entire process would have to be repeated. The agency also argues that given that Privasoft has already completed the software configuration process, there is no meaningful way for it to reopen discussions and compare revised proposals. That is, there is no way to reopen the competition on a common basis given that Privasoft has already performed a portion of the work that AINS, if selected, would have to perform in full.

The agency is incorrect in asserting that in fashioning our recommendation, we failed to consider the potential cost to the agency of terminating the call to Privasoft.² We were aware that performance had not been suspended and that, based on Privasoft's proposed schedule, the project planning and the development and configuration phases of the work, as well as approximately half of the integration and testing work—for which Privasoft had quoted a combined total of approximately \$110,000—would likely have been completed by the time we issued our decision; however, given that AINS's quoted price for the first call work was more than \$115,000 lower than Privasoft's quoted price, it was not apparent that

² We also point out that we recommended that the BPA established with Privasoft be terminated and a BPA established with AINS only if the reopening of the source selection process resulted in the selection of AINS as the vendor whose quotation represented the best value to the government. That is, implementation of our recommendation will not necessarily result in the costs described by the agency—it will result in those costs only if Privasoft is not again selected.

termination of Privasoft's call and issuance of a call to AINS would be more expensive than leaving the call issued to Privasoft in place.³

Moreover, the potential cost to the government of terminating the call to Privasoft was not the only factor that we considered in making our recommendation.⁴ We also considered the fact that the agency established the BPA with the intention of issuing additional calls against it over its 5-year term, and allowing Privasoft to continue with performance of the initial call would give it an enormous advantage in the competition for any subsequent calls. In addition, we took into account that this was the second decision by our Office concerning this procurement in which we found an unequal treatment of vendors. We concluded that the adverse effect on the integrity of the competitive procurement system that would result from allowing Privasoft to continue to perform on the first call—without a reassessment of the best value decision—outweighs the potential costs to the government of implementing our recommendation. See Panafax Corp., B-201176, June 22, 1981, 81-1 CPD ¶ 515 at 2-3.⁵ We see no basis to alter our conclusion. Accordingly, we deny the agency's request for modification of our recommendation.

Lynn H. Gibson
Acting General Counsel

³ We were not aware at the time we made the recommendation that the agency intended to invest a substantial number of hours of its own employees' time in defining its requirements and communicating them to the selected vendor after issuance of the first call.

⁴ Our Bid Protest Regulations, 4 C.F.R. § 21.8(b) (2009), provide that in making a recommendation, we are to consider all circumstances surrounding the procurement, including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation on the contracting agency's mission.

⁵ With regard to the agency's argument that it is now impossible for it to conduct a competition on a common basis for the first call work given that Privasoft has already accomplished part of the effort, we did not recommend that the agency revise the scope of work and seek revised quotations; we recommended that the agency reopen discussions as appropriate and that it request and evaluate revised quotations. In other words, if the only way to ensure an equal competition is to for both vendors to continue to quote on the full scope of work, we recommend that the agency proceed on that basis.