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Decision

Matter of: Perot Systems Government Services, Inc.

File: B-402138

Date: January 21, 2010

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Richard J. Conway, Esq., and Michael J. Slattery, Esq., Dickstein Shapiro LLP, for Electronic Data Systems, LLC, an intervenor.
Kathleen K. Barksdale, Esq., General Services Administration, for the agency.
Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rejected quotation in Federal Supply Schedule acquisition conducted under Federal Acquisition Regulation (FAR) part 8.4 is denied where protester submitted prices that were unpublished rates and not approved as fair and reasonable by the General Services Administration, as required under FAR §§ 8.402(b) and 8.404(d).

DECISION

Perot Systems Government Services, Inc., of Fairfax, Virginia, protests the issuance of a Federal Supply Schedule (FSS) task order to Electronic Data Systems, LLC (EDS), of Herndon, Virginia, under request for quotations (RFQ) No. R3094042, issued by the General Services Administration (GSA) on behalf of the Department of Veterans Affairs (VA) for information technology (IT) services to support VA's Computerized Patient Record System (CPRS). Perot asserts that the agency improperly excluded its quotation from award consideration.

We deny the protest.

The RFQ, issued pursuant to Federal Acquisition Regulation (FAR) part 8.4, was open to vendors holding GSA FSS IT contracts under special item number (SIN) 132-51 (IT Professional Services). The RFQ contemplated the issuance of a task order to perform various IT support services for a base year, with four 1-year options. RFQ at 6-7. The successful vendor was to be determined based on initial quotations, and a "best value" evaluation. Id. at 2. Vendors were to submit their

quotations in two parts, technical and price. Id. at 2. Regarding price, the RFQ advised that “The quoted price shall be derived from the labor category skill-level rates on the contractor’s current GSA IT Schedule 70 contract.” Id. at 5.

The agency issued two amendments which, among other things, provided responses to vendors’ questions regarding the procurement. In response to one question, the agency indicated that it would accept discounts to vendors’ current GSA IT Schedule 70 contract. RFQ amend. 1, at 1.

GSA received four quotations, including Perot’s and EDS’s. Perot’s quotation noted that it was based on its GSA FSS contract (GS-00F-0049M), and that it was predicated on the terms and conditions of that contract. Perot Quotation, Cover Letter, at 1. The quotation also indicated, however, that Perot was in the process of negotiating a 5-year extension of its FSS contract, and that the functional labor category rates in its quotation were the rates Perot proposed for that extension, which were currently under review by GSA. Perot Quotation, Price Quotation, at 1.

GSA determined that the rates under Perot’s current FSS contract were in effect until November 24, 2009, and that these rates did not match those in Perot’s quotation. Agency Report (AR), Contracting Officer Statement (COS), at 2. Specifically, the agency found that Perot’s quoted “schedule rates” were based upon the new 5-year contract that was under negotiation, but had not yet been approved. AR, Tab D, Perot Price Analysis, at 1. Because the rates quoted as “schedule rates” had never been approved, the agency excluded Perot’s quotation from consideration. AR at 2; AR, COS, at 2. The agency determined that EDS’s quotation represented the best value and issued a task order to EDS on October 8.

Perot asserts that it was improper for the agency to exclude its quotation from award consideration. Specifically, the protester argues that, because the solicitation permitted vendors to propose pricing “derived from” their current FSS contract, it properly could quote rates different from those in its current contract, provided that the quoted rates were derived from that contract. Protest at 10. Perot maintains that its rates were acceptable under the terms of the RFQ because they were derived from its current GSA schedule contract.

FSS procedures provide agencies a simplified process for obtaining commonly used commercial supplies and services, FAR § 8.401(a), and, although streamlined, satisfy the requirement for full and open competition. 41 U.S.C. § 259(b)(3) (2006); FAR § 6.102(d)(3). GSA schedule contracts require all schedule contractors to publish an “Authorized Federal Supply Schedule Pricelist.” FAR § 8.402(b). The pricelist contains all supplies and services offered by a schedule contractor. Id. In addition, each pricelist contains the pricing and terms and conditions pertaining to each SIN included on the schedule. Id. Supplies offered on the schedule are listed at fixed prices. Services listed on the schedules are priced either at hourly rates (the case here), or at a fixed price for performance of a specific task. Because prices in FSS

contracts already have been determined by GSA to be fair and reasonable, ordering activities are not required to make a separate determination of fair and reasonable pricing prior to issuing an order against an FSS contract. FAR § 8.404(d). Ordering activities may seek additional discounts before placing an order. Id.

While we find the RFQ language calling for prices “derived from” the contractor’s current GSA IT Schedule contract to be unclear (we assume it was intended to reflect permissible discounts from FSS contract prices), since this was an FSS acquisition conducted under FAR part 8.4, the RFQ must be read in a manner consistent with the FAR rules and regulations pertaining to FSS purchases. In this regard, vendors under FSS purchases must quote schedule prices that are published and that have been determined to be fair and reasonable by GSA. FAR §§ 8.402(b) and 8.404(d). The only exception to this rule is that vendors may offer discounts to their contract prices. FAR § 8.404(d).

Perot quoted prices that were not on its current FSS contract and thus were neither published nor determined to be fair and reasonable by GSA. This being the case, Perot’s quotation was inconsistent with the terms and conditions of the RFQ and FSS regulations, and therefore unacceptable. Thus, GSA properly eliminated it from consideration.

Perot argues that the agency should accept its quotation because most of its prices were lower than the prices on its original FSS schedule and therefore, presumably, fair and reasonable, and that the few rates that were higher were not materially so. Protester Comments at 20. In this regard, Perot notes that the RFQ did not state that the “current contract” was a cap on rates. Id. at 13. In any event, Perot contends that its quotation should have been accepted because its total price is lower than EDS’s.

As noted above, when competing for task orders under the FSS, vendors are permitted to quote their approved and published contract rates, with or without discounts. Thus, a vendor’s approved and published rates do operate, in effect, as a “cap” on its prices. Here, even if Perot’s lower prices are viewed as permissible discounts to its current FSS contract prices, rather than as new, unapproved, unpublished rates, its quotation still would not be acceptable, since, as Perot acknowledges, some of its quoted prices were higher than its current contract prices. Since nothing under FSS regulations allows a schedule holder to propose prices higher than its current FSS contract prices—those higher prices have not been determined to be fair and reasonable by GSA—the higher prices in Perot’s quotation rendered it unacceptable.

Very simply, while discounts to FSS prices are permissible, the higher prices quoted by Perot are not schedule prices; an order based on non-FSS pricing under an FSS acquisition therefore would be improper. See generally Science Applications Int’l,

B-401773, Nov. 10, 2009, 2009 CPD ¶ 229 at 1 (under FSS acquisition, all items ordered must be included on vendor's schedule contract).

Perot asserts that interpreting the RFQ as requiring that quoted prices be current (actual or discounted) FSS contract prices ignores the phrase "derived from," and thus evidences a latent ambiguity in the RFQ. Protester Comments at 18. However, even if we agreed that the pricing instructions were ambiguous, any ambiguity was patent rather than latent. In this regard, to the extent the term "derived from" led the protester to interpret the RFQ as permitting prices higher than its current FSS contract, that interpretation was inconsistent with the FAR. Since Perot was on notice of the FAR, see Environmental Tech. Assessment Compliance Serv., B-258093, Dec. 13, 1994, 94-2 CPD ¶ 239 at 3, it should have known from the face of the RFQ that its interpretation was inconsistent with the FAR, since its prices had not been determined to be fair and reasonable. As such, this protest ground is untimely, since it was not raised prior to the deadline for receipt of quotations. 4 C.F.R. § 21.1(a)(1) (2009).

The protest is denied.

Lynn H. Gibson
Acting General Counsel