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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Strategic Analysis, Inc.

File: B-292392; B-292392.2

Date: September 3, 2003

James D. Bachman, Esq., and Ron R. Hutchinson, Esq., Doyle & Bachman, for the protester.

Michael F. Copley, Esq., and Stuart W. Harris, Esq., Kegler Brown Hill & Ritter, for LOGTEC, Inc., the intervenor.

Maj. Brent G. Curtis, and Michael D. McGrath, Esq., Department of the Air Force, for the agency.

Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation expressly contemplated that vendor would not have certain required non-disclosure agreements (NDA) until after commencement of performance under task order, and provided criteria for assessing vendor's plan to obtain NDAs after issuance of order without calling for price evaluation adjustments or for any adverse evaluation consequences for doing so, agency reasonably did not downgrade proposal for including a highly rated plan to obtain required NDAs after issuance of the order, and was not required to increase the evaluated cost to the government to compensate for the alleged transition costs related to the delay in performance that the solicitation anticipated for obtaining the NDAs.

DECISION

Strategic Analysis, Inc. (SAI) protests the issuance of a 5-year time and materials task order (to be placed against a General Services Administration (GSA) federal supply schedule (FSS) contract) to LOGTEC, Inc., for independent research and development and data mining (IR&D) support under request for quotations (RFQ)

No. FA8652-03-Q-0012, issued by the Air Force Research Laboratory.¹ SAI protests that the Air Force misevaluated LOGTEC's proposal by failing to properly consider the cost and technical impact of LOGTEC's need to obtain certain non-disclosure agreements (NDAs) that are required in order to perform, and that the Air Force conducted improper discussions with LOGTEC.

We deny the protest.

The RFQ, issued on April 11, 2003, sought quotations to be evaluated on the basis of three factors, management approach to acquiring NDAs, IR&D expertise and data mining technical ability, and price respectively on a 30/40/30 percentage weighted basis. The Air Force estimates that there are approximately 100 required NDAs, and the RFQ statement of work (SOW) provided that the contractor was required to initiate, update, renew, or otherwise obtain 80 percent of these agreements prior to beginning the data mining subtask. RFQ, SOW ¶ 1.1.1.1. The RFQ also stated that the government "anticipates that it may take 5-7 months for a contractor with few existing NDAs to establish the NDAs identified" in the solicitation, and required that the vendor's "proposal regarding management approach to acquiring NDAs shall include a performance plan with progress measures." RFQ ¶ 2(a). Three quotes were received by the amended April 21 deadline, LOGTEC's and SAI's, plus one from a vendor whose technical approach was evaluated as noncompetitive.

SAI, the incumbent, had in place approximately 40 current required NDAs. LOGTEC had 90 NDAs, a limited number of which the Air Force believed could be used for the contract requirements at issue. SAI's quote was \$2,059,055.70 and LOGTEC's was \$1,532,225.68. SAI's proposal received a slightly higher overall technical evaluation resulting in part from the assessment under the approach to acquiring NDA factor, under which the evaluators credited SAI for possession of a significant number of executed NDAs, in conjunction with a solid plan to acquire the required additional NDAs. LOGTEC's proposal received a slightly less favorable evaluation under this factor because LOGTEC did not have in place a comparable base of required NDAs, but the evaluators credited LOGTEC for its extensive experience in establishing NDAs, its possession of existing NDAs that might be usable, and for a solid plan for acquiring and maintaining NDAs, which included the proposed use of an incumbent consultant whose credentials added credibility for purposes of acquiring the required NDAs. AR, Tab 7, Technical Evaluation of LOGTEC, at 1. Neither vendor's proposal was evaluated as having any weaknesses under this factor. With respect to IR&D expertise and data mining technical ability, both proposals were highly rated, with SAI's proposal again receiving a slightly higher evaluation.

¹ The IR&D program is intended to help communicate the Air Force's technology needs to industry and to help Air Force scientists and engineers find technologies relevant to Air Force needs by intensive data mining of available industry data sources. Agency Report (AR), Contracting Officer's Statement at 1.

The contracting officer determined that SAI had an extremely low risk of not obtaining the NDAs, while LOGTEC had a moderately low risk in this regard, and that the prices proposed by both vendors were reasonable and realistic for the proposed approach. The contracting officer concluded that payment of the substantial \$526,830.02 cost premium associated with the technical superiority offered by the SAI proposal was not warranted, and determined to issue the order to LOGTEC. Thereupon, after receiving a debriefing, SAI filed this protest with our office.

SAI asserts that the Air Force failed to consider the impact of LOGTEC's lack of possession of 80 percent of the required NDAs in connection with either the price or technical evaluation. With respect to price, SAI asserts that the delay in performance associated with LOGTEC's obtaining NDAs will result in higher cost to the agency because of the need for coverage during this transition period, and that this cost should be added to LOGTEC's quoted price. With respect to the technical evaluation, under which SAI's approach was evaluated as only slightly better than LOGTEC's, SAI contends that had LOGTEC's need to spend many months obtaining the requisite NDAs been properly evaluated, LOGTEC's proposal would have been rated much lower than SAI's.

Where, as here, a protest is filed with respect to an RFQ which provides for the issuance of task orders under vendors' FSS contracts, but solicits vendor responses in order for the agency to perform a detailed technical evaluation and price/technical tradeoff under stated evaluation factors, our Office will review the agency's actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. OSI Collection Servs., Inc.; C.B. Accounts, Inc., B-286597.3 et al., June 12, 2001, 2001 CPD ¶ 103 at 4.

As stated above, the RFQ at issue explicitly recognizes that the agency anticipated receiving quotes from vendors that did not possess the necessary NDAs (many of which only the incumbent possessed), estimates that it could take such vendors 5-7 months to obtain the NDAs, and provides for evaluation of the vendors' plans for acquiring the NDAs, including progress measures. While the RFQ specifically sets forth the need for a 5-7 month period to obtain the NDAs necessary to commence the data mining requirements, it does not contain any provision for adding to the vendor's quote, for cost/price evaluation purposes, any additional costs associated with satisfying the agency's data mining requirements during this transition period.²

There is no requirement that transition costs be evaluated in every procurement, and they cannot be evaluated unless the solicitation provides for their consideration.

² In fact, the SOW contains two subtasks, the first of which consists entirely of requirements associated with establishing, updating and renewing the NDAs, which SAI would also have been required to perform. RFQ, SOW 1.1.1.

Technical & Admin. Servs. Corp., B-279828, July 24, 1998, 98-2 CPD ¶ 85 at 6-7. Accordingly, there is no basis for the agency to add these costs to its evaluation of LOGTEC's quote. SAI's real objection in this regard is that the RFQ should have called for the addition of such costs to the evaluation of any quote other than that of the incumbent; however, this issue is untimely since it involves an alleged apparent solicitation impropriety which must be filed prior to the time set for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2003).

With respect to the technical evaluation, SAI's assertion that the agency improperly failed to downgrade LOGTEC for its lack of 80 percent of the required NDAs misconstrues the RFQ evaluation factor as calling for a simple quantitative assessment of how many NDAs a vendor has in place at the time of issuance of the order. On the contrary, the RFQ provides for an assessment of the vendor's management approach to obtaining the NDAs, and explicitly recognizes that obtaining the required 80 percent of the specified NDAs could take 5-7 months. As referenced above, the agency gave LOGTEC's proposal for obtaining NDAs a favorable evaluation (albeit slightly lower than SAI's) because LOGTEC has experience in establishing NDAs, proposed an incumbent consultant who would provide additional credibility in establishing NDAs, possessed 90 existing NDAs some of which may be usable, and described "a solid plan [for] acquiring and maintaining NDAs." AR, Tab 7, Technical Evaluation of LOGTEC, at 1. In our view, this evaluation is reasonable and consistent with the RFQ criterion which calls for evaluation of the vendor's plan to acquire NDAs, and not for an evaluation of simply the percentage of required NDAs currently possessed.

SAI subsequently objected that the agency's evaluation was dependent on LOGTEC's use of an incumbent consultant whose availability would be questionable in the event that SAI continued to perform the data mining services during the transition period and retained the individual as its consultant. In fact, the agency is performing the data mining services in-house during the transition period, and this speculative objection is immaterial. With regard to this same consultant, SAI also propounded a supplemental allegation that the agency improperly conducted discussions with LOGTEC only concerning the availability of the proposed consultant. SAI protests that this constituted improper discussions because, once a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range. Federal Acquisition Regulation (FAR) § 15.306(d)(1).³

³Since this procurement concerns an FSS purchase it would ordinarily be governed by FAR subpart 8.4 rather than part 15. However, as explained above, because the agency used vendor responses as the basis for a detailed technical evaluation and price/technical tradeoff, while the procurement is not directly governed by FAR part 15, we will review the agency's actions under the standards applicable to

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After receiving and evaluating the quotes, the agency sought additional information from LOGTEC regarding its contingency plans if the Air Force elected to extend SAI's task order in order to facilitate transition to LOGTEC, and SAI elected to retain the consultant whom LOGTEC had proposed. However, the solicitation did not call for vendors to address the possibility of such a sole source contract extension for transition purposes and, in fact, the agency states that it is performing this transition work in-house. As discussed above, the LOGTEC proposal was reasonably evaluated as technically acceptable. In the circumstances presented, this exchange with LOGTEC cannot be considered to constitute discussions, which pertain to significant weaknesses, deficiencies, or other aspects of a proposal that could be altered or explained to enhance materially the proposal's potential for award. FAR § 15.306(d)(3); Northeast MEP Servs., Inc., B-285963.9, Mar. 8, 2001, 2001 CPD ¶ 66 at 3. The information sought pertained to one possible transition approach being considered by the agency that was not addressed under the solicitation evaluation criteria, was not implemented, and did not affect the vendor's potential to receive the task order. In these circumstances, there is no basis to conclude that the agency improperly conducted discussions with only one vendor.⁴

The protest is denied.

Anthony H. Gamboa
General Counsel

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negotiated procurements. Digital Sys. Group, Inc., B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50 at 6.

⁴ SAI has also raised certain collateral issues that we have considered and find without merit, which do not warrant specific discussion in this decision.