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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: KEI Pearson, Inc.

File: B-294226.3; B-294226.4

Date: January 10, 2005

Scott T. Kragie, Esq., Robert E. Gregg, Esq., Karen R. Harbaugh, Esq., and Margaret L. Maciulla, Esq., Squire, Sanders & Dempsey, and William F. Savarino, Esq., and John J. O'Brien, Esq., Cohen Mohr, for the protester.
Helaine G. Elderkin, Esq., Carl J. Peckinpaugh, Esq., and Charles S. McNeish, Esq., Computer Sciences Corporation, an intervenor.
George U. Lane, Esq., General Services Administration, and Kenneth J. Densmore, Esq., Department of the Navy, for the agencies.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the solicitation required that all items or services be on a Federal Supply Schedule (FSS), the contracting agency improperly issued a task order to a vendor whose quotation was based on purchasing software products outside the framework of the FSS.

DECISION

KEI Pearson, Inc. protests the issuance of a task order to Computer Sciences Corporation (CSC) under request for quotations (RFQ) No. 4TNG17044035, issued by the General Services Administration (GSA) for phase II of the Navy Knowledge Online (NKO) system. (GSA conducted this acquisition on behalf of the Department of the Navy, the user activity.) KEI contends that GSA improperly issued the task order to CSC under that vendor's Federal Supply Schedule (FSS) contract.

We sustain the protest.

The mission of the NKO system is to provide the entire Navy "enterprise" (800,000 to 1.2 million users, with scalability up to 6 million users), with greater access to training, education, and professional development. RFQ attach. 1, at 1. The NKO system provides users with access to training for technical and professional development, delivering on-demand education and training 24 hours per day, 7 days per week, and anywhere in the world. The NKO system is required to operate using

commercial-off-the-shelf products for the majority of applications in a “web-based environment” without “client side application.” Id. As explained at the hearing conducted by our Office,¹ a “web-based environment” means that the “end user totally accesses all of these products and services . . . via . . . a common installed browser, whether it’s at home or in the office environment or wherever [the user] might be. [The] whole concept was deliver training anytime, anywhere that the person could get Internet access.” Tr. at 16. As further explained at the hearing, no “client side application” means that nothing “specific [needs] to be loaded on [a user’s] particular computer. . . . Basically[,] if [the user] can log in and get to the Internet[,] [the user] can run th[e] application without anything extra being installed.” Id.

The RFQ contemplated the issuance of a combination fixed-price, time-and-materials task order (with nine line items) for a 1-year base period and four 1-year option periods to the vendor whose quotation represented the “best value” to the government considering technical evaluation factors and cost/price. The RFQ stated that technical merit would be considered significantly more important than cost/price and that the task order could be issued to other than the vendor submitting the lowest priced, technically acceptable quotation. RFQ attach. 26, at 1-2.²

In addition, in an undated document containing general questions and clarifications, which was furnished to all vendors prior to the submission of revised quotations, GSA provided the following information:

¹ Our Office conducted a hearing in order to close the gaps in the underlying factual record as presented in GSA’s administrative report. The primary hearing witnesses were procurement officials from GSA and the Navy and representatives from CSC and two of its subcontractors. At the hearing, GSA referred to documents that had not been produced in the administrative report; at GAO’s request, these documents were subsequently furnished by GSA, as well as supplemented by CSC. In this decision, references to a hearing transcript (Tr.) relate to the hearing conducted by our Office.

² Even though GSA was using the FSS, GSA handled the selection of a vendor for the issuance of the task order much like a negotiated procurement pursuant to Part 15 of the Federal Acquisition Regulation (FAR). For example, as reflected in this decision, GSA refers to the vendors’ submissions as “proposals.” See, e.g., GSA’s New Best Value Determination, Sept. 2004.

All items or services acquired by the offeror for this delivery order must either be on the GSA schedule, or acquired through a vendor that is on the GSA schedule. In the event that it is necessary to purchase an item through a vendor, the offeror must insure that their cost proposal properly accounts for all ancillary fees (e.g. pass through fees). Additionally, current GSA acquisition policy establishes an absolute ceiling of \$25,000.00³ for the aggregate value of all open market items purchased as part of this delivery order.

General Questions and Clarifications, No. 12, at 49-50.

As relevant here, KEI (which was teamed with the phase I incumbent contractor) and CSC submitted quotations for phase II.⁴ In its revised final cost/price quotation, dated May 28, 2004, CSC provided a chart captioned “Other Direct Procurements by Vendor,” in which CSC listed six items/services with corresponding costs and GSA schedule references. The primary focus of this protest involves the following line in CSC’s May 28 quotation:

Other Direct Procurements by Vendor		
Item/Service	Cost	GSA Schedule
BEA ⁵	#[deleted]	Non-Schedule (See Note)

The referenced note, as contained in CSC’s May 28 quotation, stated as follows:

Note: BEA sells this product via a number of resellers under GSA schedules, to include for example: Merlin (GSA schedule GS-35F-0783M). However, BEA and CSC have an Alliance Agreement wherein we are able to procure this product at a significant savings to the

³ It is not clear from this record the basis for GSA’s authority to permit non-FSS purchases for this amount.

⁴ As explained at the hearing, phase I was a pilot phase where the Navy “generally go[es] off lessons learned and then [it] build[s] in [its] business practices and rules and those kinds of things that are going to lead to the mature end product. So the emphasis of Phase II was to take what [the Navy] had learned under the pilot and build the mature model of that in the product that would live the life of the system.” Tr. at 14.

⁵ The complete corporate name of BEA is BEA Systems, Inc. As relevant to this protest, Merlin Technical Solutions, Inc. is an authorized reseller of BEA software products (licenses and maintenance) via Merlin’s FSS contract GS-35F-0783M.

Government. If required by the Government, CSC will purchase this product via a Government authorized source.

As confirmed at the hearing by the witnesses for GSA, the Navy, and CSC, the cost of buying BEA products pursuant to the non-schedule “alliance agreement” between CSC and BEA—the \$[deleted] amount cited in the chart reproduced above—would be lower than the cost of buying the BEA products through a reseller holding an FSS contract. Tr. at 135-39. However, while CSC’s quotation clearly indicated that purchasing the BEA products through the FSS would cost more than the \$[deleted] amount quoted as a non-schedule buy, nowhere in its quotation did CSC indicate how much the government would have to pay if the government were to require CSC to obtain the BEA products through the FSS.⁶

In its May 26 document⁷ captioned “Fair and Reasonable Price Determination,” GSA stated, in relevant part, as follows:

The Contractor [CSC] has certified that all ODC [other direct cost] procurement[s] will be against a GSA Schedule for each ODC vendor. The only ODC procurement that is not through . . . a Schedule is “Telcom,” which the ODC procurement is under the \$25K threshold. GSA has validated that the ODC GSA Schedule cost[s] are at or below published schedule prices. The following is a Chart 2 of the planned ODC cost[s] and subcontractors.

The relevant line in Chart 2, as prepared by GSA, showed as follows:

Other Direct Procurements by Vendor		
Item/Service	Cost	GSA Schedule
BEA	\$[deleted]	GS-35F-0783M ⁸

⁶ While this protest was pending, GAO made numerous inquiries of GSA and CSC (e.g., through pre-hearing interrogatories and through repeated questions at the hearing) concerning what the higher schedule price for the BEA products would be. Prior to the filing of post-hearing comments, GAO received no clear answer from either GSA or CSC. In its post-hearing comments, GSA, for the first time, indicated that the use of the higher schedule price for the BEA products would result in an upward adjustment to CSC’s quotation of at least \$[deleted], an amount that we believe is not de minimis. GSA’s Post-Hearing Comments at 7.

⁷ It is not clear why this document was dated 2 days prior to the date of CSC’s revised final cost/price quotation.

⁸ Chart 2 as prepared by GSA is not consistent with CSC’s quotation. In this regard, the schedule referenced by GSA in this chart is a Merlin schedule, not a BEA schedule. Furthermore, the cost figure referenced by GSA in this chart is the

(continued...)

On June 2, GSA determined that CSC's cost/price was fair and reasonable.

Out of a possible 100 points, CSC's technical score was 70 and KEI's technical score was 55. CSC's evaluated cost/price (\$22,806,569) was \$248,418, or approximately 1 percent, higher than KEI's evaluated cost/price (\$22,558,151). GSA determined that CSC's higher technically rated, higher cost/price quotation represented the best value to the government. On June 9, GSA issued the task order to CSC. The "grand total" of the CSC task order was \$21,470,101.54. CSC's Task Order, June 9, 2004, at 2. The task order stated that the total of non-schedule other direct cost items was below the \$25,000 amount and that "[n]o other non-schedule items are authorized under this task order." Id. The task order also stated that the "[c]ontractor's most recent updated proposal in response to this solicitation [*i.e.*, CSC's May 28 quotation] is hereby incorporated into this task order." Id.

KEI protests,⁹ among other things, that GSA could not properly issue the task order to CSC because, according to CSC's revised final cost/price quotation of May 28, the BEA products were not being purchased by CSC through a vendor's FSS contract, but rather were being purchased by CSC pursuant to a non-schedule "alliance agreement" between CSC and BEA, which was not in accordance with the rules governing the use of the FSS and the terms of the RFQ. We agree.

The FSS program, directed and managed by GSA, gives federal agencies a simplified process for obtaining commonly used commercial supplies and services. FAR § 8.401(a). The procedures established for the FSS program satisfy the requirement for full and open competition. 41 U.S.C. § 259(b)(3); FAR § 6.102(d)(3); Sales Res.

(...continued)

CSC/BEA lower "alliance agreement" non-schedule price, not Merlin's higher schedule price. Tr. at 137-38. The record is clear that at the time this chart was prepared by GSA, CSC had not quoted a Merlin schedule price for the BEA products.

⁹ This protest follows GSA's decision to take corrective action in response to an earlier protest filed by KEI, in which KEI raised in its comments on GSA's administrative report the issue addressed in this decision. GSA's corrective action generally involved a reevaluation of the cost/price quotations submitted by KEI and CSC. In taking corrective action, GSA did not request another round of revised quotations. Corrective Action Letter from GSA to GAO, Aug. 6, 2004. Following corrective action, in September 2004, GSA made a new best-value determination in which it again determined that CSC's higher technically rated, higher cost/price quotation represented the best value to the government. The approximate 1-percent, or \$248,418, difference in the evaluated costs/prices of the two vendors, as discussed above, is based on the analysis in GSA's new best-value determination. GSA's New Best Value Determination, Sept. 2004, at 1.

Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 3-4. Non-FSS products and services may not be purchased using FSS procedures; instead, their purchase requires compliance with the applicable procurement laws and regulations. Symplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 4; Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18 at 4.

In response to this protest, GSA states that “all costs that [were] evaluated [for CSC] were GSA schedule costs.” Tr. at 135. More particularly, GSA states that the “alliance agreement” amount in CSC’s quotation was never taken into consideration. In fact, GSA maintains that the “alliance agreement” amount “represented in [CSC’s] proposal [was] actually [a] schedule item price. [CSC] gave us that notice . . . just to let us know that they could get it to us at a cheaper rate via the [a]lliance [agreement] versus [a] schedule.” Tr. at 136.

We believe, however, that GSA’s position is not supported by the language in CSC’s May 28 quotation that was incorporated into the June 9 task order, and that GSA’s evaluation of CSC’s quotation was not in accordance with the rules governing the use of the FSS and the terms of the RFQ. In this regard, CSC’s quotation clearly shows that CSC quoted a non-schedule “alliance agreement” price for BEA products, which the quotation indicated represented “a significant savings” relative to a price from an FSS source for these products. In fact, CSC recognized its non-compliance with the terms of the RFQ, as reflected by the statement in its quotation that “[i]f required,” CSC would purchase the BEA products from a “Government authorized source,” which presumably meant a vendor that could provide the BEA products under an FSS contract. While there is no dispute that it was CSC’s clear intention to give GSA the best possible price for the BEA products, CSC nevertheless had to do so in accordance with the rules applicable to FSS purchases and the terms of the RFQ, which meant that CSC had to provide the BEA products through a vendor holding an FSS contract, and GSA could only consider a quotation in the framework of the FSS for these products. While GSA and CSC point out that the note in CSC’s quotation refers to Merlin as holding an FSS contract under which it is an authorized reseller of BEA products, the fact remains that on the face of CSC’s quotation, CSC did not quote a reseller/schedule price, but rather quoted a non-schedule price based on its “alliance agreement”/non-schedule arrangement with BEA. Tr. at 134-52.¹⁰ On this record, we conclude that GSA did not reasonably evaluate, in accordance with the rules governing the use of the FSS and the terms of the RFQ, CSC’s May 28 quotation and, therefore, GSA could not properly issue the task order to CSC based on that quotation.

¹⁰ At the hearing, CSC stated that “the pricing note [in its quotation was] inartfully written, but that [did not] make the proposal invalid to the extent that there’s some ambiguities in the inartful writing because everything in fact worked out that way.” Tr. at 146; see also Tr. at 149-52.

At the hearing, for the reasons just discussed, GSA recognized that it could not issue a task order to CSC without addressing the non-schedule price quoted by CSC. GSA explained that

when we were making a final decision based upon the information we had at that time, we conducted a GSA-to-CSC discussion. And we would not award . . . unless all of these other direct costs, these license items, were licensed off of the GSA schedule. . . . And in our fair price determination . . . we go through that. And in particular, the BEA was given to us by CSC, this information from CSC, that they were going to purchase that item off of [Merlin's] GSA Schedule [GS-35F-0783M]. And at that time this was the information given to us by CSC. And we rejected . . . wholeheartedly the idea of this Alliance Agreement. . . . [T]hat whole issue was settled back on June the eighth [i.e., the day before the task order was formally issued to CSC]. . . . So that number, [\$] [deleted], was valid per the GSA schedule, even though [CSC's] proposal, what [CSC] submitted as [its] proposal, was in fact had that clause in it, when we went, the inner communication between GSA and CSC before we finalized the last document which was the Fair Price Justification, that's where we went through that issue.

Tr. at 140-42.

Based on this testimony, to the extent that GSA believed that it had cured the problem of CSC's non-conforming quotation by engaging in a "GSA-to-CSC discussion" or by having an "inner communication" with CSC prior to the issuance of the task order to CSC, we have some concern that GSA may have engaged in improper communications solely with CSC for the purpose of enabling CSC to conform a material aspect of its defective quotation to the terms of the RFQ.¹¹ Moreover, we point out that there is no contemporaneous evidence in the record that these communications, in fact, resolved the matter of conforming CSC's quotation to the terms of the RFQ prior to GSA's issuance of the task order to CSC. We also point out that at the hearing, apparently recognizing that its communications with CSC did not actually resolve the matter, GSA went on to testify that "after we made the decision [in June to issue the task order to CSC], then we started talking to CSC specifically about fixing those problems specifically with the GSA schedule and so on." Tr. at 150.

In addition, based on post-hearing documents furnished by GSA and CSC, the record shows that CSC did not revise its quotation in order to comply with the rules governing the use of the FSS and the terms of the RFQ until October 19, 2004--after

¹¹ There is information in the record that suggests that KEI also could have benefited from additional communications with GSA.

this protest was filed--when CSC submitted a revised cost/price quotation to GSA. In its October 19 quotation, CSC agreed to “purchase the Software Licenses directly from [its] proposed Team Members (. . . BEA Systems, Inc.) in support of the technical efforts outlined [in the RFQ]. These products are available under GSA schedules . . . GS-35F-0783M. . . . CSC’s revised proposal represents [the] best value to the government for the services in support of the referenced [RFQ].”¹² Cover Letter to CSC’s Revised Cost/Price Quotation, Oct. 19, 2004.

In sum, considering the referenced testimony and the post-hearing documentation, we conclude that only during performance did CSC comply with the rules governing the use of the FSS and the terms of the RFQ by submitting a revised quotation that contained a price from an FSS source for the BEA products. This testimony and the post-hearing documentation provide further support for our underlying conclusion, as discussed above, that GSA improperly issued the task order to CSC on June 9 based on CSC’s non-conforming May 28 quotation.¹³

¹² At the hearing, CSC explained that the BEA products ultimately were “acquired through the schedule, and it is consistent with the proposal to buy the BEA software through the Merlin schedule at that price. And that’s in fact what happened.” Tr. at 147. This testimony is consistent with CSC’s post-protest, October 19 revised cost/price quotation which shows that CSC ultimately purchased the BEA products under Merlin’s FSS contract, with Merlin appearing to honor for CSC an “alliance agreement” non-schedule price for the BEA products.

¹³ In its post-hearing comments, GSA includes a declaration from its contracting officer, who also served as the source selection official, who states that “[i]t is my understanding that [GSA] may have committed an error in the cost analysis of the [CSC] and [KEI] proposals.” GSA Contracting Officer’s Declaration, Dec. 13, 2004. (In GSA’s post-hearing comments, GSA made cost/price adjustments to both the CSC and KEI quotations.) The contracting officer continues that, “[b]ecause of those possible errors[,] there may be concerns that this would have affected the Best Value determination.” *Id.* The contracting officer then considers the higher revised premium associated with CSC’s quotation, considering the additional post-hearing cost/price adjustments that were made, and concludes that “[i]t is clear to me that even with this greater trade off amount, the superiority of the CSC technical proposal still makes the CSC proposal the best value to the government.” *Id.* To the extent that GSA submitted this declaration from its contracting officer to show that KEI was not prejudiced by any defects in the evaluation and source selection process, we accord little or no weight to evaluation conclusions reached by an agency after a protest has been filed, that is, in the heat of litigation. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

We sustain the protest. Ordinarily, in these circumstances, we would recommend that GSA reevaluate quotations in accordance with the terms of the RFQ and, if necessary, hold discussions with both CSC and KEI in order to address those areas in their respective quotations that render the quotations non-conforming and, therefore, ineligible as the basis for the issuance of the task order. However, this recommendation is not feasible here because GSA determined that urgent and compelling circumstances would not permit the work under CSC's task order to be suspended pending our decision and because CSC has substantially performed the task order requirements. Accordingly, we recommend that GSA reimburse KEI for its quotation preparation costs. We further recommend that GSA reimburse KEI for the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2004). KEI's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.¹⁴

Anthony H. Gamboa
General Counsel

¹⁴ KEI also argued that CSC's proposed technical solution did not comply with the RFQ's no "client side application" requirement. This issue was thoroughly addressed at the hearing, with credible testimony from the Navy procurement officials and from representatives of CSC and its subcontractors. Tr. at 13-87. Neither at the hearing nor in its post-hearing comments has KEI, in any meaningful way, established any instance in which CSC took exception in its quotation to any of the RFQ's technical requirements, including those addressing the need for a commercial, web-based, no "client side application" solution.