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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: Global Communications Solutions, Inc.

File: B-299044; B-299044.2

Date: January 29, 2007

Ronald K. Henry, Esq., Kevin S. Donohue, Esq., and John L. Bowles, Esq., Kaye Scholer LLP, for the protester.

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, PLC, for Globecomm Systems, Inc., an intervenor.

Robin Ray Coll, Esq., Department of the Navy, Naval Air Systems Command, for the agency.

Linda C. Glass, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency had no authority to use small purchase procedures to acquire a commercial item because the anticipated contract value was in excess of \$5 million, contrary to applicable regulation limiting use of these procedures to purchases at or below \$5 million.

DECISION

Global Communications Solutions, Inc. (GCS) protests the issuance of a delivery order to Globecomm Systems, Inc. (GSI) under request for quotations (RFQ) No. 0010181342, issued by the Department of the Navy, Naval Air Systems Command for a quantity of satellite communications systems capable of time division multiple access operation. GCS protests, among other things, that issuance of the delivery order was inconsistent with the solicitation provisions and contrary to statute and regulation.

We sustain the protest.

BACKGROUND

The RFQ, issued on August 24, 2006 under a combined synopsis/solicitation for a commercial item, was issued as a total small business set-aside using simplified acquisition procedures pursuant to the authority of Federal Acquisition Regulation (FAR) Subpart 13.5, captioned "Test Program for Certain Commercial Items." In this

regard, the solicitation stated that the applicable provisions and clauses of the FAR were “those in effect through [FAR] Federal Acquisition Circular (FAC) 2005-12.” RFQ at 2.¹ Thus, the then-applicable provisions of FAR Subpart 13.5 stated: “This subpart authorizes, as a test program, use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding \$5 million.” FAR § 13.500 (FAC 2005-06). Similarly, the then-applicable provisions of FAR Subpart 13.0 stated: “The contracting officer shall not use simplified acquisition procedures to acquire supplies and services if the anticipated award will exceed . . . \$5 million . . . including options, for acquisitions of commercial items using Subpart 13.5.” FAR § 13.000 (FAC 2005-06).

In preparing for this acquisition, the agency acknowledges that it initially intended to acquire the solicited items on a sole-source basis from GSI and that, in connection with that planned sole-source acquisition, the agency estimated the acquisition value to be [DELETED] an amount based on “quotes previously obtained from GSI.” Agency Report (AR), Tab 6, Price Reasonableness Memorandum, at 3. Nevertheless, the agency asserts that, in light of its determination to compete the requirements, “it was reasonable to expect the eventual cost to drop below \$5 million due to the introduction of competition.” Id.

On September 8, the agency received quotations from seven vendors. Five of the seven vendors, including GCS, submitted quotations that were less than the applicable \$5 million threshold;² the agency evaluated each of these five quotations as technically unacceptable.³ Two of the seven vendors, including GSI, submitted quotations that were higher than the \$5 million threshold;⁴ the agency evaluated GSI’s technical submission as “highly satisfactory”⁵ and the other vendor’s quotation that exceeded the \$5 million threshold as “satisfactory.”

¹ FAC 2005-12 was issued on August 4, 2006, and represented the most current FAR revisions at the time the solicitation was issued.

² These five quotations ranged from [DELETED]. GCS submitted a quotation of [DELETED]. AR, Tab 5, Source Selection Authority Approval, at 1.

³ The solicitation listed several specific technical requirements, provided for a “best value” determination on the basis of the agency’s evaluation of technical approach, past performance, and price, and stated that technical approach and past performance, when combined, were significantly more important than price.

⁴ GSI submitted a quotation of [DELETED]; another vendor submitted a quotation of [DELETED]

⁵ The documentation supporting the agency’s technical evaluation of GSI’s quotation stated: “The vendor meets all of the requirements and has provided several

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On September 28, FAR Subpart 13.5 was revised, authorizing an increase in the applicable threshold to \$5.5 million. FAR Subpart 13.5 (FAC 2005-13). However, the agency did not amend this solicitation's provision that applicable FAR provisions "are those in effect through . . . FAC 2005-12," that is, the solicitation was not amended to include any reference to FAC 2005-13, nor did the agency permit the subsequent submission of revised quotations.

Thereafter, the agency issued a delivery order to GSI in the amount of [DELETED]. The agency asserts that, "As this award was made on October 19, 2006, it did not violate the statutory or regulatory threshold." AR at 14.

DISCUSSION

GCS protests, among other things, that the agency improperly issued the delivery order to GSI in an amount exceeding the applicable \$5 million limitation, as reflected in the terms of the solicitation against which GCS submitted its quotation.

Under the terms of FAR Part 13 applicable to this solicitation, the contracting officer was not authorized to use simplified acquisition procedures to acquire supplies and services when the anticipated award exceeded \$5 million. We are unpersuaded that the agency had a reasonable expectation that, "due to the introduction of competition," the value of this acquisition would decrease below \$5 million. Nothing in the record indicates that the agency conducted any market survey or Internet product search to support its view that the required items could be purchased at a price below the \$5 million threshold. To the contrary, the only documented research performed by the agency, conducted in connection with the planned sole-source award to GSI, indicated that the procurement value was [DELETED].⁶ AR, Tab 6, Price Reasonableness Memo, at 3. In short, the record shows that the agency's estimated value of this acquisition was in excess of \$5 million, yet the agency proceeded with this procurement on the basis of authority that had application only to acquisitions below \$5 million.

Further, the record indicates that the agency's violation of the applicable FAR Part 13 provisions prejudiced GCS. GCS maintains that, had the agency amended the solicitation to place vendors on notice of its intent to proceed pursuant to the \$5.5

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enhancement[s] that provide for a more efficient and reliable design." AR, Tab 3, Source Selection Evaluation, at 1.

⁶ The reasonableness of the agency's estimate that the value of the procurement would exceed \$5 million is buttressed, after the fact, by the agency's own evaluation record in which it assessed every one of the five quotations that were priced below \$5 million as technically unacceptable.

million threshold, GCS would have added additional enhanced features to its product, just as GSI did in its quotation that exceeded the \$5 million threshold, and that GCS's enhancements would have led the agency to conclude that GCS's quotation reflected the best value to the government. Protester Comments, Dec. 11, 2006, at 19-21. In this context, GCS states that it considered the \$5 million threshold in FAR Part 13 to constitute a ceiling on its quotation. Id. We view GCS's understanding in this regard to be reasonable.

The protest is sustained.

RECOMMENDATION

The record indicates that the agency's needs are inconsistent with a \$5 million threshold and, if simplified acquisition procedures continue to be used, that the agency's needs can only be met pursuant to the higher threshold established in FAC 2005-13. Assuming that the agency intends to continue using simplified acquisition procedures, we recommend that the agency amend the solicitation to incorporate the revised FAR provision, and allow all previously competing vendors to submit revised quotations.⁷ Upon receipt of the revised quotations, the agency should select the vendor's quotation representing the best value to the government, consistent with the amended solicitation. If a quotation submitted by a vendor other than GSI is selected as representing the best value to the government, the agency should terminate GSI's delivery order and issue an order to that other vendor. We also recommend that the agency reimburse the protester for its costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2006). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Gary L. Kepplinger
General Counsel

⁷ In light of the indications in the record regarding the agency's needs, along with our recommendation that the agency amend the solicitation to reflect the higher threshold, our decision here does not address whether the agency properly evaluated GCS's quotation, submitted pursuant to the lower threshold, as technically unacceptable.