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**Comptroller General
of the United States**

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

Decision

Matter of: e-LYNXX Corporation

File: B-292761

Date: December 3, 2003

Anthony W. Hawks, Esq., for the protester.

Roy E. Potter, Esq., and Jennifer R. Seifert, Esq., Government Printing Office, for the agency.

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DIGEST

Under a request for quotations, issued under simplified acquisition procedures, under which oral presentations constituted the vendors' technical submissions and which provided for award based upon a price/technical tradeoff, protest challenging source selection decision is sustained, where the contracting officer's selection of the higher-priced, higher-rated quotation reflected a failure to meaningfully consider price, given that the price/technical tradeoff was based primarily upon a technical consideration which the contracting officer testified he did not understand and for which he obtained no advice.

DECISION

e-LYNXX Corporation protests the issuance of an order to Noosh, Inc. under request for quotations (RFQ) No. 5170903, issued by the Government Printing Office (GPO) for a contractor-hosted, web-based printing procurement system. e-LYNXX challenges the agency's evaluation of its technical submission and the contracting officer's source selection decision.

We sustain the protest.

In an effort to reduce printing costs to the federal government and to ensure permanent access to non-classified government publications, GPO and the Office of Management and Budget (OMB) have entered into a "Compact" under which both agencies would seek to develop a mechanism that would allow federal agencies to place printing orders directly with print vendors through an on-line system operated by GPO. Accordingly, GPO and OMB agreed that by October 1, 2003 GPO would

develop a “demonstration print procurement contract,” utilizing the Internet for ordering and invoicing, for a federal department or agency selected by OMB.¹ The Compact provided that GPO would “register and qualify printers for participation in the contract” and that “[a]ny registered printer in the country would be free to submit a price quote on any job placed in the system.” The Compact contemplated that the demonstration project would begin in fiscal year 2004, and the competitive procurement process would be deployed throughout the government in fiscal year 2005.

Pursuant to its agreement in the Compact, GPO issued the RFQ on July 10, 2003, as a simplified acquisition under GPO’s Materials Management Acquisition Regulations (MMAR) (GPO Publication 805.33), seeking quotations for a demonstration pilot program with a single buying agency to be deployed by October 1, 2003 for 1 year. The Compact between GPO and OMB was attached to the RFQ. Vendors were informed that GPO intended “to purchase an existing web-based e-commerce solution with necessary modifications to accomplish the requirements” identified in the RFQ, and that GPO intended to make a system available to all federal agencies by October 1, 2004. The RFQ also provided that GPO expected that as many as 1,000 printing firms could participate in the pilot program and that the “number of individual orders placed by the pilot agency [would] also be in the 1,000 range.” RFQ at 3.

The RFQ identified 25 “requirements” that “the proposed solution should provide,” including the following:

1. An online process for vendors to register and update information identifying products they were capable and willing to produce.
2. Simple, clear, easy-to-use interfaces for vendors, GPO, and ordering agencies.
3. Ability to create RFQs using clean, simple and intuitive interfaces with the ability to include attachments in a variety of formats.
4. Ability to notify selected vendors of availability of RFQs (or provide RFQ to selected vendors) and to “simultaneously post RFQs to web site available to all registered vendors. Posting site will provide sorting capabilities to aid vendors in identifying orders that they would be interested in quoting on (i.e., product categories). Small dollar orders (those under \$2,500) may be sent directly to a single vendor without posting.”
5. Ability to select from a large number of vendors those who are capable of providing services requested by describing required product in increasing detail.

RFQ at 3-4.

¹ Subsequent to the issuance of the RFQ, OMB selected the Department of Labor as the buying agency in this pilot program.

Vendors were informed that award would be made on a “best value” basis, in which technical excellence would be significantly more important than price. The following technical evaluation factors were identified: (1) solution description (how well the proposed product/solution meets the stated requirements); (2) ease of use; (3) implementation schedule; (4) features and benefits (*i.e.*, user interfaces, help screens, subject matter expertise, learning curves, and other features and benefits); and (5) prior experience (“[p]rior experience with the proposed product/solution in the Federal Government”). RFQ at 5.

The RFQ provided that the technical evaluation of a vendor’s system would be based upon the vendor’s oral presentation of its system. With respect to price, vendors were directed “to propose a method of pricing this requirement as a firm fixed price contract.” *Id.*

GPO provided the RFQ to three vendors, including Noosh and e-LYNXX, each of which provided a price quotation and presentation slides and made an oral presentation of its proposed system. Each vendor provided a 2-hour presentation to the agency’s evaluators and others (including the contracting officer), after which each vendor answered questions from the agency. Hearing Transcript (Tr.) at 211-12; 252-53. Each of the agency’s four evaluators recorded their impressions from the oral presentations in handwritten notes, which the evaluators subsequently used to prepare individual, typed evaluation memoranda.² Tr. at 17, 19, 142, 212; Agency Report, Tabs 2, 3, 4, and 5, Evaluation Memoranda. Subsequently, the evaluators met to discuss the firms’ oral presentations and reach a consensus evaluation judgment. Agency Report, Tab 6, Evaluation Report.

At the time of the oral presentation, the evaluators found that none of the vendors’ quoted systems satisfied all of the RFQ’s technical “requirements.” Tr. at 42. However, the evaluators found that each vendor demonstrated a system that, with modifications, could meet the agency’s needs. Tr. at 175-76. The evaluators concluded that Noosh had quoted the technically superior solution, and that e-LYNXX’s quoted system was the lowest technically rated of the three quotations. Agency Report, Tab 6, Evaluation Report.

The evaluators’ assessment of Noosh’s technical superiority was based, among other things, on the evaluators’ judgment that Noosh’s quoted system was the easiest to use and offered the most flexible architecture, robust reporting capability, and intuitive audit trail, and that Noosh had the most prior experience within the federal government with its quoted product/solution. *Id.* The evaluators noted that although, as presented, Noosh’s quoted solution (described as the Noosh 5 software)

² Other than the evaluators’ contemporaneous notes, the oral presentations were not recorded.

did not satisfy the requirements for on-line vendor registration and posting of RFQs to a website available to all registered vendors (the so called “open posting” requirement),³ Noosh promised to modify its product to provide these features. Tr. at 42, 231. In this regard, one of the evaluators noted that a prior version of Noosh’s software (Noosh 4) provided these features and that modifying the current version of Noosh’s software would be “fairly easy.”⁴ Agency Report, Tab 5, Evaluation Memorandum, at 1.

With respect to e-LYNXX’s quoted product, the “printLYNXX” system, the evaluators found that although e-LYNXX’s system offered a number of strengths, there were also a number of weaknesses. For example, the evaluators all noted that e-LYNXX’s system did not provide for posting of RFQs to a website available to all registered vendors and that e-LYNXX did not appear willing to modify its system to provide for such open posting. See Tr. at 42, 149-50, 217, 219. This was considered to be a significant weakness by the evaluators, given that the Compact required GPO to adopt a procedure under which any registered printer would be allowed to quote on any job placed in the system.

Following the oral presentations, on July 31, GPO requested “best and final” price quotations from the vendors. Specifically, vendors were asked to provide a fixed price for three line items: (1) modifications associated “with setting up Web Portal per Oral Presentations”; (2) 1-year period based on utilizing a single government agency processing 1,000 orders for a dollar amount of \$4 million; and (3) an option year based upon the same quantities as the base year.

Noosh’s and e-LYNXX offered the following final price quotations:⁵

| | Noosh | e-LYNXX |
|---------------|--------------|-----------------------|
| Modifications | \$3,500 | 0 |
| Base year | \$95,000 | \$32,700 ⁶ |
| Option year | \$95,000 | \$25,200 |

³ GPO states that this requirement was intended to provide for posting to a web site available only to vendors registered to participate in the pilot program and not to other vendors.

⁴ The record does not show exactly what Noosh promised or how its system would comply with the open posting requirement.

⁵ The third vendor’s price quotation exceeded the \$100,000 simplified acquisition threshold.

⁶ e-LYNXX included a notation on its best and final quotation that its base year price of \$32,700, included a one-time deployment fee of \$7,500.

The evaluators' consensus evaluation judgment that Noosh offered the technically superior quotation (Agency Report, Tab 6) and the typed evaluation memoranda of each evaluator (Agency Report, Tabs 2-5) were provided to the contracting officer for his review. Tr. at 361-62. The contracting officer adopted the evaluators' technical findings. Tr. at 410.

The contracting officer then performed a price/technical tradeoff analysis (which was not contemporaneously documented) and determined that Noosh's quotation represented the best value to the government. In this respect, the contracting officer stated that he believed that Noosh offered the most complete solution "mainly because [Noosh] was willing to accommodate the open posting requirements as identified in the RFQ," as opposed to e-LYNXX, which did not offer to satisfy the open posting requirement.⁷ Agency Report, Tab 14, Declaration of Contracting Officer (Sept. 18, 2003). The contracting officer identified a number of other factors he considered in determining that Noosh's quotation was the best value, despite e-LYNXX's substantially lower price, including that Noosh's system was easier to use and offered additional desired features that were not required by the RFQ.⁸

GPO issued an order to Noosh, and this protest followed. Noosh's performance has not been stayed based upon the agency's written determination that the best interests of the United States would not permit the agency to await our decision in this matter.

Simplified acquisition procedures are designed to, among other things, reduce administrative costs, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors. See MMAR § 13.003; Sawtooth Enters., Inc., B-281218, Dec. 7, 1998, 98-2 CPD ¶ 139 at 3. Our Office reviews

⁷ In his hearing testimony, the contracting officer testified that he viewed e-LYNXX's failure to satisfy the RFQ's posting requirement as rendering the firm's quotation "unqualified." See Tr. at 411-13. In its post-hearing comments, GPO argues that e-LYNXX's "refusal to satisfy this requirement made the offer unacceptable." GPO's Post-Hearing Comments at 33 n.12. This post-hearing contention by GPO is inconsistent with the agency's report, in which the agency stated that e-LYNXX was not found unacceptable, see, e.g., Agency Report at 8, and the contemporaneous evaluation record. See Agency Report, Tab 6, Evaluation Report, which stated that each vendor "demonstrated a system which appeared to have the ability to satisfy the requirements expected." Moreover, this post-protest judgment by the contracting officer is not consistent with his testimony that he did know or understand the open posting requirement and that he simply adopted the evaluators' technical judgment. See Tr. at 410.

⁸ Vendors' option year prices were not evaluated and Noosh's order does not include an option year.

allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation. Nunez & Assocs., B-258666, Feb. 10, 1995, 95-1 CPD ¶ 62 at 2.

e-LYNXX challenges numerous aspects of GPO's evaluation and selection of Noosh's quotation. We conducted a hearing to resolve the parties' dispute as to what e-LYNXX orally presented and what was considered by the contracting officer in his source selection decision. As explained more fully below, from our review of the record, including the hearing testimony and parties' arguments, we find unreasonable the price/technical tradeoff analysis performed by the contracting officer to determine that Noosh's higher-rated, higher-priced quotation reflected the best value to the government.

In performing the price/technical tradeoff analysis, the contracting officer adopted the technical evaluation judgments of the agency's evaluators. Tr. at 410. That is, although the contracting officer attended all of the oral presentations, see Tr. at 343, he did not independently assess the vendors' systems and, in fact, testified that he did not have the technical expertise to perform such an assessment. Tr. at 410. The contracting officer also testified that he had no conversations with any of the evaluators or anyone else regarding the technical evaluation judgments, but relied upon the evaluators' typed evaluation summaries (Agency Report, Tabs 2, 3, 4, and 5) and consensus evaluation report (Agency Report, Tab 6). Tr. at 361-62.

After accepting the evaluators' judgment that Noosh's quotation was technically superior to e-LYNXX's, the contracting officer considered the firms' best and final pricing.⁹ The contracting officer recognized that e-LYNXX had quoted a substantially lower price than Noosh (\$32,700 as compared to \$98,500, respectively).¹⁰ Tr. at 411. However, he concluded that Noosh's technical superiority outweighed e-LYNXX's price advantage primarily because Noosh promised to modify its quoted system to provide for open posting and the evaluators found that e-LYNXX would not meet this requirement.¹¹ Tr. at 362-64, 409, 411-12, 414; Agency Report, Tab 14, Declaration of

⁹ The price quotations were provided only to the contracting officer, and were not seen by the evaluators.

¹⁰ The contracting officer testified that he considered e-LYNXX's fixed-price quotation to be "underpriced." Tr. at 412.

¹¹ Although the contracting officer identified a number of other things which he believed justified the superiority of Noosh's quotation over e-LYNXX's (for example, Noosh's system appeared to be easier to use while e-LYNXX's system provided for a less desirable restrictive vendor registration), the record shows that the primary basis for the contracting officer's price/technical tradeoff judgment was e-LYNXX's alleged failure to promise a system that would post solicitations to a web site

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Contracting Officer, at 1. When asked during the hearing to articulate why Noosh's technical superiority was worth its associated price premium, the contracting officer was unable to provide a cogent explanation supporting his tradeoff. In fact, despite stating that e-LYNXX's alleged inability to provide open posting played a significant role in his decision, the contracting officer admitted that the open posting requirement "meant absolutely nothing" to him and that he did not know what open posting was. Tr. at 374, 414.

In a best value procurement, it is the function of the source selection authority (here, the contracting officer) to perform a tradeoff between price and non-price factors, that is, to determine whether one proposal's superiority under the non-price factor is worth a higher price. Even where, as here, price is stated to be of less importance than the non-price factors, an agency must meaningfully consider cost or price to the government in making its source selection decision. See S. J. Thomas Co., Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73 at 3. Although the price/technical tradeoff process allows an agency to accept other than the lowest-priced submission, the perceived benefit of the higher-priced alternative must merit the additional price. See MMAR § 15.101-1(c);¹² Beautify Professional Servs. Corp., B-291954.3, Oct. 6, 2003, 2003 CPD ¶ __ at 5.

Here, we find that the contracting officer failed to give any meaningful consideration to e-LYNXX's substantially lower quotation price, given his inability to explain why Noosh's superiority was worth the more than 65 percent higher price. More specifically, we question whether the contracting officer had a sufficient basis to perform a rational price/technical tradeoff where he testified that the open posting requirement was a key consideration in his analysis but that he did not understand the requirement or obtain any advice concerning it from anyone that did. We fail to see how the contracting officer can assign value for something he admittedly does not understand and for which he did not seek any advice, and we sustain e-LYNXX's protest on this basis.

e-LYNXX also complains that GPO misevaluated the protester's quoted system, as presented at the oral presentation. In particular, e-LYNXX argues that it demonstrated that its system would satisfy the open posting requirement. In this regard, e-LYNXX states that it informed GPO at the oral presentation that the firm's

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available only to vendors registered in this pilot program, that is, the open posting requirement.

¹² Like the Federal Acquisition Regulation (FAR), GPO's regulations allow the agency in a simplified acquisition to use procedures provided for sealed bidding and negotiation. See MMAR § 13.106-2(b). Here, the RFQ provided for the use of cost/technical tradeoff procedures from MMAR Part 15, which are comparable to the procedures contained in FAR part 15.

software was modifiable to allow any form of posting that the agency wished. e-LYNXX also argues that it was misled by the agency at the oral presentation with respect to the requirement to post RFQs to a web site available to all registered vendors, when it was informed by a GPO observer that this requirement concerned all registered vendors doing business with GPO (roughly, 15,000 vendors); GPO asserts, however, that this solicitation requirement actually concerns only vendors that have registered to participate in this pilot project.

As explained below, we have been unable to determine from this record what e-Lynxxx offered at its oral presentation, despite conducting a hearing to receive testimony from three of the agency's four evaluators, the contracting officer, and the protester's presenter. The record is replete with conflicting evidence, statements and testimony concerning what e-LYNXX presented orally to the GPO evaluators regarding the open posting requirement.

Although we recognize that this procurement was conducted under GPO's simplified acquisition procedures, it is a fundamental principle of government accountability that an agency be able to produce a sufficient record to allow for a meaningful review where its procurement actions are challenged. Checchi and Co. Consulting, Inc., B-285777, Oct. 10, 2000, 2001 CPD ¶ 132 at 6. In this regard, in reviewing agency's procurement actions, we do not limit our review to contemporaneous evidence but consider, as appropriate, hearing testimony and the parties' arguments and explanations. See Southwestern Marine, Inc.; Am. Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10.

Here, e-LYNXX's oral presentation slides provide that the printLYNXX system "enables RFQs to be electronically submitted to posting sources." Protest, exh. 1, Oral Presentation Slides, at 26. e-LYNXX's presenter testified that at the oral presentation he explained to GPO that the protester's system could satisfy the open posting requirement in numerous ways and that printLYNXX could provide for posting to any group, large or small, of vendors that the agency wished. See Tr. at 329-30. The e-LYNXX presenter also testified that he was never informed that GPO did not view the printLYNXX system as satisfying the open posting requirement. Tr. at 298. On the other hand, all of the evaluators' contemporaneous oral presentation notes and later evaluation memoranda reflect that e-LYNXX did not demonstrate at the oral presentation that its system would satisfy the posting requirement and that e-LYNXX appeared unwilling to modify its system to provide this function in the fashion requested by GPO. See, e.g., Agency Reports, Tabs 2-5. In addition, three of the four evaluators testified at the hearing, and all three testified that e-LYNXX's presenter did not demonstrate or state that the printLYNXX could provide for open posting of RFQs to a website available to vendors registered in the pilot program.¹³ Tr. at 36-37, 148-50, 219-23.

¹³ Witnesses were sequestered during the hearing.

Adding to the confusion surrounding e-Lynxx's oral presentation are the protester's arguments suggesting that it was misled by GPO regarding the pool of registered vendors that would be eligible to access the web site to which RFQs were to be posted. The e-LYNXX presenter testified that he was informed by someone at the oral presentation (apparently an observer and not an evaluator) that the pool of registered vendors for the posting requirement would be on the order of 12,000 to 15,000 vendors, which is roughly all the vendors currently registered with GPO. This testimony, which is unrebutted in the record, suggests that e-LYNXX's statement at the oral presentation that it could post to a website open to all GPO vendors (which GPO has stated would not satisfy the open posting requirement) was made to satisfy GPO's perceived desires. That is, contrary to GPO's statements that it desired a web site restricted to the vendors registered for this program, e-Lynxx states that it was led to believe at the oral presentation that the RFQ requirement actually provided for posting to a website available to the 12,000 to 15,000 registered GPO vendors. On the other hand, this testimony appears to be inconsistent with the statement in the RFQ that GPO anticipated that only 1,000 vendors would participate in the pilot program.

In short, despite receiving hearing testimony and the parties' post-hearing arguments, we are unable to determine from our review of the hearing testimony and the parties' arguments and explanations what was offered by e-LYNXX at its oral presentation. However, given our finding above that the agency's price/technical tradeoff analysis was unreasonable and that e-LYNXX's protest should be sustained on that basis, we need not resolve this conflict.¹⁴

We sustain the protest.

As noted above, GPO overrode the statutorily required stay of performance triggered by e-LYNXX's protest based upon a finding that continued performance would be in the best interests of the government. In such circumstances, the Competition in Contracting Act of 1984 requires our Office to make our recommendation without regard to any cost or disruption from terminating, recompeting, or reawarding the contract. 31 U.S.C. § 3554 (b)(2) (2000).

We recommend that the agency either conduct new oral presentations in this procurement, particularly given that the evaluators' testimony reflected an

¹⁴ e-LYNXX also objected to several other aspects of GPO's oral presentation evaluation of the protester's system, including that the printLYNXX system reflected a restrictive vendor registration and an inflexible method of issuing RFQs (that is, that there were too many fields that must be completed to issue an RFQ). Given our recommendation to reopen the competition and make a new source selection decision, we do not address these other protest allegations or e-LYNXX's objection to the agency's prior experience and price reasonableness evaluations.

understandable inability to recall the oral presentations with specificity,¹⁵ or obtain written submissions. The agency should then conduct a new technical evaluation of the firms' quotations and make a new source selection decision. If a vendor other than Noosh is selected for award, we recommend that GPO terminate Noosh's order and award an order to that other firm, if it is otherwise appropriate. We also recommend that the protester be reimbursed its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2003). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the GPO within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel

¹⁵ In conducting these new oral presentations, it would appear prudent for the agency to keep a more formal record of the oral presentations, upon which it will base its technical evaluation.