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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: AINS, Inc.

File: B-400760.2; B-400760.3

Date: June 12, 2009

Lawrence J. Sklute, Esq., Sklute & Associates, for the protester.
John R. Caterini, Esq., and Kristen E. Bucher, Esq., Department of Justice, for the agency.
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DIGEST

Protest challenging agency evaluation of quotations received in response to solicitation for establishment of a blanket purchase agreement is sustained where record fails to demonstrate that the evaluation was reasonable.

DECISION

AINS, Inc. of Rockville, Maryland protests the establishment of a blanket purchase agreement (BPA) with Privasoft Corp. of Ottawa, Canada under request for quotations (RFQ) No. DJJR-08-F-0536, issued by the Department of Justice (DOJ) for an automated Freedom of Information Act (FOIA) system and associated services. The protester challenges the evaluation of both quotations.

We sustain the protest.

BACKGROUND

The RFQ contemplated the establishment of a single BPA against the successful vendor's Federal Supply Schedule (FSS) contract for a base and four option years. Vendors were cautioned that all proposed software products and labor categories had to be available under their FSS contracts. Work under the BPA was to be accomplished through the issuance of "calls" for services. The RFQ described the first call, which was for implementation of an automated FOIA system for DOJ's Office of Information and Privacy (OIP).

The solicitation instructed vendors that their quotations should include a technical response consisting of an executive summary; a vendor self-assessment indicating

whether or not its proposed solution complied with a series of over 250 functional and technical requirements; a description of the vendor's methodology for performing the work described in the first call; a staffing plan for the first call; a description of the company's corporate experience; and past performance references. Quotations were also to include prices for the software products to be furnished and the work to be performed under the first call. The RFQ instructed that quotations were due by August 12, 2008, and that quotations received after that date would not be considered.

The RFQ provided for establishment of the BPA with the vendor whose quotation represented the best overall value to the government, with technical merit of significantly greater importance than price. Technical factors, in order of importance, were product evaluation; technical approach (to implementing the work described in the first call); staffing and key personnel; corporate experience; and past performance.[1]

The agency received quotations from three vendors on August 12. After evaluation, the agency determined that Privasoft's quotation represented the best value to the government. On September 29, the agency and "Privasoft, Inc." entered into a BPA; the agency issued the first call to Privasoft the same day. The agency notified AINS of Privasoft's selection on October 2 and furnished the protester with a written debriefing on October 9. The debriefing letter informed AINS that its quotation had been determined unacceptable because in its self-assessment it had indicated an inability to meet three critical requirements. AINS filed a protest with our Office on October 17.

In its October 17 protest, AINS objected to the technical evaluation of its own quotation. The protester also argued that the successful vendor, Privasoft, Inc., was ineligible to enter into a BPA because it did not have an FSS contract and because Privasoft employees were not U.S. citizens as required by the RFQ and did not meet the solicitation's residency requirement. In connection with the first issue, the protester observed that a company related to Privasoft, Inc., Privasoft Corp., held an FSS contract, but argued that Privasoft, Inc. and Privasoft Corp. were different entities with unique DUNS numbers and CAGE codes.

By letter dated November 21, the Department of Justice notified us that it intended to take corrective action in response to the protest. Specifically, the agency advised that it intended to reopen negotiations, hold discussions with vendors regarding weaknesses and deficiencies, allow vendors to submit revised quotations, reevaluate the revised quotations, and make a new source selection decision. On November 21, we dismissed AINS's protest as academic.

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[1] The final two factors were of equal weight.

On December 3, the agency notified both vendors of the weaknesses and deficiencies identified in their responses to the RFQ and invited them to submit revised responses.[2] The agency also amended the RFQ to include a National Security Risk Assessment questionnaire, which vendors were required to complete. Revised quotations were due on January 16, 2009.

Shortly before the January 16 due date, counsel for the protester telephoned agency counsel to express his continued concern that Privasoft, Inc. was ineligible to enter into a BPA because it did not hold an FSS contract. The agency reports that while it believed the concern to be unfounded, it decided "in an abundance of caution" to take "all necessary steps to ensure that there was no issue." Agency Report (AR) at 10. By letter of January 13, the agency advised Privasoft's designated contact that "[t]he Department may only award a task order in response to the above RFQ to a GSA schedule holder," and that, accordingly, "the lack of clarity regarding which company, Privasoft, Inc. or Privasoft Corp., submitted the proposal, and which company is seeking the task order and will perform under it, is potentially a material deficiency." AR, Tab 10. In this connection, Privasoft's quotation stated on its cover page that it was submitted by Privasoft, Inc., but included a copy of Privasoft Corp.'s FSS contract. The contracting officer instructed Privasoft that as part of its revised quotation, it should clarify the following: the corporate relationship between Privasoft, Inc. and Privasoft Corp.; why the quotation was submitted by Privasoft, Inc., when Privasoft Corp. is the GSA schedule holder;[3] which of the two entities "is seeking award of the task order in response to the above RFQ"; and which of the two entities "will be bound to perform under any such task order." Id.

Privasoft responded to the agency's first question by explaining that Privasoft, Inc. is wholly owned by Privasoft International Inc., which is in turn wholly owned by Privasoft Corp., and that Privasoft Corp. is a privately held Canadian company. In response to the second question, Privasoft explained that since calls under the BPA would constitute orders, and Privasoft Corp.'s FSS contract indicated that orders were to be placed with Privasoft, Inc., "it [was] reasonable to establish that the BPA and the proposal [were] submitted by Privasoft Inc."[4] Id. Privasoft went on to note

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[2] The agency concluded that the third vendor's quotation was not within the competitive range and thus did not seek a revised quotation from it.

[3] In connection with the second item, the agency furnished Privasoft with the following guidance: "for example, does this indicate that the proposal was being submitted 'through Privasoft, Inc.' on behalf of Privasoft Corp. as the schedule contract holder?" Id.

[4] In the section of its FSS contract where it was to identify its ordering address, Privasoft Corp. had entered Privasoft, Inc., followed by an address in Herndon, Virginia.

in response to the third question that "Privasoft Inc. is our US subsidiary and we are seeking award of the task order under Privasoft Inc. This is consistent with the terms of the existing GSA Schedule." Similarly, in response to the fourth question, Privasoft noted that Privasoft, Inc. would be bound to perform, but that Privasoft Corp., as the parent company, would guarantee performance. On January 29, the contracting officer again asked Privasoft to clarify which company had submitted the quotation.

By letter of February 2, Privasoft responded to the contracting officer's request for further clarification in relevant part as follows:

> Privasoft Corp. (. . .) is the holder of GSA Schedule GS-35F-0087S. Under the terms of that GSA Schedule, orders are to be placed with Privasoft Inc. (. . .).
>
> *Privasoft Corp. is seeking award of the Blanket Purchase Agreement with the Department of Justice, and will function as the prime contractor.* Your choice of terminology in your January 29th letter "Privasoft Corp. submitted the proposal, and is seeking award of the BPA, using Privasoft Inc. as the instrument for these purposes" is the *correct* interpretation in accordance with the terms of the GSA Schedule contract.

Id.

After receiving the revised quotations, the evaluation panel reconvened. The evaluators assigned point scores to the quotations by rating them under each of the evaluation factors on a scale of [deleted] and then multiplying the ratings by factor weights.[5] The product evaluation factor had a weight of [deleted], for example; thus the maximum point score a proposal could earn for the factor was [deleted].[6] Under the product evaluation factor, AINS received a score of [deleted] (yielding a weighted score of [deleted]), whereas Privasoft received a score of [deleted] (yielding a weighted score of [deleted]). Under the technical approach factor, AINS received a score of [deleted] (and a weighted score of [deleted]), whereas Privasoft received a score of [deleted] (and a weighted score of [deleted]). Under the staffing/key personnel factor, the protester received a score of [deleted] (and a weighted score of [deleted]), whereas Privasoft received a score of [deleted] (and a

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[5] A point score of [deleted] corresponded to an adjectival rating of excellent; [deleted] to very good; [deleted] to fair; [deleted] to marginal; and [deleted] to poor.

[6] The technical approach, staffing/key personnel, past performance, and corporate experience factors had weights of [deleted] respectively, which corresponded to maximum point scores for the factors of [deleted].

weighted score of [deleted]), and under the corporate experience factor, both vendors received scores of [deleted] (and weighted scores of [deleted]).[7] Privasoft's quotation received an overall point score of [deleted], while AINS's quotation received a score of [deleted]. AINS's proposed price was lower than Privasoft's ([deleted] vs. $507,065), but the evaluators concluded that Privasoft's technical superiority outweighed AINS's price advantage and that the former's quotation represented the best value to the government. The contracting officer concurred in the evaluation panel's recommendation and entered into a BPA with Privasoft Corp. on February 27. The agency issued the first call to Privasoft the same day.

On March 6, the agency furnished AINS with a written debriefing. In its debriefing letter, the agency explained that the evaluation panel had identified several weaknesses in the protester's quotation, including the following:

> (1) the failure of the product to fully meet the critical requirement that the [deleted] shall allow for [deleted]; (2) the failure of the final proposal to fully address requirements [deleted]; (3) the proposal's continuing lack of clarity about which version of the software is being proposed (i.e., version "6.x" as opposed to version 6.2); (4) failure of the proposal to fully address routing requirements of the OPEN Government Act and as articulated by OIP's related guidance; (5) [deleted]; and (6) the limited technical background of the proposed Product Certified Subject Matter Expert.

Debriefing Letter, Mar. 6, 2009, at 3. The same day that it received the debriefing letter, AINS protested to our Office.

DISCUSSION

AINS challenges the evaluation of both its own quotation and Privasoft's quotation. We first address the protester's complaints pertaining to the evaluation of its own quotation. The protester argues that none of the weaknesses identified by the agency in its debriefing letter was justified and that its quotation received an unfairly low overall technical score.

Where an agency conducts a formal competition for the establishment of a BPA, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the solicitation and applicable procurement statutes and regulations.

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[7] The evaluators did not reevaluate the quotations under the past performance factor since past performance had not been the subject of discussions. Under the initial evaluation, AINS received a score of [deleted], whereas Privasoft received a score of [deleted], yielding weighted scores of [deleted], respectively.

OfficeMax, Inc., B-299340.2, July 19, 2007, 2007 CPD ¶ 158 at 5. As explained below, we agree with the protester that the evaluation of its quotation was unreasonable.

First, AINS objects to the agency's finding that its product failed "to fully meet" critical requirement [deleted], which requires the vendor to propose [deleted] RFQ, Att. D (Requirements Matrix), at 24. The protester responded to this requirement by noting in its self-assessment that this feature was targeted for release in version 7.0 of its FOIAXpress software, which was due out in July 2009. During discussions, the agency noted that the requirement had to be met by the time of user acceptance testing, and that AINS's proposed date of July 2009 appeared to be well beyond the user acceptance testing date. The agency also noted that the proposed solution would be in an AINS product (version 7.0) that was not yet in existence. Accordingly, the agency asked AINS to confirm whether it could meet the requirement by the time of user acceptance testing and to explain how it would do so and the state of development of its software with regard to meeting the requirement.

AINS responded by stating that it would have critical requirement [deleted] met by the time of user acceptance testing. The protester explained that it would accomplish this by enhancing the latest version of its FOIAXpress software to include the ability to [deleted], and that after this had been accomplished, a user with the appropriate permission would be able to [deleted], which could then be [deleted]. The protester furnished a detailed timeline for completing and testing the enhancement.

While the contemporaneous record lacks detail as to the basis for the evaluators' finding that AINS's response failed to demonstrate full compliance with requirement [deleted], the agency furnished the following explanation in its report: although AINS's revised quotation had indicated that, once enhanced, the protester's software would be able to [deleted], and that these reports could then be exported into various formats, "it [did] not address making the underlying [deleted], which is what Section [deleted] specifically requires." AR at 16. The agency also noted that the protester's response made clear that its software was in a developmental stage.

The protester argued in response that it had addressed the requirement for saving the [deleted] in a format that would allow it to be made available to the public by explaining in its discussion question response that its upgraded software would permit the [deleted]. The protester further argued that the evaluators had treated the vendors unequally by failing to identify Privasoft's response to the requirement as a weakness, even though it also failed to address making the [deleted] available to the public.[8] In its report on the protest, the agency responded to the protester's

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[8] Privasoft responded to the requirement as follows:

allegation of unequal treatment by conceding that Privasoft had not directly addressed the requirement pertaining to [deleted]; DOJ maintained that it reasonably had not questioned Privasoft's compliance, however, because Privasoft had "elsewhere indicated unequivocally it could meet the requirement." The agency noted in this connection that Privasoft had represented in its self-assessment that the capabilities required by [deleted] were "currently available" in its software. Supp. AR at 16.

We fail to see a meaningful distinction between the two vendors' responses to the requirement pertaining to [deleted], neither of which specifically addressed the capability to make the data available outside the context of a report.[9] Accordingly, we do not think that the agency has demonstrated a reasonable basis for finding that AINS, but not Privasoft, failed to "fully meet" the above requirement.[10]

Next, AINS takes issue with the evaluators' finding that its quotation failed to fully address requirements [deleted].

Section 11.18 of the requirements matrix set forth a series of requirements pertaining to the contents of the annual FOIA reports that the software was to generate. For example, subsection [deleted] required that the software be capable of generating a report containing [deleted].[11] In its self-assessment, the protester represented that all of the above requirements were met in version 6.2 of its FOIAXpress software. AR, Tab 31. During discussions, the agency asked the protester how its product would comply with the new requirements of the OPEN Government Act of 2007, as well as related OIP guidance. AINS responded by listing a number of ways in which its product complied, one of which was that it had [deleted]. Protester's Response to

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(...continued)
        [deleted]

AR, Tab 26, Privasoft's Requirements Matrix.

[9] Also, it is not clear from the record why making the data available as part of the report does not satisfy the requirement for making the data available.

[10] While we recognize that the agency also made reference to AINS's product being in a [deleted] with regard to meeting this requirement, DOJ's concern (as explained in its reports on the protest) was not focused on that issue; rather, DOJ focused on whether the AINS product [deleted] would furnish the required capability pertaining [deleted]. As explained above, we do not think that the record supports the evaluators' finding that Privasoft's quotation adequately addressed the requirement pertaining to [deleted], but that the protester's quotation did not.

[11] [deleted]

Discussion Questions. In Attachment A to its response summarizing the enhancements included in version 6.2 of its software, AINS represented that its software "[n]ow include[d] [deleted] items." Id., at Att. A, p. 5. Section [deleted] of OIP's "2008 Guidelines for Agency Preparation of Annual FOIA Reports" requires the inclusion of precisely the same information as [deleted] of the requirements matrix.

The agency argued in its report that despite the fact that AINS had represented in its self-assessment that version 6.2 of its software met the foregoing requirements, it was reasonable for the evaluators to question whether the protester's software complied, given that AINS had not addressed the requirements in its discussion question response summarizing the enhancements included in version 6.2. The record does not support the agency's assertion that AINS's discussion question response failed to address the requirements in question, however; as noted above, Attachment A to the protester's response indicated that the software now included the items required by [deleted]. Id. Absent an explanation from the agency as to why it did not consider the information in Attachment A to be an adequate response to the requirements, the record does not provide a reasonable basis for the evaluators' finding that the protester's quotation failed to fully address them.

Along the same lines, we fail to see a reasonable basis for the evaluators' finding that AINS failed to address what is referred to as the routing requirement of the OPEN Government Act of 2007 and OIP guidance. The routing requirement added to FOIA by the OPEN Government Act of 2007 pertains to the 20-day period for an agency response to a FOIA request. The new language provides that the 20-day period

> shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section.

Pub. L. No. 110-175, § 6(a)(1). The routing requirement was included in the requirements matrix at item 4.2, and AINS represented in its self-assessment that the requirement was met in version 6.2 of its software. In addition, AINS represented in its response to the agency discussion questions that it had enhanced its software to comply with the new requirements of the OPEN Government Act and the OIP guidance pertaining to the particular requirement in question--i.e., "OIP Guidance: New Requirement to Route Misdirected FOIA Requests," which was posted on OIP's FOIA website on November 18, 2008.

While the agency argues that AINS's response to the discussion questions was insufficient to demonstrate that it understood and would comply with the requirement, the agency fails to acknowledge that AINS also addressed the requirement in its self-assessment. That is, AINS's discussion question response was

not the only place that the protester addressed the routing requirement--AINS also represented in its self-assessment that version 6.2 of its software met the routing requirement. The evaluation record lacks any explanation of why the protester's self-assessment, together with its discussion question response, was an inadequate response to the requirement. Thus, we find the agency's determination that the protester failed to address the routing requirement to be unsupported by the record.

Next, AINS takes issue with the evaluation team's finding that its quotation failed to make clear which version of its software was being "proposed."

While we agree that the protester's response to the agency discussion question regarding the availability, deployment, and functionality of version 6.2 of its software was confusing in that it included references to software version 6.X, we fail to see how this resulted in a lack of clarity as to which version of the software was being "proposed." AINS's FSS contract does not specify a particular version of its FOIAXpress software, nor did AINS "propose" in its quotation to furnish a particular version of the software--rather, in accordance with the RFQ's requirements matrix, AINS's response described which of the agency's requirements were met in the current version of its product (i.e., version 6.2) and which were under development for release in a future version of the software. AR, Tab 31. We think that it was reasonably clear from the protester's quotation that it would furnish the version of the software that was current at the time any order was placed (as opposed to the version identified as the current version at the time the quotation was submitted).

Finally, AINS argues that it was unreasonable for the evaluators to attribute a weakness to its quotation under the staffing/key personnel factor based on the allegedly limited technical background of its proposed Product Certified Subject Matter Expert. The protester contends that but for the wrongly attributed weakness, its quotation would have received a rating of [deleted] (the maximum possible) under the factor.

In its report, the agency argued that the position in question required technical experience and that the resume of the individual whom the protester designated for the above position demonstrated management, but not technical, experience. In support of its position, the agency cited an excerpt from the proposed individual's resume, which described the responsibilities of her current position as including [deleted]. The agency also cited language from the individual's resume stating that her general experience included "increasing responsibilities in FOIA business process systems design and/or management; establishing project plans as they related to [AINS's] standard implementation and rollout methodology and the customer's business process." AR at 27.

In our view, the agency's argument ignores additional information set forth in the resume pertaining to the proposed individual's experience. For example, the paragraph summarizing the proposed staff member's general experience did not end

with the words "business process," as the agency report implies; rather, the description continued as follows: [deleted]. AINS Technical Proposal at 32. The resume also indicated that the proposed individual had a degree in [deleted] and that she had experience working as both a [deleted] and a [deleted]. It is not clear from the record that the agency considered any of this information, and the agency was obviously obligated to evaluate the resume in its entirety. We therefore agree with the protester that the evaluation was flawed in this regard.[12]

Turning then to the protester's complaints regarding the evaluation of Privasoft's quotation, AINS's chief argument is that it was improper for the agency to enter into a BPA with Privasoft Corp. because it was Privasoft, Inc. that submitted the original quotation. AINS contends that permitting Privasoft Corp. to step into the shoes of Privasoft, Inc. constitutes an improper substitution of offerors. DOJ argues in response that it is clear from the documentation submitted by Privasoft that Privasoft Corp. submitted the original quotation, that Privasoft Corp. will function as the contractor, and that Privasoft Corp. merely used Privasoft, Inc. as its instrument for submission of the quotation.

The record clearly establishes that Privasoft, Inc. submitted the original quotation and that it was the entity seeking to enter into a BPA with the agency. The original BPA (i.e., the BPA that was the subject of AINS's first protest) was between DOJ and Privasoft, Inc. AR, Tab 17. In addition, Privasoft responded to the agency's first request for clarification by explaining that since Privasoft Corp.'s FSS contract indicated that orders were to be placed with Privasoft, Inc., it was reasonable for the quotation to have been submitted by, and the BPA to be established with, Privasoft, Inc. Also, Privasoft posed the following question in response to the agency's request for revised quotations: "Does DOJ have any concern regarding the administrative structure of our bid and of the contract, with Privasoft Corp. as the holder of the

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[12] The protester also complained that the evaluation of quotations under the key personnel/staffing factor was unequal in that the evaluators had cited as a strength in Privasoft's quotation the Project Management Professional (PMP) certification of its project manager, but had failed to acknowledge a similar strength in AINS's quotation. The agency responded that it had reasonably not considered AINS's offering of a PMP-certified project manager a strength because AINS had proposed the individual in response to a discussions question asking whether the protester would be able to provide a project manager who is PMP-certified. The agency has cited no authority in support of its position that--and we fail to see why--information offered in response to a discussion question which addresses fully the agency's concern should not be evaluated under the same standards applied to information in initial submissions. Accordingly, we agree with the protester that the evaluators' treatment of the two quotations was unequal with regard to this point and recommend that the agency treat the quotations consistently when it reevaluates.

GSA Schedule 70 contract, and Privasoft, Inc. as the holder of the BPA?" AR, Tab 10, Privasoft Email, Dec. 11, 2008.

Although Privasoft, Inc. submitted the original quotation, under the facts here we see no basis to object to the establishment of a BPA with Privasoft Corp., the vendor holding the FSS contract. A BPA is not a contract,[13] and orders placed against an FSS BPA are placed against the underlying FSS contract. Canon USA, Inc., B-311254.2, June 10, 2008, 2008 CPD ¶ 113 at 3. That is the situation here: the quotation submitted by Privasoft, Inc. was for the establishment of a BPA under Privasoft Corp.'s FSS contract. As noted above, Privasoft Corp.'s FSS contract identified Privasoft, Inc. as the entity through which ordering and payment transactions would be effected. Under these circumstances, we do not think that the roles of the two different corporate entitities are a basis for us to sustain the protest.

The protester also argues that Privasoft's quotation should have been rejected as technically unacceptable because Privasoft's proposed subcontractor does not have an FSS contract. This argument has no merit. AINS does not dispute that Privasoft Corp. has the labor categories corresponding to the services in question on its own FSS contract. While a schedule contractor may not properly use a subcontractor to offer services not included in either its own or the subcontractor's FSS contract, a schedule contractor is not precluded from using a subcontractor to offer services that are included in the prime's FSS contract.[14] OMNIPLEX World Servs. Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199 at 5.

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[13] The protester cites various cases for the proposition that substitution of bidders (or offerors) is generally not permissible. E.g., The Calvin Corp./CRIT Constructors, JV, B-258756, B-258947, Feb. 13, 1995, 95-1 CPD ¶ 71. Given that a BPA is not a contract, and quotations submitted in response to an RFQ for the establishment of a BPA are not offers that may be accepted by the government to form a binding contract, Computer Assocs. Int'l., Inc.--Recon., B-292077.6, May 5, 2004, 2004 CPD ¶ 110 at 3, the cases cited by protester are inapplicable here.

[14] AINS also objected to the assignment of a score of [deleted] to Privasoft's quotation under the staffing/key personnel factor. We do not address its arguments on this point in detail in this decision, but did consider them. Based on our review of the record, we conclude that they do not furnish a basis for finding the rating unreasonable. Similarly, we considered, but find to be without merit, the protester's argument that the agency conducted improper discussions with Privasoft by permitting it to revise its price schedule to identify its subcontractor as the provider of certain services. We likewise find no merit to the protester's argument that the weakness attributed to its proposal under the technical approach factor pertaining to [deleted] was unjustified. We see no basis in the record to question the judgment of the evaluators with regard to the feasibility of AINS's [deleted].

CONCLUSION and RECOMMENDATION

In sum, we find that some aspects of the agency's evaluation of quotations are not supported by the record and indicate unequal treatment of competing vendors. Given that AINS's quotation was lower in price than Privasoft's, and that the score assigned to AINS's quotation may increase after a proper evaluation, it is clear that AINS was prejudiced by the agency's actions. Accordingly, we sustain the protest.

We recommend that the agency reevaluate the quotations consistent with this decision and make a new source selection determination. If AINS is selected as the vendor whose quotation represents the best value to the government, we recommend that the BPA established with Privasoft be terminated and that a BPA be established with AINS. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2009). The protester's certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The protest is sustained.

Daniel I. Gordon
Acting General Counsel