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Decision

Matter of: Velos, Inc.; OmniComm Systems, Inc.; PercipEnz Technologies, Inc.

File: B-400500; B-400500.2; B-400500.3; B-400500.4; B-400500.5; B-400500.6; B-400500.7

Date: November 28, 2008

C. Joël Van Over, Esq., Jack Y. Chu, Esq., Corrie L. Plant, Esq., and Daniel S. Herzfeld, Esq., Pillsbury Winthrop Shaw Pittman LLP, for Velos, Inc.; John G. Horan, Esq., and Courtney J. Edmonds, Esq., McKenna Long & Aldridge LLP, for OmniComm Systems, Inc.; and Philip A. Nacke, Esq., David T. Ralston, Jr., Esq., and Frank S. Murray, Esq., Foley & Lardner LLP, for PercipEnz Technologies, Inc., the protesters.

David F. Dowd, Esq., and Roger D. Waldron, Esq., Mayer Brown LLP, for Medidata, Inc., the intervenor.

James L. Weiner, Esq., and Sherry K. Kaswell, Esq., Department of Interior, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency conducted prejudicially misleading discussions where the agency specifically agreed that some terms in a software license agreement proposed by the protester were acceptable, but then rejected the protester's revised proposal because the license was determined unacceptable based on the terms which it had previously advised the protester were acceptable and did not advise the protester, prior to the submission of the revised proposal, that the agency no longer considered these terms to be acceptable.

2. As a general rule where discussions are opened or reopened, an offeror may revise any aspect of its proposal, including portions of its proposal which were not the subject of the discussions.

DECISION

Velos, Inc., OmniComm Systems, Inc., and PercipEnz Technologies, Inc. protest the award of a contract to Medidata, Inc. under request for proposals (RFP) No. 1406-04-

08-RP-20201, issued by the Department of the Interior on behalf of the National Cancer Institute (NCI),¹ for data capture and management system software. Velos, OmniComm, and PercipEnz challenge the conduct of discussions and the technical evaluation.

We sustain Velos's protest and deny OmniComm's and PercipEnz's protests.

The NCI invests several hundred million dollars annually to sponsor and conduct clinical trials in the areas of cancer therapy, prevention, diagnosis, and epidemiology. These studies are conducted at the NCI and at NCI-designated cancer centers, which collectively are referred to as the NCI Clinical Research Enterprise.

This RFP, issued on October 30, 2007, sought to acquire commercial-off-the-shelf data capture and management system software, and related installation, support, and maintenance services needed to support clinical and related human subjects cancer research within the NCI Clinical Research Enterprise. The contractor will be required to deliver commercial clinical management software that meets the RFP requirements, including updated versions of the software and technical support. Of particular relevance here is the following RFP requirement:

The government must be granted a perpetual use license to the software that gives the government unlimited distribution and usage rights within the boundaries of the NCI Clinical Research Enterprise. There may not be any imposed limits on the number of installations nor the number of users. The NCI Clinical Research Enterprise is defined to include government and NCI-supported not-for-profit research institutions that conduct clinical and related human subjects research in the field of cancer. Non-cancer research is outside the boundaries of the NCI Clinical Research Enterprise.

RFP § C.3.1. The RFP also stated, "Updated versions of the software shall be provided under the same terms as the originally delivered versions i.e. must be production-ready and under the same license and distribution terms." RFP § C.4.3. The RFP contemplated the award of a fixed-price contract for a 6-month base period with 9 option years.

Award was to be made to the offeror whose proposal represented the best-value considering the following evaluation factors: (1) technical approach, (2) business experience/history, (3) past performance, (4) small disadvantaged business participation, (5) small business participation, and (6) price. The technical approach factor was the most important technical factor, followed by the equally weighted

¹ The Department of Interior, National Business Center, Acquisition Services Directorate conducted the procurement on behalf of NCI.

business experience/history and past performance technical factors, followed by the least and equally weighted small disadvantaged business participation and small business participation technical factors. The combined weight of the technical factors was more important than price. The RFP further stated that “[t]he government will evaluate whether it shall be granted a perpetual use license in accordance with the requirements in C.3.1. Contractors unable to comply with this requirement will not be considered for award.” Amended RFP § M.1.

Eleven offerors submitted proposals by the closing date on December 10. A technical evaluation panel (TEP) evaluated the proposals under the five technical factors utilizing an adjectival rating scale.² Four proposals, including those of Velos (rated overall very good), OmniComm (rated overall satisfactory), PercipEnz (rated overall very good), and Medidata (rated overall very good) were included in the competitive range. Contracting Officer’s Statement at 6. Oral presentations were conducted with the competitive range offerors on February 7 and 8, 2008, during which each competitive range offeror was afforded the opportunity to demonstrate the functionality of its software before a panel and to discuss with the panel the strengths and weaknesses of its proposal. *Id.* at 7-8. On February 15, interrogatories were sent to each competitive range offeror and responses were received and evaluated. *Id.* at 8. The agency received revised price proposals from competitive range offerors on March 11. *Id.* at 10. The final evaluation results were as follows:

| Offeror | Overall Rating ³ | Revised Price | Initial Price |
|-----------|-----------------------------|---------------|---------------|
| Velos | Very Good | [DELETED] | [DELETED] |
| Medidata | Very Good | [DELETED] | [DELETED] |
| OmniComm | Satisfactory | [DELETED] | [DELETED] |
| Percipenz | Very Good | [DELETED] | [DELETED] |

Id. at 10. Based on Velos’s proposal’s significant price advantage and “very good” overall technical rating, it appeared to the contracting officer that Velos was in line for award, and he decided to conduct exclusive negotiations with Velos to resolve issues related to its application program interface (API) and commercial software license.⁴ *Id.* at 11. On March 28, Velos revised the technical and price sections of its

² The adjectival ratings were excellent, very good, satisfactory, poor, and unacceptable.

³ Although adjustments were made in the technical evaluation, the overall ratings of the competitive range proposals did not change.

⁴ The record indicates that the agency did not evaluate, nor were offerors required to provide, commercial software licenses as part of the technical proposals during the overall evaluation and that none of the offerors had adequately addressed the API requirement in the RFP. While PercipEnz, OmniComm, and Medidata have questioned the propriety of the discussions conducted exclusively with Velos,

(continued...)

proposal to address the API requirement and to increase its price to [DELETED] to address API development and possible NCI-requested enhancements in future upgrades and releases of the offered software. Id. at 11-12.

Meanwhile, extensive discussions were conducted with Velos to reach agreement upon the terms of Velos's software licensing agreement, including a software escrow provision requested by the agency.⁵ Hearing Transcript (Tr.)⁶ at 340. On June 6, after conference calls between Velos's representative with its counsel, and the contracting officer with NCI counsel and an official from the Center for Biomedical Informatics and Technology, the contracting officer developed a draft of the Velos license agreement to be included in the contract. See Tr. at 260-61, 324-28. This is documented in the record in an email prepared by the contracting officer that reads in pertinent part:

Attached are a list of issues for follow-up per our discussions today, as well as updated versions of the Velos License and the Govt's contract for your review.

Regarding the Velos License, I accepted deletes and additions that both sides agreed to, so fewer markups appear in the license document.

AR, Tab 33, Email from Contracting Officer to Velos (June 6, 2008). Velos's representative and the contracting officer continued to negotiate over the remaining issues in the Velos license and other matters until June 27, when the contracting officer advised Velos as follows:

There were numerous unresolved issues between the Government and Velos, and we were unable to come to agreement in a timely way.

The Government is in discussions with all members of the competitive range, and has requested via email this afternoon that all members of

(...continued)

because Velos did not ultimately receive the award there is no reason to consider the propriety of the agency's actions in this regard.

⁵ The software escrow provision, which involved placing the source code to the software in escrow, was added by the government to the terms of the contract to ensure that the government would have access to the source code in the event that the contractor went out of business. Contracting Officer's Statement at 12; Tr. at 349.

⁶ Our Office conducted a hearing to address the issues concerning the acceptability of Velos's and Medidata's proposed software licenses and the discussions conducted on this subject with Velos.

the competitive range submit final proposal revisions due no later than Monday July 7, 2008 at 10AM ET.

Hearing exh. No. 16, Email from Contracting Officer to Velos (June 27, 2008).

On that same date, the agency requested final proposal revisions from the four competitive range offerors as follows:

This is a request for final proposal revisions. The Government intends to make award without obtaining any further revisions. Please address the following 2 items.

1) Develop an API according to the specification in Attachment 1.

2) Provide your commercial license agreement (if any) that you will expect the Government to execute. You are advised that commercial licenses which are not consistent with Federal law, regulation or solicitation requirements, and otherwise do not satisfy the Government's needs, may result in your offer being eliminated from further consideration for award. Accordingly, it is highly recommended that you review your license agreement to ensure that any terms or conditions that are present in your license do not conflict with Federal law or the requirements, terms and conditions of the solicitation.

You need only indicate in your proposal revision any changes from your original proposal. You do not need to include the entirety of your original proposal. You should accompany any changes in your price proposal with a revised Excel spreadsheet that also documents your assumptions.

AR, Tab 37, Request for Final Proposal Revisions (June 27, 2008).

Final proposal revisions were received on July 7. All offerors' prices remained the same with the exception of Medidata, which significantly reduced its price to [DELETED]. Although Velos, OmniComm, and PercipEnz addressed only the specific questions raised by the agency in their final proposal revisions, Medidata, besides significantly reducing its price, also revised various aspects of its technical proposal.⁷

Based on his review of the final proposal revisions, the contracting officer found that Medidata's proposal represented the overall best value, considering its very good

⁷ The technical ratings were not revised based upon these final proposal revisions.

technical rating, second lowest price, and acceptable license agreement.⁸ AR, Tab 51, Award Summary, at 53.

Omnicom's proposal was not considered in the agency's best-value analysis because its lower-rated proposal was determined to be outside of the competitive range due to its lower overall rating and significantly higher price. Contracting Officer's Statement at 13-14. The contracting officer also found that no aspect of PercipEnz's proposal, which was rated very good, would justify a price premium of [DELETED], and eliminated that proposal from further consideration. AR, Tab 51, Award Summary, at 53.

Although Velos's proposal, which was rated very good, offered the lowest price, the contracting officer eliminated it from further consideration solely because its license agreement was determined to be unacceptable.⁹

As noted above, the contracting officer solicited the views of Interior's counsel regarding the software licenses submitted with the final proposal revisions. This counsel advised the contracting officer that Velos's license agreement was "confusing and contains conflicting terms which could cause it to be unenforceable" and contained "unacceptable escrow provisions." AR, Tab 46, Memorandum from Agency Counsel to Contracting Officer (Aug. 6, 2008), at 2; Tab 51, Award Summary at 14. This counsel testified that her review was limited and that she did not determine Velos's license was unacceptable based on the terms of the solicitation, but found that the license did not afford maximum flexibility under the terms of the solicitation. See AR, Tab 46, Memorandum from Agency Counsel to Contracting

⁸ In a memorandum, the agency's counsel advised that Medidata's license was the most responsive to the solicitation, which the contracting officer concluded could be executed without any further discussions. AR, Tab 46, Memorandum from Agency Counsel to Contracting Officer (Aug. 6, 2008), at 2. In contrast, this counsel noted various problems with the licenses submitted by Velos, PercipEnz, and Omnicomm. Id. This counsel, employed by the Department of Interior's Solicitor's office, was not the counsel (provided by NCI) mentioned above who participated in the negotiations with Velos. See id.; Tr. at 260-61, 324-28.

⁹ The award decision states that the negotiations with Velos revealed [DELETED], which creates [DELETED]. AR, Tab 51, Award Summary, at 6. An agency may not consider the offeror's manners, attitudes or behavior or the tone of negotiations as part of an evaluation, absent an evaluation factor that allows for downgrading the proposal on this basis. See Computer Info. Specialist, Inc., B-293049, B-293049.2, Jan. 23, 2004, 2004 CPD ¶ 1 at 3-4. We need not resolve the reasonableness of the agency consideration of these matters in light of our decision in this case.

Officer (Aug. 6, 2008) at 1; Tr. at 50, 97, 141-42, 149, 162-63, 169-72, 176, 185-87, 197, 200-01.

Based on his own analysis of Velos's license submitted in its final proposal revision, the contracting officer determined that, in addition to the "unacceptable" escrow provision identified by the agency counsel, the license was unacceptable based on three specific issues. AR, Tab 46, Memorandum from Agency Counsel to Contracting Officer (Aug. 6, 2008), at 2; Tab 51, Award Summary, at 14-15, 50, 53.

The primary problem the contracting officer found with the Velos software license agreement involved the [DELETED] provision in Velos's license agreement (paragraph 2.1), which the contracting officer found conflicted with the requirement in section C.3.1 of the RFP that the government be granted a perpetual use license to distribute and use the software without limits within the boundaries of the NCI Clinical Research Enterprise. AR, Tab 51, Award Summary at 14-15. This section of Velos's license provided:

[DELETED]

AR, Tab 38, Velos's Final Proposal Revision, Special License Agreement, at 1. The contracting officer found that this paragraph by its terms only granted the [DELETED] and did not state that a perpetual use license was being granted as was required by the RFP. AR, Tab 51, Award Summary, at 14-15.

Further, the contracting officer found that the license was confusing and in apparent conflict with paragraph 2.1 of the license (quoted above) because Schedule B of the license stated:

[DELETED]

AR, Tab 38, Velos's Final Proposal Revision, Special License Agreement, Schedule B; AR, Tab 51, Award Summary, at 15. While there was nothing wrong with this language *per se*, the contracting officer did not believe that paragraph 2.1 incorporated the Schedule B provision; to the contrary, he found that paragraph 2.1 provided for more limited rights that were not compliant with section 3.1 of the RFP. Tr. at 290-94.

Finally, the contracting officer found that the Velos license did not include language that assured the government that there would never be any confusion during the contract that the license agreement would always be subordinate to the government's contract and Federal procurement law and procedure. AR, Tab 51, Award Summary, at 15. In this regard, the contracting officer noted that during negotiations Velos refused to include the government's request for language that "any conflict between the terms of this Agreement, and the Contract or applicable Federal law of regulation, shall be resolved by the terms of the Contract or applicable Federal Law or Regulation." *Id.*

Based on these concerns, Velos's proposal was rejected because of its noncompliant license, and award was made to Medidata on August 14. These protests, filed by Velos, OmniComm, and PercipEnz, followed.

Velos contends that the agency engaged in misleading discussions with regard to its commercial software license. Velos argues that the objection to provisions in the software license that it submitted in its final proposal revision on July 7 were identical to those provisions set forth in the version of the Velos commercial license that the contracting officer marked up and made available to Velos on June 6 as representing the terms of the license that had been agreed to by Velos and the agency. See Velos Protest at 11; Velos Post-Hearing Comments at 8-9.

It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions may not mislead offerors and must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving the award. Federal Acquisition Regulation (FAR) § 15.306(d); Bank of Am., B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137 at 10-11; Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6. Specifically, an agency may not, through its questions or silence, lead an offeror into responding in a manner that fails to address the agency's actual concerns; may not misinform the offeror concerning a problem with its proposal; and may not misinform the offeror about the government's requirements. See Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168 at 9-11; DTH Mgmt. Group, B-252879.2, B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227 at 4.

As discussed above, on June 6, after various conference calls regarding the terms of the Velos license agreement, the contracting officer prepared a marked up version of the document that reflected the areas where the agency and Velos had agreed upon the terms of the special license agreement for the software. See AR, Tab 33, Email from Contracting Officer to Velos (June 6, 2008); Tr. at 323-28, 338. As indicated above, however, the contracting officer, in his award determination, found the Velos license agreement submitted with its July 7 final proposal revision was unacceptable because the language containing paragraph 2.1 (quoted above) conflicted with the RFP requirements that the agency be granted a perpetual use license to distribute and use the software without limits within the boundaries of the NCI Clinical Research Enterprise. The record evidences that paragraph 2.1 of the license submitted with Velos's final proposal revision is the exact language that Velos and the contracting officer agreed was acceptable after lengthy discussions. Tr. at 323-28; compare AR, Tab 33, Velos's Final Proposal Revision (July 7, 2008), Special License Agreement) (also designated Hearing exh. No. 3) with Hearing exh. No. 15, Marked Up Velos License Prepared by Contracting Officer (June 6, 2008).

As to Velos's refusal to agree to a provision stating that "any conflict between the terms of this Agreement, and the Contract or applicable Federal law of regulation, shall be resolved by the terms of the Contract or applicable Federal Law or Regulation," Velos asserts that this was a matter discussed earlier in the negotiations. Velos's Post-Hearing Comments at 10. According to Velos, this matter was resolved by including the following language defining "Contract" in the software license and agreeing to include the license in Attachment J-1 to the contract:

"Contract" shall mean Contract No. 1406-04-08-CT-20201, executed by and between the Parties hereto on June XX, 2008. This Special License Agreement shall be Attachment J-1 to the Contract and shall be incorporated by reference into the Contract at Section J.

AR, Tab 33, Velos's Final Proposal Revision (July 7, 2008), Special License Agreement), Definitions, at 1. Velos explains that under the contract's order of precedence clause, incorporating the license in Attachment J would subordinate it to the rest of the contract. Velos Post-Hearing Comments at 10; see FAR § 52.215-8 (incorporated by the RFP at 38). As argued by Velos, the record shows that the identical provision defining "Contract" included in the earlier markup that Velos and the contracting officer agreed was acceptable to the parties was contained in the final proposal revision. See Tr. at 329-30; compare Tab 33, Velos's Final Proposal Revision (July 7, 2008), Special License Agreement) (also designated Hearing exh. No. 3) with Hearing exh. No. 15, Marked Up Velos License Prepared by Contracting Officer (June 6, 2008).

The problems the contracting officer found with the language in Schedule B are based solely upon the problems that he now has with paragraph 2.1 of the license and not the Schedule B language per se. See AR, Tab 51, Award Summary, at 15. In fact, at the hearing, the contracting officer admitted that he may well have prepared the Schedule B language in question. Tr. at 352.

As to the escrow agreement, the record shows that this agreement was not required by the RFP and was only included at the request of the agency. See Contracting Officer's Statement at 12. The contracting officer also testified that he never advised Velos during the negotiations that there was a problem with the proposed terms of Velos's escrow provision. Tr. at 350.

The agency asserts that there was no agreement on the terms of the Velos license. Hearing exh. No. 16, Statement of Contracting Officer (Oct. 31, 2008). In support of this assertion the agency references a string of emails that occurred after June 6, culminating in the June 27 email closing negotiation because of numerous unresolved issues and advising that the competition would be reopened. Id. The agency also references the request for final proposal revisions (quoted above) and an email in response to a question submitted after the request for final proposal revisions that advised offerors

to be aware that licenses that were inconsistent with federal law, regulation, or the solicitation requirements might result in the proposal being eliminated. AR, Tab 37, Request for Final Proposal Revisions (June 27, 2008); Hearing Exh. No. 13, Email from Contracting Officer (July 2, 2008). In fact, Velos agrees that there was no final agreement on the terms of its license when the negotiations were closed. Velos's Post Hearing Comments at 6.

However, there is no evidence in the record that the contracting officer ever specifically or even generally told Velos that the previously agreed-upon language in its license agreement in the "Grant of License" paragraph and in the "Contracts" definition was considered unacceptable by the agency. Because the reasons provided by the contracting officer in determining that the Velos license was unacceptable are based upon the precise language that Velos and the agency had found acceptable, and because the agency had not advised Velos that this language was no longer acceptable, we find that Velos was prejudicially misled in submitting its final proposal revision that included the agreed-upon language.¹⁰ We sustain the protest on this basis.¹¹

The protesters also argue that the agency must have held unequal and improper discussions with Medidata regarding its proposal concerning the technical proposal, price, and software license, as evidenced by the changes that Medidata made in its final proposal revision.¹² The protesters argue that the changes that Medidata made went beyond the scope of the agency's specific request, and indicate that Medidata must have received other discussions from the agency. The protesters also argue that the agency could not properly accept Medidata's significant revisions, without affording the other offerors a similar opportunity to improve their technical proposals, and that failing to allow other offerors to submit revisions beyond the agency's specific request resulted in unequal/disparate treatment of the offerors.

¹⁰ As noted above, the other two reasons could not in themselves form a basis for finding Velos's license agreement was unacceptable: the Schedule B issue was based entirely on the "Grant of License" paragraph problems on which Velos received misleading discussions and did not itself render the license unacceptable, and the escrow provision was not inconsistent with any RFP requirement.

¹¹ Velos asserted that Medidata's license also did not satisfy the requirements that the agency imposed in the evaluation of Velos's license. Since we recommend below that the agency consider amending the RFP with regard to its license requirements and obtain revised proposals that would include revised licenses, we need not determine whether Velos's or Medidata's licenses, as submitted, met the RFP requirements.

¹² For example, Medidata's offered price was dramatically lower and its software license was the only one that could be executed by the government without further revisions.

In response to the allegations of the protesters, we requested and received a detailed sworn statement from the cognizant agency official as well as a detailed sworn statement from the Medidata official who was responsible for preparing that firm's proposal, including the final proposal revision. The agency official's declaration categorically denies that any improper communications regarding Medidata's proposal took place during the period from March 11, 2008 until June 27, and there is no evidence in the record that casts doubt upon this declaration or shows that there were improper discussions with Medidata. Contracting Officer's Declaration (Oct. 31, 2008). The Medidata official also denies that it received any such discussions and advises that the delay in the award caused it to surmise that it needed to revise its proposal to reflect the current business of the company, the competitive nature of the marketplace, and strategic value of the award. See Medidata Official's Declaration (Oct. 31, 2008). On this record, there is no evidence that any improper discussions or communications occurred between Medidata and the agency, and we are left with only the inference and speculation of the protesters, which is insufficient to find improper discussions were conducted. See All Phase Env'tl. Group, B-292919.2 et al., Feb. 4, 2004, 2004 CPD ¶ 62 at 9.

To the extent that the protesters question the propriety of Medidata making changes that went beyond the agency's limited discussion letter and the agency accepting these revisions, the general rule is that offerors in response to an agency request that discussions be opened or reopened may revise any aspect of their proposals, including portions of their proposals which were not the subject of discussions. See Partnership for Response and Recovery, B-298443.4, Dec. 18, 2006, 2007 CPD ¶ 3 at 3; American Nucleonics Corp., B-193546, Mar. 22, 1979, 79-1 CPD ¶ 197 at 2. Here, although the request for final proposal revisions requested offerors to address specific areas, there was nothing in the request that limited offerors to these specific proposal revisions. Thus, all offerors, including the protesters, had the opportunity to revise all aspects of their proposals as they sought fit.

The protesters also challenge the technical evaluation of their own proposals, and have questioned whether the evaluations were properly documented and support the individual and consensus ratings, including whether the API revisions were taken into account in the agency's final evaluation. OmniComm, for example, argues that the agency's evaluation failed to make a qualitative assessment of the technical differences among the offerors; that the agency failed to adhere to the stated evaluation factors; that offerors were not evaluated on an equal basis; and that the award decision was not properly documented. PercipEnz argues that the agency assessed weaknesses to its proposal for failing to meet certain requirements that it was capable of meeting, including requirements that were not disclosed in the RFP, and that unstated evaluation factors were applied in the evaluation of its proposal. Velos argues that the final consensus evaluation of its proposal was not adequately documented and that the proposals were evaluated inconsistent with the RFP criteria.

We have reviewed the record, in light of each of the protester's specific allegations, and find no basis to find that the evaluation or the resultant ratings of the competitive range proposals were unreasonable, inconsistent with the evaluation criteria, or not adequately documented. The consensus evaluation documentation and source selection decision sufficiently document the agency's rationale for the evaluations, including detailing the strengths and weaknesses of the various proposals that formed the basis for the agency's evaluation ratings and the selection decision. Although the protesters disagree with the evaluations of their proposals, mere disagreement with the agency's judgment does not show that the agency's judgment was unreasonable, and thus we find no reason to question the evaluation of the proposals on the record before us here. See AVCARD, B-293775.2, Dec. 30, 2004, 2005 CPD ¶ 9 at 4.

OmniComm and PercipEnz also argue that the agency failed to conduct meaningful discussions regarding the areas in their proposals where the agency identified weaknesses, including technical matters, the license, and price. The protesters maintain that the oral presentations and interrogatories were insufficient, since these communications with the agency did not specifically address the weaknesses that the agency identified in the evaluation of their proposals. PercipEnz also contends that Medidata put a [DELETED] limit on NCI-directed enhancements to the software, as compared to PercipEnz's offer to support all such enhancements, and proposed a 4-hour response time for severity-critical and severity-serious situations, as opposed to PercipEnz's 2-hour response time, both of which allowed Medidata to offer a lower price than PercipEnz.

The agency responds that even assuming that the agency may have erred in not providing OmniComm and PercipEnz with meaningful discussions in the areas that both protesters complain about, neither protester has been prejudiced due to their significantly higher prices (OmniComm—[DELETED], PercipEnz—[DELETED]), which would not have offset the price and technical advantages of either Medidata's ([DELETED]) or Velos's ([DELETED]) proposals. The agency points out that both of these protesters had two opportunities to revise their price proposals, but neither reduced its price to a level to be competitive with these two proposals. The agency states that even if these two offerors had achieved the highest rating of excellent, neither offeror would have had a reasonable chance of receiving the award because of the huge price differential. Supplemental Agency Report (Oct. 27, 2008) at 2-4.

We will not sustain a protest absent a showing of competitive prejudice, that is unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving the award. Language Servs. Assocs., Inc., B-297392, Jan. 17, 2006, 2006 CPD ¶ 20 at 11; see McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Notwithstanding the agency's specific assertions that OmniComm and PercipEnz were not prejudiced because of their offered high prices, neither protester

has argued with any specificity how if it had been afforded meaningful discussions it would have lowered its significantly higher price so as to be competitive with the highly rated proposals of Medidata and Velos.¹³ OmniComm and PercipEnz merely argue that, had they been aware of the weaknesses in their proposals, including price, or if they had been allowed to put a limit on NCI-directed enhancements or offer a lesser response time, they would have reduced their prices. However, given the substantial difference in price between OmniComm's and PercipEnz's proposals and Velos's and Medidata's proposals, these general assertions are not sufficient to show that they could have reduced the substantial monetary differential so the agency could have determined either of their proposals to represent the best value to the government.¹⁴ See Language Servs. Assocs., Inc., *supra*; MCI Constructors, Inc., B-274347, B-274347.2, Dec. 5, 1996, 96-2 CPD ¶ 210 at 6. On this record, there is no basis to find that either OmniComm and PercipEnz was prejudiced, even if they were not accorded meaningful discussions.

Velos's protest is sustained, and OmniComm's and PercipEnz's protests are denied.

We recommend that the agency consider amending the RFP to change or clarify its license requirements to reflect the agency's actual needs,¹⁵ conduct meaningful discussions with the offerors that it determines are in the competitive range (including at least Medidata and Velos), request final proposal revisions, and make a new source selection. If as a result of the reevaluation Medidata is not selected for award, the agency should terminate Medidata's contract and make award to the successful offeror. We also recommend that Velos be reimbursed the reasonable costs of filing and pursuing the protests, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2008). The protester should submit its certified claim for such costs

¹³ For example, while PercipEnz argues that it should have been advised that its price was too high, even assuming this was the case, it does not indicate that had it received such advice that it would have lowered its price to be competitive with Velos's or Medidata's offered prices.

¹⁴ Although PercipEnz also complained that after the award to Medidata, the agency extended the base period under the contract from 6 months to 30 months to allow for installation at all NCI facilities, there is no suggestion that this prejudiced PercipEnz, inasmuch as Medidata's final offered price and the total 9.5-year contract term was not changed.

¹⁵ The record suggests that the RFP did not reflect the agency's actual requirements as to software licenses (*e.g.*, a software escrow provision). In this regard, many of the concerns found with Velos's license are not specifically related to the RFP requirements and the agency has indicated that it wants a license with maximum flexibility.

incurred, directly to the contracting agency within 60 days after receipt of this decision.

Gary L. Kepplinger
General Counsel