

Matter of: Integrity International Security Services,
Inc.

File: B-261226

Date: September 1, 1995

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DIGEST

Agency failed to conduct meaningful discussions where the
preponderance of the evidence in the record does not support
the agency's account that it advised the protester of the
central deficiency in the protester's proposal during
discussions.

DECISION

Integrity International Security Services, Inc. protests an
award to Areawide Services Limited under request for
proposals (RFP) No. SSA-RFP-95-1747, issued by the Social
Security Administration (SSA) for armed guard services at
two sites in Baltimore, Maryland.

We sustain the protest because the agency did not conduct
meaningful discussions.

The RFP, issued on May 25, 1994, contemplated award of a
fixed-price contract to an 8(a) contractor for 1 year with 4
option years.¹ The RFP provided a best value evaluation
scheme with technical factors being more important than

¹Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)
(1994), established a program that authorizes the Small
Business Administration (SBA) to enter into all types of
contracts with other agencies and let subcontracts for
performing those contracts to firms eligible for program
participation. The SBA's subcontractors are referred to as
"8(a) contractors." Federal Acquisition Regulation (FAR)
§ 19.800(a).

price, although price was said to be the determining factor between proposals determined to be technically equal.

Numerous proposals were submitted and almost all were included in the competitive range.² The agency conducted multiple rounds of oral discussions and requested four separate BAFOs. The relevant events leading up to the award decision are as follows.

On November 17, after the receipt of the initial BAFOs, SSA issued amendment 2 to the RFP, which, among other things, changed the contract start date, incorporated a collective bargaining agreement into the RFP, added two guard positions to one of the site locations, and requested a second round of BAFOs be submitted by December 12. The collective bargaining agreement set the wages for security guards and corporals, and provided for annual wage and benefit increases which would apply to this contract as of the contract start date, and as of November 1 in 1995 and 1996. The two new guard positions added approximately 10,000 labor hours per year.

The competitive range offerors submitted a second round of BAFOs. The SSA audit staff audited the second BAFO cost proposals and issued an audit report dated December 15.³ This audit report determined that the majority of offerors had failed to accurately reflect the terms of the collective bargaining agreement in their second BAFOs. SSA determined that discussions should be reopened to address the widespread failure to comply with the collective bargaining agreement requirements.

Integrity's second BAFO did not demonstrate compliance with the collective bargaining agreement requirements and did not include the hours for two new guard positions added by amendment 2.⁴ A third round of discussions was conducted, but not with Integrity, and third BAFOs were requested and

²A technical evaluation panel evaluated and ranked by evaluation score the initial proposals and the first round of best and final offers (BAFO). The record contains no evidence of technical evaluation of subsequent BAFOs.

³The SSA auditors reviewed the cost proposals for mathematical accuracy of proposed prices and compliance with minimum required wage rates.

⁴This latter discrepancy was not noted in the December 15 audit report. The Integrity contract representative testified that she apparently overlooked these added hours in preparing the staffing tables for the second BAFO. Transcript (Tr.) at 22, 30, 54, 56.

received, but not from Integrity. Integrity's exclusion from the third round of BAFOs was due to uncertainty about Integrity's eligibility to compete as an 8(a) contractor.⁵

SSA subsequently determined that Integrity was eligible to compete. There were oral discussions with Integrity's contract representative concerning Integrity's second BAFO cost proposal shortly before final BAFOs were received, the content of which is in dispute. By letter dated February 2 to the competitive range offerors, SSA confirmed the oral discussions and requested final BAFOs be submitted February 10. The text of this letter was basically the same for all of the offerors. Among other things, the letter reminded offerors that the cost proposal should be consistent with the collective bargaining agreement incorporated by amendment 2 and admonished offerors to include all contract requirements in their prices.

Integrity's final BAFO still did not include hours for the two new guard positions. SSA determined that most of the competitive range offerors were technically equal and determined that award would be made on the basis of price, and preliminarily selected Integrity's lowest-priced final BAFO for award. Based on a February 15, 1995, audit report of the final BAFOs, it was determined that Integrity's wage rates were slightly higher than required because the effective dates of proposed rate increases were not consistent with those required in the collective bargaining agreement added by amendment 2. The contracting officer also noted the problem with regard to the shortfall in the total labor hours as indicated on the spreadsheet in Integrity's final BAFO.

Since Integrity's final BAFO did not take exception to the terms of the amended RFP and Integrity proposed a total fixed price for contract performance, the contracting officer determined that Integrity's final BAFO was

⁵Integrity graduated from the 8(a) program in November 1994, and it was erroneously believed that this meant that the firm could not participate in this procurement. It is disputed whether Integrity indicated that it was ineligible or the agency unilaterally made this determination and did not invite Integrity to submit the third BAFO. An 8(a) contractor's eligibility for award is determined as of the time of submission of initial proposals. 15 U.S.C. § 637(a)(1); FAR § 19.805-2(c); Gutierrez-Palmenberg, Inc., B-255797.3 et al., Aug. 11, 1994, 94-2 CPD ¶ 158. Here, Integrity was an 8(a) contractor eligible for award at the time of initial proposals and was thus eligible to compete for this award. Integrity's eligibility for award is not now in dispute.

acceptable if Integrity verified its price. SSA subsequently spoke with Integrity's replacement contract representative about the content of its final BAFO, including the problem with the effective dates of its wage rate increases as well as Integrity's failure to include hours for the two new guard positions.⁶ Integrity then submitted a revised final BAFO. SSA did not consider the revised final BAFO, but rejected the original final BAFO as technically unacceptable since it did not include the additional guard positions in its offered price. SSA then selected the next lowest-priced final BAFO submitted by Areawide for award. This protest followed.

Integrity asserts that it was not accorded meaningful discussions regarding its second BAFO's failure to include hours for the additional guard positions.⁷

In negotiated procurements, contracting officers generally are required to conduct discussions with all offerors whose proposals are within the competitive range. 41 U.S.C. § 253b(d) (1988); FAR § 15.610; E.L. Hamm Assocs., Inc., B-250932, Feb. 19, 1993, 93-1 CPD ¶ 156. Although discussions need not be all-encompassing, they must be meaningful; that is, an agency is required to point out

⁶The initial Integrity contract representative had resigned during the interim for personal reasons, and states that she does not intend to return to employment with Integrity. Tr. at 34, 41, 70-71. The content of the post-BAFO conversations is also in dispute; the contracting officer states that he merely asked Integrity to verify its bid, whereas Integrity's replacement contract representative states that the contracting officer requested a revised final BAFO.

⁷The agency asserts that Integrity's protest that it did not receive meaningful discussion should be dismissed as untimely. We disagree. As indicated in its protest, the protester filed its initial protest under the belief that, although the agency had failed to raise the labor hour deficiency during the pre-final BAFO discussions, the agency had subsequently remedied its error by advising Integrity of the deficiency and soliciting revisions which Integrity submitted on February 21. When SSA awarded the contract to Areawide, Integrity protested on the basis that its February 21 revised proposal should have been selected for award. It was not until issuing its report in response to this protest that the agency alleged that the February 2 discussions adequately addressed the labor hour deficiency. Since Integrity protested the adequacy of these discussions within 10 days of receiving the report, its protest of this issue is timely. 4 C.F.R. § 21.2(a)(2) (1995).

weaknesses, excesses, or deficiencies in a proposal as specifically as practical considerations permit so that the agency leads the offeror into areas of its proposal which require amplification or correction. Besserman Corp., 69 Comp. Gen. 252 (1990), 90-1 CPD ¶ 191; E.L. Hamm Assocs., Inc., supra. Discussions are not meaningful where the agency does not inform an offeror of the central deficiency in its proposal. E.L. Hamm Assocs., Inc., supra.

The one material deficiency in Integrity's final BAFO was Integrity's failure to include the additional labor hours added to the RFP by the second amendment.⁸ This deficiency was first introduced in Integrity's second BAFO and the agency should have pointed it out during the final round of discussions with Integrity so that Integrity could have addressed it in its final BAFO. Due to the continuing presence of this deficiency in Integrity's final BAFO, the agency eliminated Integrity from consideration for award. Thus, the central issue to be resolved is whether the contracting officer advised Integrity during the final discussions of this disqualifying deficiency.⁹

The contracting officer states that on February 2 he held discussions with the Integrity contract representative, who had been in that position from the onset of the procurement. Tr. at 154, 199. The contracting officer states that he brought to Integrity's attention that Integrity's second BAFO was based on incorrect effective dates for the wage rate requirements imposed by the collective bargaining agreement.¹⁰ Tr. at 155-156, 203, 215-216. The contracting officer also testified that he had determined, based on his own review, that Integrity's second BAFO did not include all of the labor hours added by amendment 2 and he brought this

⁸The issue regarding Integrity's use of higher wage rates than minimally required due to the use of incorrect effective dates, although present in its final BAFO, was not a basis for eliminating Integrity's final BAFO from consideration. Tr. at 156, 246-247.

⁹None of the participants in the oral conversations took notes during the conversations nor recorded the content of these conversations soon afterwards. During the hearing, all witnesses had difficulty recalling specific dates of oral conversations and relied on what contemporaneous documentation does exist in order to date these conversations. Tr. at 25, 66, 71, 105, 170, 191, 196, 199-200.

¹⁰The contracting officer stated that he thought this discrepancy did not have an appreciable effect on Integrity's proposed price. Tr. at 155-156.

issue to the representative's attention. Tr. at 156-157, 206. The contracting officer states that he had the audit report in front of him during these discussions with the representative and he inscribed a mark next to the first issue on the audit report to indicate that he had addressed it. Tr. at 154, 158, 165-66. He states that he also wrote the word "hours" on the audit report and inscribed a mark next to it to indicate that he had discussed the second issue. Tr. at 158, 166.

The Integrity contract representative testified that during this final round of discussions, which she believed occurred on February 3, the contracting officer told her that Integrity needed to explain the composition of the weighted hourly rates which it had proposed in its second BAFO. Tr. at 14-16. She states that the collective bargaining agreement required increases in wage rates in the course of a contract year and, in order to minimize the size of the spreadsheet which she used to present the wage rates, she provided a weighted average wage rate for each year. Id. She states that the contracting officer wanted her to show how she calculated these weighted hourly rates. Tr. at 15-16, 37-38. She states that she began preparing Integrity's final BAFO immediately following this conversation.¹¹ Tr. at 32, 48-49, 56. She further states that the contracting officer did not discuss the collective bargaining agreement effective dates, nor did he discuss the number of labor hours proposed or the failure to address the two new guard positions in Integrity's second BAFO. Tr. at 16-17, 38, 54.

Based on our review, the record, including the file documentation and hearing testimony, does not support the contracting officer's testimony as to the contents of his oral discussions with the Integrity contract representative.¹²

¹¹The contracting officer provided evidence of receipt of Integrity's final BAFO corroborating that it must have been prepared and sent within 1 day of the discussions. Tr. at 160.

¹²As indicated, the contracting officer conducted multiple rounds of undocumented discussions with numerous offerors. SSA challenges the credibility of Integrity's initial contract representative largely because she wavered on the timing of her conversations with the contracting officer regarding Integrity's 8(a) eligibility and subsequent discussions. As stated previously, all witnesses had difficulty with recalling dates, see infra, footnote 9; however, this witness, in particular, candidly acknowledged
(continued...)

The contracting officer states that the December 15 audit report was the basis for his oral discussions. Tr. at 154. Although the contracting officer stated that his oral discussions focused on whether Integrity's wage rate effective dates were consistent with those required in the collective bargaining agreement, as well as the labor hour discrepancy, Tr. at 155-156, 203, 215-216, the December 15 audit report noted that it was "difficult to determine" whether Integrity's second BAFO complied with the required wage rates because of the apparent use of "weighted" average wage rates. This audit report did not reference, with regard to Integrity's proposal, any problem regarding its wage rate effective dates or any discrepancy between the proposed hours represented in the spreadsheets in Integrity's second BAFO and those required by amendment 2. The December 15 audit report did note other issues for other offerors (e.g., regarding their wage rate effective dates¹³), but not for Integrity.

Moreover, the record indicates that the effective date problem with regard to Integrity's proposal was not apparent in Integrity's second BAFO because it used weighted rates and did not state the dates when the increased wage rates became effective. Integrity only first identified these wage rate increase dates in its final BAFO. The contracting officer could not have known at the time of the final discussions that Integrity had used earlier dates for wage increases than were required.

¹²(...continued)

her own difficulty in recalling dates (but had no difficulty in recalling the content of discussions), and stated that her testimony with regard to dates was dependent on her review of documents she had been furnished. Tr. 24-25, 66, 257-259. In this regard, since the representative was not employed by Integrity during any part of this protest, she had no opportunity to review the contract file. To the extent that her testimony did vary with regard to timing, her responses were always consistent with the documents presented to her. The representative's demeanor was calm throughout her testimony and she never appeared defensive, even when challenged; this was entirely consistent with her decision to end her employment with the protester for non-job-related reasons. In sum, we find her testimony that she received no discussions regarding the labor hour shortfalls in Integrity's second BAFO to be credible.

¹³An admonition that offerors should make sure they address this problem was included in the generic February 2 letters to all offerors requesting final BAFOs.

The problem in Integrity's proposal regarding the effective dates was first identified in the February 15 audit report reviewing the final BAFOs, not the December 15 report reviewing the second BAFOs. During the post-BAFO conversation, the contracting officer explained to Integrity's replacement contract representative that Integrity's final BAFO used the wrong effective dates for wage increases and failed to include the labor hours added by amendment 2. Tr. at 226-227. The contracting officer states that he explained during this conversation that he was seeking a price verification from Integrity, not a revised BAFO. Tr. at 170. The replacement representative testified that she had the file before her during the conversation, made the corrections via her computer, and stated for the contracting officer just how the corrections changed the proposal. Tr. at 73-74, 76-78.

Since the contracting officer could not have identified the effective date problem prior to receipt of final BAFOs, his recollection of the discussions prior the submission of final BAFOs on this point is clearly inaccurate. Thus, it may be that the contracting officer, in stating that he advised Integrity of the labor hour discrepancy, recalled his post-BAFO discussions with Integrity's replacement representative, particularly given that all parties concede that the effective date problem and the labor hour discrepancy in Integrity's final BAFO constituted these post-BAFO discussions.

Another relevant document supporting the protester's account is the February 2 request for final BAFOs that confirmed the discussions in question.¹⁴ While the contracting officer states that the February 2 request for final BAFOs sent to Integrity reflects the content of discussions with Integrity, Tr. at 162, this letter did not reference the labor hour deficiency, even though Integrity's failure to address this point essentially disqualified its proposal.

SSA maintains that the admonition in the February 2 letter that cost proposals address all contract requirements is either evidence that the deficiency in labor hours was addressed during discussions or serves as adequate notice of the deficiency. The referenced paragraph is a general reminder that was provided in all offerors' BAFO requests advising them to review their price proposals before submitting BAFOs and suggesting a number of areas for

¹⁴The record is unclear as to whether this letter was prepared just before or just after the oral discussions. Tr. at 199-200.

review.¹⁵ SSA also included this boiler-plate instruction, which was not intended to apprise an offeror of a specific failure to address a contract requirement, verbatim in the letter requesting the first round of BAFOs in August 1994. The contracting officer admits that the contents of this letter incorporated "generic" text sent to all offerors. Tr. at 184-185, 199-200. The contracting officer, who prepared and sent this letter, states that it did not address the labor hour deficiency in Integrity's proposal. Tr. at 184. In our view, this letter is neither evidence that the labor hour deficiency was raised during discussions with Integrity, nor did it provide sufficient notice of this deficiency to satisfy the agency's obligation to conduct meaningful discussions on this point. See Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300.

The agency also references the handwritten marks and the word "hours" appearing on a copy of the December 15 audit report as evidence that the contracting officer advised Integrity's contract representative that its second BAFO did not address the additional labor hours added by amendment 2. The marks and the word "hours" on the December 15 audit report have no meaning without explanation from the contracting officer, whose testimony on this issue is contradictory. At the hearing, the contracting officer first testified that he wrote the inscription when he raised the issue during the oral discussions with the Integrity contract representative,¹⁶ Tr. at 154-155, 158, 166, but later testified that he wrote the inscription sometime prior to discussions (perhaps more than a month before) in order to remind himself of an issue to raise during discussions.¹⁷

¹⁵The paragraph containing the admonishment reads:

"[y]ou are hereby reminded to review your price proposal to be sure you have provided pricing for all items to perform the work effort including, but not necessarily limited to, equipment, vehicles, communications, uniforms, bond, and supervisory and production hours which shall include training, relief and walk time. . . ."

¹⁶This was consistent with the position he took in the agency report.

¹⁷Presuming the "hours" inscription occurred more than a month prior to the discussions in question as now asserted by the contracting officer, it seems possible that he may not have recalled the purported meaning of this inscription at the time of the discussions, given the passage of time and the numerous other discussion sessions with the other offerors.

Tr. at 182-183, 203-206, 220-221. As for the other marks inscribed on the audit report, the contracting officer states that not only did these marks mean a matter had been discussed, but the marks in some cases meant other things as well, including that a particular item on the report was not discussed. Tr. at 207-210, 219-220.

As noted by the agency, the undated 15-page negotiation memorandum outlining the events in the procurement from acquisition planning through the source selection recommendation indicates that the contracting officer discussed Integrity's labor hour discrepancy in the final round of discussions.¹⁸ However, this was a procurement that had run nearly the course of a year and the events are such that confusion of facts and events could easily occur without contemporaneous notes of the events. For example, the procurement included a large number of competitive range offerors, several rounds of oral discussions, and several rounds of BAFO requests, which produced many events to recall, some quite similar or repetitive. As previously noted, the contracting officer did not have a clear recollection of the pre-final discussions vis-a-vis the post-BAFO discussions.

The preponderance of the evidence in the record, in particular the consistency of the December 15 audit report with the protester's account of the discussions, the contracting officer's inaccurate recollection of the wage rate increase effective date issue, and the absence of any mention of the labor hour deficiency in the request for final BAFOs, supports that SSA did not identify during discussions with Integrity the deficiency in labor hours in Integrity's second BAFO. Thus, we conclude that SSA failed to conduct meaningful discussions with Integrity. See E.L. Hamm Assocs., Inc., supra.

We recommend that the agency reopen discussions consistent with this decision, request another round of BAFOs, make a new source selection decision, and terminate the contract to Areawide if appropriate. Integrity is also entitled to recover the reasonable costs of filing and pursuing its protest, including attorney's fees. 4 C.F.R. § 21.6(d)(1). Integrity should submit its certified claim for protest costs directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.6(f)(1).

¹⁸While the contracting officer is uncertain as to when this memorandum was prepared, it describes events after review of final BAFOs, including the post-final BAFO communications with Integrity, the rejection of Integrity's low-priced offer, and the selection of Areawide, which culminated around March 15. Tr. at 167-168.

The protest is sustained.

/s/ Robert H. Hunter
for Comptroller General
of the United States