Matter of: Information Spectrum, Inc.--Reconsideration

File: B-256609.6

Date: September 28, 1995

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DIGEST

Decision denying protest is affirmed on reconsideration where requesting party indicates its disagreement with initial decision, but does not demonstrate that the decision was based on errors of fact or law.

DECISION

Information Spectrum, Inc. (ISI) requests reconsideration of our decision, Information Spectrum, Inc., B-256609.3, B-256609.5, Sept. 1, 1994, 94-2 CPD ¶ 251, in which we denied its protest against the award of a contract to Value Systems Services, a division of VSE Corporation (VSS), under request for proposals (RFP) No. N00019-92-R-0051.

We affirm our decision.

BACKGROUND

The RFP was issued for the acquisition of logistics support services for Navy and Marine avionics weapons systems. Offerors were required to submit technical and price proposals. The technical proposals were to be evaluated against four factors: personnel, sample tasks, management plan/manpower utilization matrix and corporate experience. Prices were to be evaluated for, among other things, realism. The solicitation advised offerors that a price proposal determined to be unrealistic would be assessed as having high performance risk. The solicitation provided that the price realism evaluation:

> "may include consideration of actual salaries being paid for similar work under other [Naval Air

> Systems Command] contracts, salaries being paid for comparable civil service employees, excessive amounts of competitive time [uncompensated overtime], DCAA [Defense Contract Audit Agency] audit information, and evaluation of compensation for professional employees."

The solicitation advised offerors that the government intended to evaluate proposals and award the contract without holding discussions. The award was to be made to the offeror whose proposal was considered to be the most advantageous to the government.

In evaluating ISI's proposal, the agency found ISI proposed salaries that were too low, expected its employees to work an excessive amount of uncompensated overtime, and offered a compensation plan that did not offset these unfavorable working conditions. As a result, ISI's proposal was considered unrealistic, with a high risk that ISI would be unable to retain a qualified work force. The Navy also determined that the protester's proposed use of 10 subcontractors was excessive for this effort and was a critical deficiency in its management proposal. The Navy selected VSS for award without holding discussions.

ISI, the incumbent contractor for these services, then protested, asserting, among other things, that the Navy's determination that ISI's proposal represented a high performance risk was based on an erroneous conclusion that ISI offered its employees low salaries and required them to work excessive uncompensated overtime. ISI also protested the Navy's conclusion that ISI's management plan contained a critical deficiency because ISI proposed to use 10 subcontractors and a part-time project manager, that the Navy improperly failed to hold discussions and that, in awarding the contract to VSS, the Navy failed to perform a proper price/technical tradeoff. We denied ISI's protest on all grounds.

PERFORMANCE RISK

We found that the Navy reasonably concluded that ISI's proposal represented a high performance risk that ISI would be unable to retain its personnel because ISI proposed low salaries and high uncompensated overtime. In finding that the Navy reasonably determined that ISI proposed low salaries, we concluded that the agency properly compared ISI's proposed salaries to the salaries of government employees, the awardee's proposed labor rates, the government estimate, and rates on recently awarded similar contracts.

ISI asserts that our decision was contrary to the holding in United Int'l Eng'g, Inc., et al., 71 Comp. Gen. 177 (1992), 92-1 CPD ¶ 122, since we failed to address the protester's argument that the Navy did not consider that ISI proposed the same salaries it was currently paying under its incumbent contract for the same personnel. ISI also asserts that we erroneously concluded that the Navy properly compared ISI's proposed salaries to civil service salaries. ISI asserts that in reaching that conclusion we relied on the fact that ISI, in its protest submissions, did not argue that the Navy compared ISI's proposed salaries to incorrect civil service salaries. ISI states that we failed to recognize that the civil service levels against which ISI's employees were compared was protected information to which only ISI's counsel had access. ISI asserts that since its counsel could not discuss with ISI itself the civil service grade levels against which its employees were compared, its counsel could not argue on ISI's behalf that those grade levels were inappropriate.

ISI also asserts that we erroneously concluded that the Navy properly compared ISI's proposed rates to the rates on four recently awarded contracts. ISI asserts that our decision ignores ISI's argument that the contracts were not comparable because the labor category requirements for all four were different, the four contracts relate to different commodities and contain different requirements and that two of the contracts were set aside for small disadvantaged business (SDB) or 8(a) firms which are generally less competitive than large businesses like ISI. Concerning the labor categories, ISI asserts that contrary to the statement in our decision that "ISI agrees that the labor categories that were compared are the same," it specifically argued that the labor categories entailed different requirements. For example, ISI asserts that we found that the Navy reasonably compared ISI's proposed rates for the program manager under the protested solicitation to the rates being paid under contract No. N00019-94-D-0060 (0060). ISI asserts that contract 0060 is not similar to this contract because contract 0060, which is for only two aircraft, requires more specialized personnel. In fact, ISI asserts that the program manager on that contract was required to have a masters degree and 10 years of experience while this solicitation required only a bachelors degree and 6 years of experience. ISI also asserts that the rates should have been different based on the end items involved and notes that in its initial protest it asserted that contract 0060 calls for more specialized services for a limited number of aircraft than does the instant solicitation and contract N00019-94-D-0030 (0030) calls for a category of services different from what the instant contract involves.

ISI's request for reconsideration provides no basis for us to reverse our conclusion that the Navy reasonably determined that ISI's proposal presented a high performance risk. First, we did not address ISI's argument that it proposed to pay its employees the same salaries as they receive under its incumbent contract because, while that issue may have some relevance to ISI's ability to attract and retain personnel, in our view, if the proposed salaries are too low it was still reasonable for the Navy to conclude that ISI could have trouble hiring and retaining personnel despite what it is currently paying its employees. United Int'l Eng'g Inc., et al., supra, cited by the protester to support its contention that its current salaries must be considered, involved a cost reimbursement contract, not a fixed-price contract, and the issue there was whether the offerors' proposed costs were realistic, not whether the offerors would be able to retain their personnel. In considering whether costs were realistic, that is, whether it was likely that the contract would cost what the offerer was proposing, the agency was required to consider that the proposed rates were comparable to what the offeror was currently paying its employees. In this case, the issue was whether ISI would be able to hire and retain personnel and, as discussed above, the fact that ISI is currently paying certain salaries does not mean that it will be able to keep its employees or hire additional employees at those salaries.

As for the Navy's comparison of ISI's proposed salaries to the salaries being paid to civil service employees, our conclusion that the Navy acted reasonably is not impeached by the fact that only the protester's counsel, and not the client, was aware of the grade levels which the Navy assigned to particular labor categories. Protester's counsel, but not the protester, had access to the information because of a protective order issued in the case. The purpose of a protective order is to allow the protester's legal representatives to review documents that the protester would not otherwise have access to and make arguments on the protester's behalf. There is no reason why ISI's counsel could not have reviewed the record of the grade levels assigned by the Navy to each key employee labor category and compared that information to the qualifications of ISI's proposed personnel, as set forth in the resumes in the protester's proposal. Moreover, it would not have been a violation of the protective order for protester's counsel to question ISI about its employees' experience and education or request other information about the employees that counsel needed to determine the validity of the Navy's comparison.

With respect to the Navy's comparison of ISI's proposed rates for key personnel to the rates being paid on other

recently awarded Navy contracts, when we referred to the fact that ISI did not argue that the categories were different, we were referring to the classification of the employees. Thus, for example, the Navy compared ISI's proposed rate for a program manager to the rate being paid a program manager under a recent contract.

Contrary to its present position, ISI did not argue in its protest submissions that the categories of personnel on the contracts that were compared were different. Nor did ISI, as it now suggests, argue that the experience and education requirements were different for the same categories of personnel. On the contrary, ISI stated: "even if contracts have similar requirements for education and experience, the experience required is different, because the contractual requirements to which the experience relates [are] different." With respect to the differences in the requirements for the different labor categories, ISI's expert stated only, "The labor category requirements vary across contracts, significantly in some cases." He did not, however, explain what those differences were.

Further, while ISI asserted in its protest submissions that the requirements on some of the contracts were different, and thus required more specialized personnel, ISI offered no more than its own unsupported conclusion that this meant that the rates on the contracts should be different. Thus, with respect to ISI's argument that the end items or requirements for the contracts were different, ISI's expert simply stated that, based on the differences between the contracts, it would be reasonable to assume that significant analysis would be required to determine whether the requirements of these contracts are similar enough to the protested solicitation to permit a reasonable comparison. Again, however, the expert did not offer any specifics as to why the Navy's comparisons were not valid.

Regarding the 8(a) and SDB contracts, ISI argues that the indirect cost components of fully burdened rates for a small business are higher than those for a large business. Nonetheless, ISI did not in its protest, and does not in its request for reconsideration, explain why this argument invalidates the Navy's comparison of those rates in determining whether ISI proposed adequate salaries to retain its work force. In any case, only two of the four recent contracts against which the agency compared ISI's labor rates were SDB or 8(a) contracts. In our initial decision, we concluded that the agency reasonably determined that ISI's proposed labor rates were low based on a comparison with civil service rates, the government estimate, the awardee's proposed rates and the rates on four other recent contracts. Even if, as a result of ISI's arguments, we were to determine that the agency should not have compared ISI's

labor rates to the rates on the 8(a) and SDB contracts, that leaves two other non-8(a) and non-SDB contracts as a reasonable basis for comparison, in addition to civil service rates, the government estimate, and the awardee's rates. We think these bases of comparison provided reasonable support for the agency's judgment that ISI's salaries were sufficiently low as to create a risk that ISI would be unable to retain its personnel. Under the circumstances, ISI's contention concerning the 8(a) and SDB contracts provides no basis for reconsideration.

UNCOMPENSATED OVERTIME

In evaluating ISI's proposal, the Navy found that ISI proposed its employees for 47 hours a week, including 7 hours of uncompensated overtime. This finding contributed to the Navy's conclusion that ISI's proposal presented a high performance risk. ISI protested that it proposed its employees for 45 hours per week, not 47. We found that ISI's assertion was based on an expectation that its employees would take less leave per year than they were entitled to under ISI's benefit plan. When we considered the number of hours that the employees were proposed to work and accounted for the number of hours for holidays and leave to which the employees were entitled, we agreed with the Navy's conclusion that ISI would recoup the employees' proposed salaries only if the employees worked 47 hours per week.

On reconsideration, ISI asserts that we improperly concluded that ISI's cost proposal did not account for the correct number of hours of leave earned by each employee. ISI asserts that the RFP did not require offerors to account for every cost contingency in their proposals, such as that employees would take all the leave to which they were entitled. Rather, ISI asserts that offerors were only required to support their proposed labor rates. ISI asserts its proposal reflected the indirect costs that ISI actually expected to incur under the contract, and that those costs were based on the leave hours ISI expected its employees actually would take. ISI further argues that because we erroneously found that ISI had failed to correctly account for the amount of leave employees actually earned, we improperly permitted the Navy to recompute the amount of hours that employees would be required to work. ISI asserts that in fact its cost proposal is properly based on the amount of leave that employees are expected to take. Finally, ISI asserts that we erroneously concluded that any employee who earns more than 16 hours of leave and takes all of that leave will have to work more than 45 hours per week to put in all the hours he or she was proposed to work under the contract and to cover his or her salary. According to ISI, one employee may take more leave than he or she is

expected to take while another may take less, and the RFP did not require each employee to work all the hours for which he or she was proposed.

Our decision was based on our conclusion that the Navy reasonably found that ISI expected its employees to work 47 hours per week. Our decision does not say anything about accounting for every cost contingency or that every employee was required to work every hour proposed. It is based on the simple fact that ISI proposed each employee for 45 hours per week plus 208 indirect hours to account for leave and holidays for a certain salary. However, those 208 hours do not take into consideration all the leave to which employees are entitled. When the Navy factored in the leave to which the employees are in fact entitled, on average the employees would have to work 47 hours per week to recover their salaries. The possibility that this might not happen, that is, that the employees might not take all their leave or be required to work all the hours for which they were proposed, does not render unreasonable the Navy's conclusion that ISI's proposal was based on an expectation that employees could be required to work 47 hours per week.

TURNOVER ON ISI'S INCUMBENT CONTRACT

In our original decision, because we concluded that the Navy reasonably found that ISI proposed low salaries and high uncompensated overtime, we also concluded that the Navy reasonably rated ISI's proposal as representing a high performance risk. In doing so, we noted that while the Navy and ISI argued over how much turnover ISI experienced on its incumbent contract, we did not need to consider that issue given our conclusion that the Navy otherwise reasonably determined that ISI's proposed salaries and uncompensated overtime created a risk that ISI would be unable to retain its personnel.

On reconsideration, ISI states that one of the Navy's stated grounds for rejecting ISI's proposal was that ISI had experienced a high rate of turnover under its incumbent contract. ISI asserts that in its protest submissions it disputed that it had experienced high turnover and that, by failing to address this issue, we ignored the primary reason why ISI's proposed salaries and uncompensated overtime do not pose any risk that it would be unable to retain its employees.

ISI's argument constitutes no more than disagreement with our conclusion that, irrespective of turnover, its low proposed salaries and uncompensated overtime alone were a sufficient basis on which the Navy could find that ISI's proposal posed a risk that ISI will be unable to retain its personnel. Mere disagreement with our decision does not

provide a basis for reconsideration. See John Peeples--Recon., B-233167.3, Dec. 9, 1991, 91-2 CPD ¶ 522.

MANAGEMENT PLAN

ISI submitted a management plan showing that it intended to use 10 subcontractors to perform the contract. The Navy concluded that 10 subcontractors was an unacceptable number for this contract, and in conjunction with the use of a part-time project manager, was a critical deficiency in ISI's management plan. In denying ISI's challenge to the management plan evaluation, we stated that while ISI proposed to use fewer subcontractors on this contract than on its incumbent contract, ISI did not dispute the Navy's statement that this contract will require fewer hours than the incumbent contract, and using the 12 subcontractors ISI is using on its incumbent contract as a baseline, ISI should have proposed no more than 6 subcontractors for this contract. In addition, while ISI explained in its proposal how it would manage the subcontractors, we found it was reasonable for the Navy to conclude, in spite of that explanation, that the use of 10 subcontractors posed a risk to effective management, control and communication, response times, and quality assurance.

On reconsideration, ISI asserts that our decision is erroneous because it incorrectly implies that ISI was aware that the Navy was unhappy with its performance under the incumbent contract. ISI asserts that the agency never indicated that it was dissatisfied with ISI's performance under the incumbent contract and therefore there was no reason for ISI to believe that the RFP's warning about the use of a large number of subcontractors was applicable to the number of subcontractors used or proposed by ISI. ISI further asserts that it could not respond to the Navy's argument concerning the appropriate number of subcontractors because only ISI's counsel, and not ISI itself, had access to this argument under the protective order.

These contentions provide no basis for reconsidering our conclusions concerning the evaluation of ISI's management plan. First, our decision does not imply and was not based on any assumption that ISI was aware that the Navy was unhappy with ISI's performance under the incumbent contract. Rather, the decision was based on the fact that the solicitation clearly stated: "A large number of subcontractors or a poorly structured partnership/joint venture, or a high proportion of contingent hires will result in a reduced technical rating," a warning that ISI

ignored at its own risk.[1] While ISI asserts that it could not respond to the Navy's arguments concerning the baseline number of subcontracts because only ISI's counsel had access to that argument under the protective order, as discussed above, this does not excuse the failure to respond to the argument since the purpose of the protective order is to provide the protester's representatives with access to information that the protester would not otherwise have. In this regard, we fail to see why protester's counsel could not have compared the volume of work required under the incumbent contract against the volume of work under the solicitation to determine if the Navy's argument regarding the appropriate baseline number of subcontractors was valid.

AWARD WITHOUT DISCUSSIONS

In its reconsideration request, based solely on its assertion that we erroneously concluded that there were deficiencies in ISI's price and management proposals, as well as a high performance risk associated with its proposal, ISI asserts that we also erroneously determined that the agency properly awarded the contract without holding discussions. Since we find no error in our conclusions regarding the agency's determination that ISI's proposal represented a high performance risk with critical deficiencies in the management area, we need not respond to the assertion that the agency was required to hold discussions.

AWARD DECISION

ISI protested that in awarding the contract to VSS at a $15 million price premium, the Navy failed to perform a proper price/technical tradeoff. In our decision, we noted, among other things, that in reaching the award decision, far from considering ISI's low price an advantage, the source selection authority (SSO) considered it a problem that could result in delayed and questionable performance. Based on this assessment, we found that the SSO properly followed the evaluation criteria and reasonably determined that an award to VSS presented the best value to the government.

On reconsideration, ISI asserts that the SSO's conclusion that ISI's low price could result in delayed and questionable performance was based on ISI's allegedly poor

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[1]Although ISI states in its reconsideration request that "there was no reason for ISI to believe that the RFP, warning about large numbers of subcontractors was applicable . . . to ISI," ISI does not explain why it assumed that this clearly stated RFP provision did not apply to it.

performance under its incumbent contract, and there is no support in the record for this conclusion. ISI argues that since there is no support in the record for finding that ISI had performed poorly under the incumbent contract at its currently proposed salaries and uncompensated overtime levels, there also is no basis for the conclusion that an award to ISI would result in poor performance.

ISI's argument fails to recognize that the SSO's statement was based on his conclusions about ISI's proposal, which proposed low salaries and high uncompensated overtime, not on ISI's prior performance. ISI's argument is no more than restated disagreement with our conclusion that the Navy could find that ISI's low proposed salaries and high uncompensated overtime presented a performance risk. Accordingly, it provides no basis for reconsideration. See John Peeples--Recon., supra.

Our original decision is affirmed.

/s/ Robert H. Hunter
for Robert P. Murphy
General Counsel