United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE
The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: United International Investigative Services, Inc.

File: B-284871

Date: June 15, 2000

Brian T. Scher, Esq., Ira E. Hoffman, Esq., and Alan M. Grayson, Esq., Grayson & Kubli, for the protester.
Dennis J. Gallagher, Esq., Department of State, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that request for proposals for guard services was ambiguous is denied where, when read as a whole, there are no material discrepancies between the various RFP provisions as alleged by the protester.

DECISION

United International Investigative Services, Inc. (UIIS) protests several alleged improprieties in request for proposals (RFP) No. S-KE500-99-R-9999, issued by the Department of State for guard services. The protester alleges that the RFP is ambiguous because there are several material discrepancies between the original RFP's terms and provisions incorporated by amendment.

We deny the protest.

Issued on November 10, 1999, the RFP solicited offers for providing guard services at the American Embassy in Nairobi, Kenya; proposals were due by March 24, 2000. The RFP stated that the Embassy required guard services to prevent unauthorized access; protect life; maintain order; deter criminal attacks against employees, dependents and property; deter terrorist acts against all assets; and prevent damage to government property. RFP § C.1.1. The RFP contemplated a level-of-effort contract, to be paid at fixed hourly rates, for a basic period of 1 year with options for 4 additional years. RFP § B. The RFP stated that the contract would be awarded to the lowest-priced, technically acceptable offeror. RFP §§ M.1.2, M.3.

The RFP advised offerors that UIIS was the incumbent contractor, that current employees were covered by a Collective Bargaining Agreement (CBA) which controlled their wages and benefits, and that offerors could obtain a copy of the CBA upon written request. RFP, Cover Letter, at 2. The RFP required any new contractor to give guards who were under contract with UIIS and who were terminated as a result of the change in contractors the right of first refusal for employment openings under the new contract for positions for which they were qualified. RFP § I.3.

The RFP recognized that the competition might result in lower compensation being given to contractor employees and that reduced compensation might be detrimental to obtaining the quality of services needed. The RFP required offers to include an employee compensation plan which would be evaluated to ensure that it reflected a sound management approach and understanding of the requirements. The RFP stated that the compensation proposed would be considered in terms of its impact upon recruiting and retention, realism, and consistency with the total compensation plan. RFP § L.1.3.4(2)(a). The RFP specifically stated:

> [P]roposals envisioning compensation levels lower than the current contractor for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent service employees. Offerors are cautioned that lower compensation for essentially the same work may indicate lack of sound management judgment and lack of understanding of the requirement.

RFP § L.1.3.4(2)(b).

The RFP included a price adjustment clause that stated:

> The contract price may be increased or decreased in actual costs of direct service labor which result directly from laws enacted and effective during the term of this contract by the **Kenyan** Government, **not actions taken by the Contractor solely in its implementation and execution of a Collective Bargaining Agreement**.

RFP § B.5.

A preproposal conference was held with potential offerors on December 8, 1999, at which time the contracting officer gave out copies of UIIS's CBA (as amended on September 1, 1998). Agency Report, Tab 51, Preproposal Conference Notes, at 2. At the end of that meeting, two UIIS employees distributed copies of a "draft" CBA (dated November 17, 1999) along with a letter from a Kenyan District

Labour Officer (dated January 14, 1999) stating that any company taking over for UIIS as the Embassy guard services contractor would have to abide by UIIS's CBA with the union.[1]

The Embassy sought the advice of a local private attorney, who advised:

> [The CBA] was a personal agreement between [UIIS] and the Union. We do not see that that [CBA] can be binding either on the Embassy or on any other contractor employed by the Embassy.

Agency Report, Tab 58, Letter from Hamilton, Harrison & Mathews to Contracting Officer 1 (Dec. 16, 1999).

Between December 21, 1999, and January 20, 2000, the Embassy's private attorney wrote (on four separate occasions) to the District Labour Officer asking that he provide the legal authority for his position that the CBA would bind a successor guard services contractor.[2] The District Labour Officer never responded to the lawyer's inquiries. Contracting Officer's Statement at 24.

In mid-January 2000, a potential offeror wrote to the agency, specifically referenced the CBA amendment and the District Labour Officer's letter that were distributed by UIIS, and asked for a determination whether the next guard services contractor would be required to abide by the wages and benefits set forth in UIIS's CBA. Contracting Officer's Statement at 25; Agency Report, Tab 85, Letter from [deleted] to the Contracting Officer 1-2 (Jan. 17, 2000). The Embassy then wrote to the Permanent Secretary of Labour of the Republic of Kenya, explained that the Embassy was not a party to the CBA, and asked for clarification of why the Government of Kenya believed that the incumbent's CBA would be binding on the next contractor. Contracting Officer's Statement at 25-26; Agency Report, Tab 90, Letter from Embassy Nairobi Deputy Chief of Mission to Permanent Secretary of Labour of the Republic of Kenya 1-2 (Jan. 19, 2000).

---

[1] The record shows that the Embassy officials disapproved of UIIS's distribution of this information to potential offerors, because UIIS had not notified the contracting officer of the CBA changes and because they believed that UIIS was trying to discourage potential offerors from underbidding UIIS's current wage structure. The agency considered disqualifying UIIS from the competition, but did not. Agency Report at 5-6.

[2] On the fourth occasion, the agency's lawyer was advised that the District Labour Officer had been transferred to Mombasa. Contracting Officer's Statement at 24.

The agency amended the RFP on February 22, specifically addressing the applicability of UIIS's CBA as follows:

> A(1) The [CBA] of September 1998 referenced in the solicitation was negotiated by the incumbent contractor. Said contractor is the only contractor required to comply with this CBA.
>
> . . . . .
>
> (3) The Government's intent of addressing the CBA in the solicitation cover letter and commonly asked questions and answers, was merely to ensure that all Offerors were aware of the wages and benefits being paid to guard personnel under the present [local guard program] contract.
>
> **(4) Offerors are reminded that the solicitation does not require compliance with this CBA.**
>
> **(5) Upon advice of our local counsel, it is the position of the Embassy that a successor contractor would not be obliged to comply with this CBA by local law or by the Ministry of Labor, despite information provided to the contrary by the incumbent contractor. Should a successor contractor incur costs in reliance upon this response that are not included in its offered price, as a result of actions of the host government, the Embassy would recognize entitlement to an equitable adjustment to reimburse the successor contractor for such costs, if the Department concurs at that point that no further challenge to the host government's actions should be pursued under local law or if no further challenge is possible.**
>
> **(6) Offerors are required by the solicitation to submit a compensation plan.** . . . [E]ach offeror must make an assessment of the solicitation requirements . . . and then make its independent business and pricing decisions accordingly.

RFP amend. 4, at 3.

On February 24, the contracting officer and the Embassy Nairobi Deputy Chief of Mission met with the Permanent Secretary of Labour of the Republic of Kenya to discuss the CBA matter. According to the contracting officer, the Permanent Secretary of Labour "vehemently" stated that the CBA would only bind the parties to that agreement and that he had no idea why the District Labour Officer had issued a

contrary opinion.[3] Contracting Officer's Statement at 30-31; see also Agency Report, Tab 116, Memorandum from Deputy Chief Industrial Relations Officer, Ministry of Labour and Human Resource Development 2 (Feb. 24, 2000).

At the end of February, negotiations between UIIS and the union broke down and the CBA expired. UIIS notified its employees and the Embassy that the CBA would not be renewed because the union's demands were unreasonable and that it would continue to employ all personnel under the same pay conditions as had been in effect for the past year.[4] Agency Report, Tab 122, Letter from CEO/President of UIIS to UIIS Employees 1 (Feb. 29, 2000); Agency Report, attach. 1, RSO Declaration, ¶¶ 4-5. On March 3, the Embassy issued an RFP amendment informing potential offerors of these new facts. Contracting Officer's Statement at 34-35. The amendment also stated:

> For informational purposes only, the Embassy received official confirmation from the Kenyan Ministry of Labour and Human Resource Development, that only the current [local guard program] contractor was required to comply with the [CBA] despite any information provided to the contrary. If any offeror is interested in receiving a copy of this official confirmation, it may do so with a written request to the Contracting Officer.

RFP amend. 7, at 2.

The essence of UIIS's protest is that there are several conflicts between the original RFP and various RFP amendments, and between the two opinions issued by officials

---

[3] The Permanent Secretary of Labour confirmed this in writing, stating that, subject to further investigation, the CBA would bind only those parties that had signed it, but would not bind any other parties. Agency Report, Tab 105, Letter from the Permanent Secretary of Labour to Embassy Nairobi 1 (Apr. 2, 2000).

[4] During a February 28 meeting with the Embassy's Regional Security Officer (RSO), union representatives stated that they wanted guards' wages to be more than doubled; the RSO responded that the present wages were already [deleted] the prevailing wages, and the union's position was unrealistic. Agency Report, attach. 1, RSO Declaration, ¶¶ 4-5. Also, UIIS reported to our Office that it was still negotiating with the union, that the parties had agreed upon the principal terms of a new CBA, but UIIS was hesitant to execute a new CBA because the alleged ambiguities in the RFP made it unclear how the new CBA would affect UIIS's ability to compete for the follow-on contract. Letter from Protester to GAO 3 (Mar. 17, 2000).

of the Kenyan Ministry of Labour and Human Resource Development, regarding applicability of the CBA that cannot be resolved, thus creating ambiguities and preventing offerors from competing on an equal basis. Protest at 6-7.

An RFP's provisions must be sufficiently definite and free from ambiguity to permit competition on a common basis. An ambiguity exists if provisions are subject to more than one reasonable interpretation. Toxicology Testing Servs., Inc., B-219131.2, Oct. 28, 1985, 85-2 CPD ¶ 469 at 4. Where a dispute exists as to the meaning of RFP provisions, we will resolve the matter by reading the RFP as a whole and in the manner that gives effect to all its provisions. See D&L Constr. Co., Inc., B-279132, May 11, 1998, 98-1 CPD ¶ 136 at 4. Reading the RFP, RFP amendments, and the opinions of the Kenyan Ministry of Labour against the background presented above and in light of the protest arguments, we do not agree that the RFP provisions are contradictory or ambiguous.

The protester alleges that the RFP's price adjustment clause (RFP § B.5) and amendment 4 (both quoted above) are in direct conflict. Basically, UIIS contends that the RFP's price adjustment clause states that the contractor will not be entitled to an equitable adjustment for implementation of a CBA, but amendment 4 states that a successor contractor may be entitled to an equitable adjustment if it incurs costs that were not included in its offered price because of a determination that UIIS's CBA applies to it. Protest at 6. We do not agree that an irreconcilable conflict exists between these provisions.

The price adjustment clause (RFP § B.5) specifically stated that a price adjustment would not be allowed where the sole basis for the claim was that the contractor was implementing/executing a CBA. The agency states that UIIS previously had requested a price adjustment when it received Kenyan approval of the CBA it negotiated with the union. The agency explains that it therefore modified its standard price adjustment clause to limit price increases for direct service labor costs to those instances where labor cost increases were due to Kenya's enacting a new law after contract award, and to clarify that the contractor's negotiation and acceptance of a CBA, even if subject to Kenyan approval, would not be considered enactment of a new law for purposes of price adjustments. Agency Report at 5, 7-8

After UIIS distributed its "draft" CBA and the District Labour Officer's opinion, the Embassy reasonably tried to ascertain whether a follow-on contractor would really be bound by UIIS's CBA. In addition to trying to contact the District Labour Officer for clarification, the Embassy sought the advice of both private counsel and the Permanent Secretary of Labour of the Republic of Kenya--the host country's chief labor official--both of whom indicated that a new contractor would not be bound. Agency Report at 7. The Embassy then issued RFP amendment 4 to inform offerors of the Embassy's position that contractors other than UIIS would not be bound by UIIS's CBA. In this regard, the Embassy reasonably provided relevant information that it had obtained in order to counteract the earlier and possibly incorrect

information disseminated by UIIS so that offerors would have a clearer understanding of their obligations concerning employee compensation. See Alpha Q, Inc., B-248706, Sept. 18, 1992, 92-2 CPD ¶ 189 at 3.

Amendment 4 also clarified that, in the event an offeror relied upon the Embassy's advice that the CBA was not applicable to it and subsequently incurred higher labor costs because the Government of Kenya decided that the higher CBA rates were applicable to the new contractor, then the Embassy would recognize that contractor's entitlement to reimbursement for the higher labor costs. We do not see how this provision conflicts with the original price adjustment clause. Rather, it is clear from reading both provisions in light of the circumstances of this procurement that amendment 4 represents a further modification of the standard price adjustment clause. Reading both provisions together, it is clear that price adjustments will be considered for direct service labor costs in two circumstances: (1) if a law is enacted by Kenya affecting labor costs after contract award; and (2) if Kenya decides that UIIS's CBA is legally applicable to a new contractor.

The protester asserts that the conflicting opinions issued by the Kenyan Ministry of Labour regarding applicability of UIIS's CBA to a new contractor created an ambiguity. Protest at 6-7. Again, we do not agree. After UIIS's distribution of the District Labour Officer's opinion, the Embassy inquired and obtained the opinion of the Kenyan Permanent Secretary of Labour on this issue. As it is undisputed that the Permanent Secretary of Labour is the highest labor official in the country and that he issued his opinion after he was informed of the District Labour Officer's earlier contrary opinion, it is clear that the Permanent Secretary of Labour repudiated the earlier, lower-level opinion. As discussed above, the Embassy issued amendment 4, informing offerors that UIIS's CBA would not bind the successor contractor, consistent with the Permanent Secretary of Labour's opinion on the issue.[5] Again, the Embassy reasonably provided this relevant information, which was material to potential offerors' pricing decisions, to offerors through amendment 4. See Alpha Q, Inc., supra, at 3.

UIIS next alleges that RFP amendment 4, which states that UIIS is the only contractor that is required to comply with the September 1998 CBA, is ambiguous because it is unclear whether the Embassy will require UIIS to comply with the CBA even though it has expired. Protest at 7. The agency responds that amendment 4, by its express terms, clearly states that it imposes no obligations on UIIS or any other offeror to comply with UIIS's CBA. Agency Report at 9. Amendment 4, quoted in full

---

[5] The two Kenyan officials' opinions on the applicability of the CBA include no citations to Kenyan laws, regulations, or court cases, and neither party to this protest has proffered any such citations. As the contract will be performed outside the United States, the Service Contract Act is not applicable. Federal Acquisition Regulation § 22.1003-2.

above, pointed out that the incumbent contractor (i.e., UIIS) was the only contractor that was required to comply with the CBA of September 1998, and also specifically stated: "Offerors are reminded that the solicitation does not require compliance with this CBA." Thus, it is clear from the amendment that the Embassy does not intend to enforce compliance with the September 1998 CBA, and since that CBA expired on March 1, 2000, we do not see how the RFP amendment could be read as requiring UIIS to comply with it, either. To the extent that UIIS may have negotiated, or will negotiate, a new CBA with its union, that agreement and not the RFP will require UIIS to comply with its terms regarding compensation.

The protester alleges that there is an ambiguity because RFP § I.3 requires a new contractor to offer employment to current employees, but does not state whether those offers of employment must be made at the employees' current wage and benefit rates. While RFP § I.3, quoted above, was silent regarding whether a new contractor must pay any incumbent contractor employees it hires at the rates presently paid by UIIS, RFP amendment 4 specifically stated that offerors were not required to comply with the CBA signed by UIIS. Moreover, the RFP required offerors to submit a compensation plan for evaluation and specifically envisioned that offerors might lower the compensation levels currently paid to employees. RFP § L.1.3.4(2). In this regard, amendment 4 indicated that, when making their compensation proposals, offerors must make independent business and pricing decisions. Reading these provisions together, it is clear that a new contractor will have to pay the rates set forth in the compensation plan it submits and will not be required by its Embassy contract to pay the same rates that UIIS has paid even if it hires UIIS's former employees.

The protest is denied.

Comptroller General
of the United States