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Decision

Matter of: General Dynamics One Source, LLC; Unisys Corporation

File: B-400340.5; B-400340.6

Date: January 20, 2010

Kevin C. Dwyer, Esq., Daniel E. Chudd, Esq., and Daniel I. Weiner, Esq., Jenner & Block LLP, for General Dynamics One Source, LLC; Richard J. Webber, Esq., Kavitha J. Babu, Esq., and Kevin R. Pinkney, Esq., Arent Fox LLP, and Alice H. Warner, Esq., Unisys Corporation, for Unisys Corporation, protesters.
Carl J. Peckinpugh, Esq., and Jill Renee Newell Chung, Esq., Computer Sciences Corporation, LLC, for the intervenor.
Christian F.P. Jordan, Esq., Virginia G. Farrier, Esq., and Kimberly Shackleford, Esq., Transportation Security Administration, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Transportation Security Administration's (TSA) challenge to GAO's jurisdiction to review protest-based on agency's position that it initiated phase I of acquisition prior to effective date of GAO's jurisdiction over TSA protests—is denied where record shows that, although phase I was for purpose of down-selecting firms to compete under phase II, agency abandoned phase I results and engaged in all acquisition activities under phase II, which was initiated after effective date.
2. Protest challenging agency's evaluation of awardee's proposal for price realism is sustained, where record shows that agency failed to evaluate disparity between staffing offered in awardee's technical proposal and price proposal, and also failed to evaluate awardee's ability to hire incumbent's employees (as it proposed) given relatively low labor rates in its price proposal.
3. Agency unreasonably accepted awardee's proposal with incentive fee lower than amount specified in solicitation where solicitation reasonably led protesters to understand that specified fee was mandatory; agency should either have amended solicitation or engaged in discussions to advise all firms that different incentive fee could be proposed.

DECISION

General Dynamics One Source, LLC (GD), of Fairfax, Virginia, and Unisys Corporation, of Reston, Virginia, protest the issuance of a task order to Computer Sciences Corporation (CSC), of Falls Church, Virginia, under Transportation Security Administration (TSA) request for proposals (RFP) No. HSTS03-08-R-CIO903, for computer support services. Both protesters maintain that the agency misevaluated proposals and made an unreasonable source selection decision. Additionally, General Dynamics asserts that the agency engaged in misleading discussions.

We sustain the protests.

BACKGROUND

The RFP sought fixed-price proposals to perform a task order for a wide variety of computer support services for TSA at a large number of the agency's installations nationally and worldwide, for a base year, with four 1-year options. TSA solicited proposals from firms that previously had been awarded indefinite-delivery, indefinite-quantity contracts by the Department of Homeland Security under its Enterprise Acquisition Gateway for Leading Edge Solutions (EAGLE) program.¹ The task order to be issued is valued at approximately \$500 million.

The requirement was to be solicited in two phases. During phase I, offerors would provide broad information concerning their transition strategy, technical capabilities and past performance. Based on an evaluation of this information, TSA would make a "down-selection" among firms responding to the solicitation. The phase I RFP was issued in April 2008. The agency received six proposals. After evaluating the proposals, the agency selected three offerors to proceed to phase II, and advised the remaining three that they were being eliminated from the competition. After learning of the down-selection, two of the three unsuccessful offerors filed protests with both our Office and the Federal Aviation Administration's Office of Dispute Resolution for Acquisition (ODRA), objecting to their elimination from the competition. Shortly after being advised by ODRA that it would consider the protests, both protesters withdrew their protests at our Office, and we advised that we were closing our files in the matters by letters dated August 1, 2008. Contracting Officer's (CO) Statements, at 3.²

¹ There are numerous functional categories under the EAGLE program; the subject acquisition was limited to contractors holding contracts to provide services in functional category 2.

² We developed the records separately, but concurrently, in these two protests. Consequently, there are parallel, but not identical, records. While we now have consolidated the protests for purposes of issuing a single decision, there are instances where citation to the two records are the same, and other instances where
(continued...)

On June 26, while the two protests were pending at ODRA, the agency issued a phase II solicitation to the three successful phase I offerors. It received proposals from all three on July 25. TSA initiated its evaluation of the phase II proposals, but then halted the process, apparently before reaching any definitive conclusions concerning the relative merit of the proposals. CO Statements, at 4. In August 2008, the agency settled the two outstanding ODRA protests by allowing the two protesters, as well as the third offeror that had been eliminated during phase I, to compete in phase II. Id. The agency also agreed to reissue the phase II solicitation to all offerors after September 30, and to provide the offerors an opportunity to comment on the draft phase II solicitation. Id. Thereafter, in November, the agency conducted an industry day meeting, attended by all six firms that originally had expressed interest in the acquisition, during which offerors had an opportunity to comment on the draft phase II RFP. Id.

The agency issued the phase II solicitation on December 8. The solicitation advised that the agency intended to make award on a “best value” basis considering price and several non-price factors. RFP § M.1. The solicitation included three equally-weighted, non-price considerations—technical approach, management, and performance³—which, collectively were significantly more important than price, and a fourth non-price factor, small business contracting plan, which was less important than price. RFP § M.5.⁴

(...continued)

the citations are different. In those instances where we refer to portions of the record that are identical (such as certain portions of the two CO Statements), we reference the documents in the plural (i.e. CO “Statements”). In those instances where we refer to identical information that appears in different portions of the respective record for each protest, we provide parallel citations to the exhibit numbers and BATES numbers assigned by the agency in each record, with a citation to the GD record first, followed by a citation to the Unisys record (e.g. ARs, exhs. ____, at GD BATES ____, Unisys BATES ____). In those instances where we refer to only one or another record, we do not provide parallel citations. Counsel for each protester was admitted to the protective orders issued for both protests immediately prior to issuance of our decision.

³ For technical approach, there were four subfactors: IT security requirements, solutions delivery requirements, operational effectiveness requirements, and transition technical approach. For the management factor, there were four subfactors: program management, staffing; transition management, and quality assurance plan. For performance, there were two subfactors: service level agreements, and performance management and incentive process. RFP § M.5.

⁴ Adjectival ratings of outstanding, good, acceptable, or unacceptable would be assigned to proposals under the technical approach, management, and performance (continued...)

The agency received phase II proposals from GD, Unisys and CSC. After performing an initial evaluation, the agency engaged in discussions with all three offerors, after which it issued a clarifying amendment and solicited proposal revisions, which were received on May 18, 2009. GD CO Statement, at 15-16; Unisys CO Statement, at 14-15. After evaluating the revised proposals, the agency requested additional information telephonically and by e-mail, and also issued another solicitation amendment. GD CO Statement, at 16; Unisys CO Statement, at 15. Thereafter, the agency solicited final proposal revisions (FPR), which were received on July 20. GD CO Statement, at 16; Unisys CO Statement, at 15-16.

After receiving the FPRs, the agency's evaluators prepared a technical evaluation report and a price evaluation report. Agency Reports (ARs), exhs. 28, 29. These reports, along with a source selection recommendation prepared by the respective chairmen of the agency's technical/management evaluation team (TMET) and price evaluation team (PET), ARs, exh. 30, were forwarded to the agency's source selection advisory council (SSAC) for review. GD CO Statement, at 16-17; Unisys CO Statement, at 16. After receiving comments from the SSAC, the TMET and PET revised the source selection recommendation and then sent it back to the SSAC, along with the technical and price evaluation reports. The SSAC, in turn, prepared a source selection recommendation. ARs, exh. 31. In summary, the agency's evaluation results were as follows:

(...continued)
factors, and ratings of either acceptable or unacceptable would be assigned to proposals under the small business subcontracting factor. RFP § M.6.

Factors/Subfactors	CSC	GD	Unisys
IT Security	Good	Acceptable	Acceptable
Solutions Delivery	Good	Acceptable	Acceptable
Operational Effectiveness	Acceptable	Good	Acceptable
Transition Technical Approach	Acceptable	Acceptable	Acceptable
Overall Technical Approach	Good	Acceptable	Acceptable
Program Management	Acceptable	Acceptable	Acceptable
Staffing	Acceptable	Acceptable	Acceptable
Transition Management	Acceptable	Acceptable	Acceptable
Quality Assurance Plan	Acceptable	Acceptable	Acceptable
Overall Management	Acceptable	Acceptable	Acceptable
Service Level Agreements	Acceptable	Acceptable	Acceptable
Performance Management and Incentive Process	Acceptable	Acceptable	Acceptable
Overall Performance	Acceptable	Acceptable	Acceptable
Total Price	\$467,180,425	\$499,895,567	\$510,809,903
Small Business Subcontracting Plan⁵	Acceptable	Acceptable	Acceptable

GD CO Statement, at 17-18; Unisys CO Statement, at 17-18. On the basis of these evaluation results, the SSA chose CSC for issuance of the task order, finding that its proposal offered the best value to the government. ARs, exhs. 32. After being advised of the agency's source selection decision and receiving debriefings, GD and Unisys filed the instant protests.

JURISDICTION

As a threshold matter, the agency asserts that our Office lacks jurisdiction to consider the protests. According to the agency, it conducted the procurement pursuant to the acquisition authority conferred on TSA by the Aviation Transportation Security Act (ATSA), 41 U.S.C. § 114 (o) (2006), which provides that TSA procurements for services, equipment, supplies, and materials are to be conducted using the acquisition management system (AMS) established by the Administrator of the Federal Aviation Administration (FAA) pursuant to 49 U.S.C. § 40110 (2006), which further provides that protests concerning such matters are to be resolved by ODRA. The agency acknowledges that its procurement authority recently has been changed by statute, but maintains that this acquisition is governed

⁵ The evaluation results for the small business subcontracting plan were not included in the CO Statements, but were derived from ARs, exhs. 30, at GD BATES 6808, Unisys BATES 7873.

by its acquisition authority under the ATSA, and was conducted using the AMS. Accordingly, TSA maintains that the protests should be dismissed for lack of jurisdiction.⁶

We do not agree with TSA that our Office lacks jurisdiction over this matter. The ATSA, enacted in 2001, established TSA as a new agency within the Department of Transportation (DOT) and tasked it with broad transportation security responsibilities. Pursuant to 49 U.S.C. § 114, TSA procurements were made subject to FAA's AMS; because protests arising from acquisitions conducted pursuant to the AMS were designated for resolution by ODRA, our Office historically has declined to exercise jurisdiction over them.⁷

However, recent legislation changed the basis of TSA's acquisition authority. Specifically, the Consolidated Appropriations Act, 2008 (CAA), Pub. L. No. 110-161, Div. E, Title III, § 568, 121 Stat. 1844, 2092 (2007) (to be codified at 49 U.S.C. § 114 note) enacted on December 26, 2007, repealed TSA's authority to use FAA's AMS.⁸ The CAA further provided that these changes "shall take effect 180 days after the date of enactment of this Act." *Id.* To implement these changes, DHS published a final rule providing that TSA acquisitions initiated after June 22, 2008 would be subject to the Federal Acquisition Regulation (FAR). 73 Fed. Reg. 30,317 (2008). Similarly, our Office published proposed changes to our Bid Protest Regulations in March 2008 and, on June 9, 2008, issued the final rule, stating: "[I]n the interest of an

⁶ By letter to our Office dated November 10, 2009, TSA's Assistant Administrator for Acquisitions asserted that, pursuant to the terms of the RFP, ODRA was the exclusive forum in which a protest concerning this acquisition could be filed, and advised us that TSA was canceling the stop work order it initially had issued to CSC in connection with these protests pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553 (2006). Thereafter, Unisys filed an action at the U.S. Court of Federal Claims seeking injunctive relief from the agency's cancellation of the stop work order. By decision dated December 18, 2009, the court granted Unisys the requested relief, finding that the automatic stay requirement of CICA applied to the task order issued to CSC. Unisys Corp. v. The United States and Computer Sci. Corp., Fed. Cl., No. 09-800C, Dec. 18, 2009.

⁷ In 2002, TSA was transferred from DOT to the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, 2173 (2002); however, TSA's authority to conduct procurements pursuant to the FAA's AMS was not changed at that time.

⁸ As noted by the Court of Federal Claims in its December 18 decision, Senator John Kerry, in connection with the bill that ultimately became the CAA, stated that Congress's intent that TSA conduct its procurements through the AMS was never meant to be permanent. Unisys Corp. v. The United States and Computer Sci. Corp., *supra*, at 3, n.1.

orderly transition by TSA to FAR-based procurements, GAO will hear protests of TSA procurements covered by TSA solicitations issued on or after June 23.” 73 Fed. Reg. 32,429.

At the heart of the agency’s position regarding jurisdiction is its view that, since the phase I solicitation was issued prior to June 23, 2008, its pre-CAA exemption from our bid protest jurisdiction applies to this procurement. According to the agency, phase I was the beginning of a continuous, two-phase acquisition process, and the fact that phase II was commenced after June 23 thus is not controlling for purposes of determining whether this procurement is subject to our jurisdiction as established under the CAA.

We do not agree with TSA’s position. Our final rule states only that we will hear protests of TSA procurements covered by “TSA solicitations issued after June 23.” Here, the agency issued two solicitations after June 23, one dated June 26, and a second dated December 8. Thus, while TSA maintains that it initiated this acquisition before June 23 by issuing its phase I solicitation, its position fails to account for the fact that our final rule is not couched in terms of the “initiation” of an acquisition, but rather in terms of the issuance of a solicitation. Here, as noted, the agency issued two solicitations after June 23. We conclude that our Office is authorized to hear protests in connection with the issuance of these solicitations.⁹

In any event, as noted, the sole purpose of the phase I solicitation was to narrow the field of prospective contractors. As discussed, however, the record shows that this purpose was not achieved. Rather, TSA abandoned the results of its phase I acquisition, and, therefore, the phase I portion of the agency’s acquisition was effectively nullified. Thereafter, TSA engaged in other activities consistent with the initiation of an acquisition. Specifically, it issued a draft statement of work and draft evaluation criteria to the prospective offerors for review and comment, ARs, exhs. 6; the agency then conducted an industry day briefing during which it presented information concerning the acquisition and solicited comments and questions from industry participants, ARs, exhs. 7; thereafter, the agency issued “pre-solicitation questions and answers” to the prospective offerors, ARs, exhs. 9; finally, some 6 months after it issued the original phase II solicitation, the agency issued the final RFP that then was used in conducting the competition. ARs, exhs. 10. In our view, these actions evidence the “initiation” of an acquisition, not the continuation of an acquisition already initiated. Accordingly, even if we were to agree with the agency’s

⁹ We point out as well that, although the agency maintains that it is conducting the acquisition pursuant to the AMS, it has not provided any explanation regarding why, in light of its theory, it conducted the procurement under the authority of the FAR using preexisting DHS contracts that also had been awarded under the authority of the FAR. The solicitations contained exclusively FAR clauses with the exception of one clause, discussed below.

position, we conclude that the acquisition effectively was initiated after June 23, and that the protests therefore are within our jurisdiction.

The agency also points to a solicitation clause which provided that, as a condition of submitting a proposal, the offerors agreed to file protests exclusively at ODRA. ARs, exhs. 10, at GD BATES 780-82, Unisys BATES 780-82. According to the agency, by submitting proposals in response to an RFP that included this provision, the parties agreed to protest only at ODRA. We disagree. We are unaware of any procurement statute or regulation—and TSA cites none—under which agencies properly may limit a competition to firms that agree to forego filing a protest with our Office in the event they are not the successful offeror. Moreover, such a restriction is antithetical to the bid protest provisions of CICA, which provide unsuccessful offerors with a means—principally, the filing of a protest with our Office—for an interested party to challenge allegedly improper agency procurement actions. This being the case, coerced agreements such as those here are not a basis upon which we will forego review of protests that otherwise are within our jurisdiction. See Letter to the Secretary of Energy, B-245882.2, Feb. 21, 1992.¹⁰

PROTEST ARGUMENTS

Both protesters challenge the agency's evaluation of CSC's price proposal and the offerors' technical proposals on several grounds. We have considered all of the protesters' arguments and find those discussed below to be meritorious.

Price Realism Evaluation of the CSC Proposal

Both protesters maintain that the agency unreasonably concluded that CSC's pricing was realistic. In this regard, the RFP required the agency to evaluate price proposals for realism as follows:

The Government will also evaluate the offeror's Total Evaluated Price to determine fairness and reasonableness, as well as realism. The Government will assess how well the Total Evaluated Price realistically reflects an understanding of the solicitation requirements as well as a consistency with the approach proposed by the Offeror in the Volumes

¹⁰ This letter was issued in connection with, and mentioned in, a decision by our Office, Rodriguez & Assocs., B-245882.2, Feb. 12, 1992, 92-1 CPD ¶ 209. Although the letter was not published in the Comptroller General's Bid Protest Decisions, it nonetheless may be found on our website, www.gao.gov, using the B-number as a search term.

I-IV proposals [volume I to III were to include the firms' technical proposals while volume IV was to include the firms' price proposals].

ARs, exhs. 10, at GD BATES 795, Unisys BATES 803.

Price realism need not necessarily be considered in the evaluation of proposals for the award of a fixed-price contract, because these contracts place the risk of loss upon the contractor rather than the government. However, in light of various negative impacts on both the agency and the contractor that may result from an offeror's overly optimistic proposal, an agency may, as TSA did here, expressly provide that a price realism analysis will be performed in order to assess an offeror's understanding of the requirements and/or the risk inherent in a proposal. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 19. In reviewing protests challenging an agency's evaluation of these matters, our focus is on whether the agency acted reasonably and in a manner consistent with the solicitation's requirements. Id.

Evaluation of CSC's Proposed Level of Effort

Unisys asserts that CSC's low proposed price should have been found to be unrealistic because it reflected proposed staffing that was both inadequate to meet the requirements of the RFP and inconsistent with staffing information included in the firm's technical/management proposal. The solicitation required offerors to propose staffing in four areas--business activities (BA), security (ITSEC), operational effectiveness (OE), and solutions delivery (SD)--and Unisys claims that there were significant disparities between the staffing in CSC's technical/management proposal and its pricing proposal.

The record bears out Unisys's allegation regarding the staffing disparity. In its technical/management proposal, CSC offered [deleted] full-time equivalents (FTE), allocated among the four staffing areas as follows: BA-[deleted], ITSEC-[deleted], OE-[deleted], and SD-[deleted]. ARs, exhs. 21, at GD BATES 4469, 4481; Unisys BATES 4611, 4623. CSC's technical proposal further represented as follows:

Exhibit 3-2 [showing this staffing profile] illustrates our proposed staffing levels to perform the required services of the solicitation. Team CSC is proactively engaged to achieve this staffing at contract startup and throughout the life of the contract.

Id. at GD BATES 4469, Unisys BATES 4611 (emphasis supplied). Contrary to this representation, and in contrast to the staffing profile in CSC's technical/management proposal, CSC's price proposal contained staffing that decreased steadily through the option years, to a level significantly below that outlined in CSC's technical/

management proposal.¹¹ The FTEs included in CSC’s price proposal were as follows:

Staffing Area	Base Year	Option 1	Option 2`	Option 3	Option 4
BA	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
ITSEC	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
OE	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
SD	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
Total¹²	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]

CSC Price Proposal, at 28A-30B. Thus, by the final year of contract performance, CSC’s price proposal included [deleted] fewer FTEs--an approximately [deleted] percent reduction--than in its base year staffing.

We find nothing in CSC’s proposal that adequately explains the decline in option year staffing in its price proposal, or the inconsistency between the staffing in its technical/ management and price proposals, and it appears that the agency was not aware of these staffing issues during the evaluation and award process. Nonetheless, the agency states that the TMET reviewed the technical/management proposals to determine whether adequate staffing was offered by the firms and that, thereafter, the PET reviewed the staffing in the price proposals to determine whether it was consistent with the staffing in the technical/management proposal. With respect to CSC’s proposal, the final price evaluation report states as follows:

Labor Hours/Categories

We tested the proposed hours in Volume IV Price to the Staffing Plan in Volume II Management (of the tech proposals). In all cases the Staffing Plan FTEs tied to the price proposals. The Tech Team stated the Staffing Plans were adequate. We then had the Tech team chair review the proposed labor categories for the offerors and he determined that

¹¹ Our citations to the CSC price proposal are directly to the pages of the proposal, as opposed to the BATES numbered copies included in the agency record. CSC provided our Office and Unisys with copies of its price proposal because the version in the agency record was difficult to read. Nonetheless, all of the information discussed, including the actual page numbers of the CSC price proposal, may be found at GD BATES 6253-6639, Unisys BATES 6467-6853.

¹² We provide the arithmetic totals in this table. CSC’s price proposal presented slightly different totals, and stated that the totals differ slightly due to rounding. The totals provided in CSC’s price proposal are: Base Year-[deleted], Option 1-[deleted], Option 2-[deleted], Option 3-[deleted], and Option 4-[deleted]. CSC Price Proposal, at 30B.

each offeror used realistic categories and hours for their offered technical solution. The three offerors proposed cost were determined to be realistic in relation to their proposed ITIP SOW technical solution.

ARs, exhs. 29, at GD BATES 6785, Unisys BATES 7850. Since there is no mention of the staffing disparity between CSC's technical/management and price proposals, the price evaluators appear not to have considered the disparity at the time their views were memorialized in the price evaluation report.

The agency has submitted several affidavits from its evaluators in an attempt to support its price realism evaluation of CSC's proposal. The first of these affidavits, executed by the chairman of the PET, states:

Labor Hours

We had a technical person as a member of the PET so he could review the proposed labor hours. During discussions we had questions to all Offerors about elements of the Basis of estimates. Our technical person determined that CSC's proposed labor hours were realistic. We also tested the proposed hours in Volume IV Price to the Staffing Plans in Volume II Management (of the tech proposals). In all cases the Staffing Plan FTEs tied to the price proposals. The staffing plans show that CSC proposed more FTEs than the other Offerors as shown in the table below.

As a last element of the realism for labor hours we had the Tech team chair review the proposed labor categories for the offerors and he determined that each offeror used realistic categories and hours for their offered technical solution. It should be noted that the labor hour analysis included the hours of all subcontractors. This way we could determine realism of the entire contract not just of the prime contractors work. At no time did the TET chair question the realism of CSC's proposed hours or labor rates.

Affidavit of PET Chairman, Nov. 12, 2009, at 8. Below this statement appeared a table in the affidavit that outlined what were purportedly a comparison of the offerors' option 1 staffing profiles. However, the hours noted in the table as included in the CSC proposal are the hours in the technical/management proposal, not the price proposal. Id. There is nothing in this statement that indicates the chairman was aware of, or ever considered, [deleted] or the disparity between the technical/management and price proposal staffing.

The agency furnished a second affidavit from the PET chairman elaborating on the representations in his first affidavit. That affidavit states (in relevant part) as follows:

When the PET traced the staffing plan from the Management proposal to the price proposal that was intended to verify accuracy. I did make a mistake in the Price Report and in my prior Declaration when I said the staffing plans were verified to the Option Year 1. The Staffing plans were verified to the Base Year of CSC Labor Distribution Table pages 28-A to 30-B. AR Tab 26 at Unisys 06488-90. While this is a mistake it has no bearing on the determination of realism of any of the proposals because both the technical person on the PET and the TET chair determined the proposed hours found within the CSC Proposal Volume IV--Price Proposal bases of estimates were realistic for CSC's approach.

Second Affidavit of PET Chairman, submitted by agency on Dec. 12, 2009, at 2.

We have no basis to question the chairman's explanation that only the base year staffing was considered in the realism evaluation. Indeed, this explanation is totally consistent with the fact that, as noted, proposed staffing in the base year of CSC's price proposal was similar to the staffing in its technical/management proposal. However, the evaluation was to include the option years and this statement still does not address the option year staffing decline in the price proposal. It certainly does not establish that the PET ever considered these issues in the evaluation.

The agency also furnished an affidavit from the member of the PET with expertise in the technical aspects of the requirement, who actually performed the detailed price realism evaluation referred to by the PET chairman; according to the agency, he was selected to perform this evaluation because, in addition to being capable of evaluating the proposed prices, he had the technical expertise necessary to assess the offerors' proposed solutions to meeting the agency's requirements. The PET evaluator states that he read the price proposals and, where necessary, the technical proposals, and that the focus of his evaluation was on the offerors' respective bases of estimates (BOE). More specifically, he states as follows:

[F]or this part of the evaluation I concentrated on BOE Attachment 1, which lists details on each section including: [deleted]. Attachment 1--BOE and Organization Charts, (pg 84-A through 431) [deleted]. For each CLIN and each section of the WBS, I verified that the proposed labor categories and the number of hours were in my professional opinion sufficient and reasonable to complete the work required by the SOW. Whenever I had questions or areas of concern/focus, I referred back to the specific sections of the SOW, the technical proposal and/or the management proposal to verify that the required function was adequately addressed either by CSC's approach, their experience, the proposed tools, covered in another section/CLIN, or was otherwise explained in sufficient detail as to present a reasonable solution and low risk to the government. If any questions or areas of focus

remained I submitted them to the Price Evaluation Team, which passed them to the Technical Evaluation Team, and as appropriate to the Contracting Officer (CO) for clarification or discussion.

An example of the process is CLIN Y-5-12-0000, described on page 394-A of the BOE. CSC proposed [deleted]. I verified this against WBS section 5.12 and the SOW to ensure this was permissible and a valid method of supporting the requirements. This approach does represent a valid approach and per the BOE for CLINs Y-3-01-0000 & Y-3-03-0000 there are sufficient and appropriate resources to cover the function. The side effect of this and similar methodologies proposed by CSC [deleted]. This is a valid and arguably significantly more cost effective approach [deleted].

Affidavit of PET Evaluator, at 2.¹³

While we find no basis for questioning the PET evaluator's statement that CSC was able to achieve certain efficiencies with its proposed staffing approach (and correspondingly reduce its overall staffing profile), this statement—as with the two statements by the PET chairman—does not address the fact that the staffing proposed in CSC's price proposal decreased significantly—by [deleted] FTE—in the option years of the contract and was inconsistent with the staffing in CSC's technical/management proposal.

We conclude that there is no indication in the record that the agency considered in the evaluation either the significant staffing decrease in the option years under CSC's price proposal, or the staffing inconsistency between CSC's price proposal and technical/management proposal. Meanwhile, it appears that the TMET based its technical findings and ratings of CSC's technical/management proposal on the underlying assumption that CSC was offering the staffing indicated in its technical/management proposal which contained the [deleted] staffing numbers. In light of the significantly different—[deleted]—staffing in CSC's price proposal, this assumption, without some explanation for the staffing inconsistency between the technical/management and the price proposals, was unwarranted. The staffing decline and disparity bear on both the realism and technical quality of CSC's

¹³ The agency also submitted an affidavit from the TMET chairman, the other individual the PET chairman identifies in his second affidavit as having determined that the staffing proposed by CSC in its price proposal was realistic. His statement concerning this aspect of the evaluation are general in nature, and there is no suggestion in his affidavit that he observed or evaluated the decline in CSC's staffing during the option years, or that he somehow was able to rectify the disparity in CSC's proposed staffing between its technical/management proposal and its price proposal. Affidavit of TMET Chairman, Nov. 12, 2009, at 6-7.

proposal. It follows that the agency's evaluation conclusions that CSC's proposal was technically superior to the other two firms' proposals, and that its price was realistic, necessarily is not supported by the record. Pemco Aeroplex, Inc., B-310372, Dec. 27, 2007, 2007 CPD ¶ 2 at 10-12. Accordingly, we sustain this aspect of the protests.

Evaluation of CSC's Low Labor Rates

Both GD and Unisys assert that the agency's realism analysis failed to give adequate consideration to CSC's comparatively low proposed labor rates in light of the firm's proposal to hire incumbent personnel to perform the requirement. The protesters assert that such consideration was necessary for the purpose of determining whether CSC's proposed pricing (labor rates) was consistent with its proposed technical approach of hiring incumbent personnel. GD notes in this regard, for example, that the agency's evaluation found that CSC had the lowest proposed labor rates (among the three offerors) for [deleted] of the contract's 71 labor categories and that, within those categories, CSC's proposed rates are significantly—in some cases more than [deleted] percent—lower than the rates proposed by Unisys, the incumbent contractor. ARs, exhs. 29, at GD BATES 6780-6782, Unisys BATES 7845-7847. The protesters maintain that these low rates should have led the agency to question CSC's ability to implement its plan to hire incumbent personnel.

The agency responds, first, that the labor rates in all three of the offerors' contracts are not wage rates, but fully burdened hourly rates for categories of employees. The agency maintains that a comparison of the proposed labor rates alone therefore does not necessarily show that the actual wages to be paid by CSC are lower than the wages proposed by the incumbent. The agency also asserts that it considered the fact that CSC's proposal included the lowest proposed labor rates for many of the contract labor categories, but concluded that this would not be problematic because, for several key employee categories, CSC had offered the highest wages among all of the offerors; the agency reasoned that CSC would be able to attract the incumbent employees for these key personnel positions, and that its rates for the remaining labor categories were "competitive." ARs, exhs. 30, at GD BATES 6807, Unisys BATES 7872.

We agree with the protesters that the evaluation in this area was unreasonable. First, the agency has presented, and the record contains, no evidence or information supporting its assertion that the comparison of CSC's and Unisys's fully burdened labor rates would not be meaningful because a comparison of these burdened rates would not effectively reflect the difference in the wages that actually will be paid. More specifically, the agency has not shown that it ever determined that there really was no substantial difference in the wage rate component of the burdened rates, and that the apparent difference was explained, for instance, by a substantial disparity in the two firms' indirect rates. To the extent that the agency evaluated the offerors' proposed rates, its evaluation was confined to a comparison of the fully burdened labor rates. ARs exhs. 29, at GD BATES 6780-6782; Unisys BATES 7845-7847. In the

absence of such an analysis, there is no support in the record for the agency's assertion that the firms actually could--or would--pay similar wages, even though their proposed labor rates were dramatically different.

Second, it appears fundamentally inconsistent for the agency to assert, on the one hand, that the labor rates are not a meaningful basis for evaluation, and then, on the other hand, to state that it relied on the firms' comparative labor rates in finding that certain CSC high labor rates would better enable it to recruit, hire and retain a number of key personnel who would ensure CSC's successful performance. ARs. exhs. 30, at GD BATES 6807-6808, Unisys BATES 7871-7872; Affidavit of Contracting Officer, Dec. 10, 2009, at 2-3. If, as the agency suggests, the firms' proposed labor rates provided no meaningful insight into wages actually to be paid, then it was unreasonable for the agency to rely on those same proposed rates to support a favorable evaluation of CSC's ability to recruit, hire and retain certain key personnel.

Third, not only is the agency's litigation position--that comparing CSC's labor rates to the incumbent's rates would not be meaningful--not reflected in the contemporaneous record, the record shows that, on the contrary, some concern was raised during the evaluation that CSC's proposed labor rates were so low as to indicate a risk that CSC would be unable to hire incumbent employees, as it proposed to do. Specifically, after the source selection recommendation was presented to the SSAC (which was comprised of the heads of each of the four functional areas under the task order), the director of the operational effectiveness (OE) division (one of the members of the SSAC) expressed concern regarding CSC's low proposed labor rates, stating:

Headquarters/Field/FC -- Based on the low labor rates provided by CSC, I feel that an evaluation of their rates be conducted to determine whether or not the successful hiring of incumbent staff could be accomplished. Not being able to hire incumbent staff members would pose a major risk to our daily operations based on the incumbents institutional knowledge of TSA and the customers that they support.

ARs, exhs. 31, at GD BATES 6820, Unisys BATES 7885. The record shows the agency determined that this concern was overstated because the OE division was "not the most important subfactor within the factor." Contracting Officer's Affidavit, Dec. 10, 2009, at 4. The contracting officer explains, in this regard, as follows:

On September 1, 2009, the SSAC was reconvened to address the SSAC member memos [one of which is quoted above] and the SSA comments to v [version] 3.2 of the Source Selection Recommendation. During this meeting I addressed with [the Director of the OE division] and the rest of the SSAC the analysis of CSC's proposed labor rates. In addition, I affirmed that OE was not the most important subfactor within the factor and the evaluation team had determined the technical approach to be realistic and the level of staffing to support the

approach to be realistic. I asked the SSAC if [the Director of the OE division's] concerns were of such a magnitude [as to merit my] direct[ing] the evaluation team to go back and look at the proposal for OE again. [The Director of the OE division] stated that given the order of importance he believed his concerns associated with CSC's proposal were acceptable and manageable by TSA and CSC management. The SSAC concurred with [the Director of the OE division] and agreed that the risk associated with CSC's support of OE were not unreasonable and expected during a transition of this size, scope and complexity and should not by itself prevent CSC from receiving award

CO Affidavit, Dec. 10, 2009, at 4. The record also contains an affidavit in which the SSA also describes the meeting discussed by the contracting officer above, and states further that, in light of that discussion, she considered the matter "closed." SSA Affidavit, Dec. 11, 2009, at 2. The agency's briefs and other submissions similarly suggest that it viewed this concern as limited to the OE area. See, e.g., Supplemental Agency Report, GD Protest, at 6-8.

The above suggests that the agency ultimately disregarded CSC's low labor rates, not because there was no basis for comparing them to the incumbent rates, but because it concluded that the impact of the low rates was limited to the OE division. To the extent that this was the case, the agency's conclusion was not based on a complete examination of the proposed labor rates, since CSC's proposed labor rates were low by a significant margin across the board. Thus, the impact from any difficulties CSC experienced in recruiting incumbent employees based on inadequate compensation would not be limited to the OE division, but would extend to the entire contract effort in all functional areas. Simply stated, the fact that only the agency's OE director expressed concern about CSC's low labor rates did not provide a reasonable basis for the agency to conclude that the impact of low wage rates would be limited to the director's area of responsibility.

Finally, the record shows, that there was no reasonable basis for the agency to be unconcerned with CSC's comparatively low labor rates in the main, based on the fact that, for a few select labor categories, CSC offered the highest labor rates. The record shows that the number of labor categories considered by the agency in its analysis was [deleted]¹⁴, ARs, exhs. 30, at GD BATES 6807, Unisys BATES 7872, Contracting Officer's Affidavit, Dec. 10, 2009, at 2-3, and the number of employees

¹⁴ The labor categories were: [deleted]. ARs, exhs. 30, at GD BATES 6807, Unisys BATES 7872, Contracting Officer's Affidavit, Dec. 10, 2009, at 2-3. The record also shows that, of these [deleted] categories, [deleted]. CSC Price Proposal, at 28-A-30-B. Thus, to the extent that the agency did analyze the adequacy of CSC's labor rates for the firm's key positions, its analysis was principally limited to just [deleted] out of 71 labor categories.

proposed in these categories by CSC ([deleted] in the base year, declining to [deleted] in the final option year) is low in relation to the overall number of staff proposed by CSC ([deleted] in the base year, declining to [deleted] in the fourth option year). CSC Price Proposal, at 28-A-30-B. Accordingly, it is not clear why CSC's high proposed rates for these key employees would be viewed as eliminating the need to consider CSC's low rates under the other labor categories, which include the overwhelming majority of CSC's proposed staff ([deleted] employees in the base year, declining to [deleted] employees in the fourth option year). Id.

The record thus shows that CSC's staffing strategy contemplated hiring incumbent personnel, but offered labor rates that were significantly lower than the rates proposed by the incumbent. The agency's failure to consider this price realism concern in both its price and technical evaluations was unreasonable, and we therefore also sustain this aspect of the protests.

In sum, and as noted at the outset of our discussion, agencies are not necessarily required to perform realism evaluations in fixed price contract settings. Nonetheless, if the agency undertakes to do so, as was the case here, its evaluation must be consistent with the provisions of the FAR governing the conduct of price realism evaluations, and more specifically, with any evaluation standards established in the solicitation. Here, the RFP provided generally for the agency to assess the realism of the proposed prices, and more specifically called for an evaluation of the consistency between the technical/management and price proposals, as well as an assessment of how well the firms' prices realistically reflected an understanding of the solicitation's requirements.

As the foregoing discussion demonstrates, the agency here did not observe, much less analyze, the fact that the staffing included in CSC's proposed pricing was inconsistent with the staffing proposed in its technical/management proposal; nor did the agency analyze the degree to which CSC's proposed prices--specifically its proposed labor rates--would enable it to implement its offered technical solution of hiring incumbent staff. Although the agency's numerous post hoc assertions have necessitated a somewhat lengthy discussion of these considerations, nonetheless, the agency has failed to establish that it performed an adequate price realism evaluation.

Incentive Fee

Both protesters assert that the agency impermissibly accepted CSC's proposal with an incentive fee that varied from the fee specified in the RFP.¹⁵ In this regard, the RFP contemplated that offerors' proposed prices would include an incentive fee that

¹⁵ Although both protesters advance this argument, GD principally developed the issue. Our discussion thus is framed in terms of CSC's and GD's actions.

would be payable, in whole or in part, based on the contractor's level of success in performing the contract. The RFP as initially issued included a table that outlined the CLIN framework to aid offerors in preparing their price proposals. This framework included spaces to enter prices for all of the various services in each division for the base year and the 4 option years. ARs, exhs. 10, at GD BATES 804, Unisys BATES 804. The final rows in the table were labeled "incentive fees" and included four line item rows, each of which contemplated entry of a price for the incentive fee for each calendar quarter of each year of contract performance. Id. The RFP did not include any further instructions or information regarding how the incentive fee would be evaluated. Elsewhere, the RFP's statement of work provided: "The amount of incentive dollars potentially available to award to the Contractor in each quarter is five percent of the funds expended on core services during that quarter. The CLINS which comprise the core services will be specified by TSA." RFP § C.2.10.4.

CSC's initial price proposal did not include an incentive fee. ARs, exhs. 13, at GD BATES 1680-1683, Unisys BATES 1667-1670. After reviewing CSC's proposal, the agency requested that the firm clarify it, noting that CSC had not included an incentive fee, and inquiring whether the firm intended to propose an incentive fee, or whether those CLINs of its pricing sheet had been intentionally left blank. ARs, exhs. 19, at GD BATES 4020, Unisys BATES 4161. CSC replied as follows:

CSC's intention is that the RFP specified incentive fees will be available for CSC to earn during contract performance, and our proposal was not intended to waive eligibility for these fees. CSC's proposal intentionally left the quarterly incentive fee amounts blank for the following reasons:

Section C.2.10.4.1 stated that "the amount of incentive dollars potentially available to award to the Contractor in each quarter is 5% of the funds expended on core services during that quarter. The CLINs which comprise the core services will be specified by TSA." Since TSA did not specify these core services, we did not have adequate information to accurately determine a dollar amount in the CLIN table.

Since the ITIP RFP specified the incentive fees, we did not believe that alternative incentive fee proposals were permitted and that the government would complete this portion of the CLIN tables at contract award or when the core services were identified.

Id.

GD's initial proposal included incentive fees. However, following oral discussions, GD posed the following question to the agency:

The RFP required that vendors add a 5% incentive, for evaluation purposes, on CORE CLINs. However, the RFP did not define CORE CLINs. TSA indicated during discussions that CORE CLINs were all CLINs other than optional CLINs and that offerors should thus add 5 % incentive fee on all non-optional CLINs only. Please confirm our understanding.

GD AR, exh. 20, at GD BATES 4101. The agency never responded directly to GD's question, and there is no further information relating to whether the agency communicated further with CSC after receiving its clarifying statement quoted above. However, the agency did issue an amendment to the RFP in order to clarify the question of the incentive fee. ARs, exhs. 10, at GD BATES 1227-1228, Unisys BATES 1214-1215. Specifically, the agency amended the CLIN framework table, changing the incentive fee CLIN entries on the table to reference a second table, and providing this second table, which listed the core services to which the incentive fee would apply. In this second table, the incentive fee line items stated the following: "Quarter [One, Two, Three or Four] incentive fee (5% of ¼ of CLIN prices specified above)." *Id.* GD included a 5% incentive fee in its FPR price. GD AR, exh. 27, at BATES 6693. (Unisys likewise included a 5% incentive fee in its FPR price. Unisys AR, exh. 27, at Unisys BATES 7345.) In contrast, CSC included an incentive fee of only 3%. CSC Price Proposal at 13A.

The protesters principally assert that the agency led them throughout the acquisition to believe that they were required to apply a 5% incentive fee in calculating their prices, and that the agency was required either to reject CSC's proposal for failing to use a 5% fee, or to advise all offerors that some other percentage was acceptable.

The agency asserts that all offerors were free to propose any incentive fee they thought was appropriate, notwithstanding the amount specified in the RFP. The agency maintains that the wording of the statement of work provision quoted above (relating to the amount of the incentive fee "potentially available") put all firms on notice that the agency would entertain offers of amounts different from 5%. In support of its position, the agency cites our decision Holmes and Narver, Inc., B-196832, Feb. 14, 1980, 80-1 CPD ¶ 134 at 3-9, in which we denied a protest where the awardee proposed an award fee less than the amount stipulated in the solicitation, finding that the agency could properly take advantage of the awardee's lower proposed fee.

At the outset, we think that our decision in Holmes and Narver is distinguishable from the case here. There, the RFP as originally issued provided that the award fee "will be" 10 percent, but was amended to delete this language and to provide instead for "an award fee of up to" 10 percent. *Id.* at 5-6. We found that this change was sufficient to convey the agency's intention to permit offerors to propose award fees lower than 10 percent.

Here, there was no similar language in the original or amended RFP stating how the agency would treat the incentive fee, or indicating that offerors were free to propose a lower fee. While the statement of work provision did refer to the amount of the award fee, it did not explain how the fee would be evaluated or state that a lower fee would be acceptable. Rather, this was a contract administration provision explaining how the agency would calculate the amount of the contractor's fee during performance. The provision's reference to the amount of the fee "potentially available" as 5% of the cost of core services reasonably indicated, in our view, not that lower maximum fees could be proposed, but that, depending on the quality of performance, the contractor could, at TSA's discretion, receive a fee as high as 5%. This language therefore did not reasonably put offerors on notice that they could propose a lower fee.

When presented with an opportunity to clarify its intent regarding the award fee—in response to the manifest confusion expressed by CSC and GD—the agency amended the RFP by issuing a supplemental pricing table that had the 5% incentive fee amount already inserted into the CLINs as a plug number for the offerors to use in their calculations. As noted, the express purpose of the new table, in the words of the amendment, was "to add a new item B.8 [the new table] to clarify the calculation of the quarterly incentive fee . . ." ARs, exhs. 10, at GD BATES 1227-1228, Unisys BATES 1214-1215. We conclude that GD and Unisys were reasonably led to understand that the 5% amount included in the amendment was required to be used in the "calculation of the quarterly incentive fee" in their price proposals. See Johnson Controls World Servs., Inc., B-254887.2, Dec. 13, 1993, 93-2 CPD ¶ 313 at 3 (where solicitation clearly specifies a particular incentive fee amount, a different, lower, incentive fee may not be offered); accord, Aquasis Servs., Inc., B-240841.2, June 24, 1991, 91-1 CPD ¶ 592 at 3-4.¹⁶ Accordingly, we also sustain the protests on this ground.

¹⁶ In an unrelated issue, GD asserts that it was misled by the agency in one other area during discussions. Specifically, GD was advised of a perceived risk in its initial proposal in a discussion question that included very specific references to a page number and a section of GD's proposal [deleted]. GD AR, exh. 20, at GD BATES 4081. GD states that, because it was not certain that it understood the agency's concern, it specifically asked the agency during oral discussions whether the perceived risk identified actually related to the referenced proposal section and page. According to GD, the agency responded that the risk did relate to the referenced proposal provision and advised GD that its response should be included in a revision to the particular proposal page and section. During its debriefing, however, GD learned that the agency had found that the risk was not resolved, but with reference to a different proposal page and section [deleted] than had been identified by GD during discussions. GD AR, exh. 36, at 6878. The agency does not contest this allegation, and we agree with GD that the agency's original discussion question, as well as its apparent response to GD's question during oral discussions

(continued...)

RECOMMENDATION

In view of the flaws discussed above, we conclude that GD and Unisys were prejudiced during the agency's procurement; neither firm was made clearly aware of the basis for preparing their price proposals in terms of the incentive fee, and GD was affirmatively misled during discussions with regard to the proposal page and section relating to risk. Additionally, the agency's price realism evaluation of the awardee's proposal was flawed for the reasons discussed above, such that there is no reasonable basis for our Office to know what source selection the agency might have made. We therefore sustain the protests.

We recommend that the agency amend the RFP to advise offerors of its intent concerning the incentive fee to be used in preparing their price proposals; provide offerors adequate discussions, consistent with our decision; and solicit revised proposals. We further recommend that the agency evaluate the revised proposals in a manner consistent with the terms of the RFP and this decision, and make a new source selection decision. If the agency determines that a firm other than CSC is in line for award, we recommend that the agency cancel CSC's task order and issue a new task order to the successful offeror, if otherwise proper. Finally, we recommend that the agency reimburse the protesters the costs of filing and pursuing their respective protests, including reasonable attorneys' fees. The protesters should file their claims directly with the agency, detailing the time spent and costs incurred, within 60 days of receiving our decision. 4 C.F.R. § 21.8(d) (2009).

The protests are sustained.

Lynn H. Gibson
Acting General Counsel

(...continued)

was misleading. Where, as here, the manner in which an agency communicates with an offeror during discussions misleads the offeror into responding in a way that does not address the agency's concerns, the discussions are inadequate. Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6-7.