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**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** First Information Technology Services, Inc.--Reconsideration

**File:** B-405602.3

**Date:** May 15, 2012

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Christian F.P. Jordan, Esq., and Kimberly M. Shackelford, Esq., Transportation Security Administration, for the agency.

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### **DIGEST**

Request for reconsideration of decision is denied where request does not show that our prior decision contains either errors of fact or law or presents information not previously considered that warrants reversal or modification of our decision.

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### **DECISION**

First Information Technology Services, Inc. (FITS), of Arlington, Virginia, requests reconsideration of our December 1, 2011 decision denying its protest against the award of a contract to Knowledge Consulting Group, Inc. (KCG), of Reston, Virginia, under request for proposals (RFP) No. HSTS03-11-R-CIO556, issued by the Department of Homeland Security, Transportation Security Administration (TSA), for information technology security support services.

We deny the request for reconsideration.

FITS filed a protest with our Office on August 25, 2011, challenging the award to KCG. FITS argued, among other things, that the agency improperly conducted a price realism analysis of offerors' proposals which led to prejudicially misleading (i.e., coercive) discussions with the firm, improperly evaluated KCG's proposal, and made a flawed best value determination. FITS also raised a new issue on October 6 alleging that TSA's determination that the protester's fixed-price labor rates were so low as to create a performance risk to the government was a responsibility matter which should have been referred to the Small Business Administration (SBA).

On December 1, we denied the protest, finding that the agency did not coerce FITS into raising its prices, that TSA's evaluation of KCG's proposal was reasonable and in accord with the solicitation's stated evaluation criteria, and that the best value determination was proper. First Info. Tech. Servs., Inc., B-405602, Dec. 1, 2011, 2011 CPD ¶ 261. We also dismissed FITS' responsibility challenge as untimely, concluding that the protester knew of this basis of protest when it received its May 10 discussions letter, but did not file until after receipt of the agency report. Id. at 6 n.5. FITS then filed this request for reconsideration.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a) (2011); Waterfront Techs., Inc.--Recon., B-403638.4, June 29, 2011, 2011 CPD ¶ 126 at 3. The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4. Further, errors of fact warranting reversal must be ones crucial to the outcome of the protest. Richards Painting Co.--Recon., B-232678.2, May 19, 1989, 89-1 CPD ¶ 481.

FITS argues that the GAO decision, like the underlying agency price analysis, is based on a misreading of the factual record. TSA's price evaluation included a comparison of offerors' prices to each other using a standard deviation analysis to determine their dispersion from the average of all proposed rates for each labor category (the mean). TSA also employed an evaluation scheme in which proposed rates that were two or more standard deviations above or below the mean indicated there was risk--price or performance, respectively--to the agency. FITS contends that first TSA and then GAO erroneously determined that 10 of FITS' 12 proposed rates were two or more standard deviations below the mean; according to the protester, the charts used by the agency which show that most of FITS' rates fell within the "Standard Deviation 2" column indicate that the rates were in fact between one and two standard deviations from the mean, not two or more standard deviations. The protester argues that if the agency had adhered to its own internal evaluation scheme, TSA would not have found FITS' rates to be unreasonably low, identified any performance risk, and raised the issue with FITS in discussions; in turn, FITS would not have raised its proposed labor rates and, as a result, likely would have received the contract award.

We find no basis on which to reconsider our earlier decision. The record clearly indicates that TSA found FITS' proposed rates were routinely the lowest ones submitted by all the offerors and deviated substantially from the mean.<sup>1</sup> Agency

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<sup>1</sup> For example, for the Cyber Intelligence Analyst labor category, the mean was \$[DELETED] per hour while FITS' rate was \$[DELETED] per hour, a difference of (continued...)

Report (AR), Tab 19, Business Clearance Memorandum, at 39-50. The agency reasonably concluded that FITS' consistently low labor rates carried with them an element of performance risk such that it was a weakness to be raised with the offeror in discussions. Id. at 50. As stated in our prior decision,

the agency's comparison of offerors' proposed labor rates, and standard deviation analysis, was . . . a tool used by the agency to analyze offerors' labor rates, and provided a reasonable basis for its decision to seek additional information during discussions from two offerors who had most of their rates identified as too high or low.

First Info. Tech. Servs., Inc., supra, at 8 n.7. Moreover, we know of no--and the protester has not cited to any--procurement statute, regulation, or solicitation provision which requires that an offeror's prices be two or more standard deviations from the mean in order to be identified as unreasonably low and/or a topic for discussions. Nor were TSA's discussions with FITS misleading; the discussions letter did not say that FITS' rates were considered to be unreasonably low because they were more than two standard deviations below the mean. Furthermore, notwithstanding FITS' view that its rates were not unreasonably low, the offeror nevertheless made an independent business decision to raise its rates in the final revised price proposal.

In sum, even assuming arguendo that FITS' rates were only between one and two standard deviations below the mean, we find this would not warrant reconsideration of our protest decision. At most, FITS has shown that TSA did not comply with its own internal price evaluation scheme, which does not provide a basis on which to sustain the protest. See Meadowgate Techs., LLC, B-405989, B-405989.3, Jan. 17, 2012, 2012 CPD ¶ 27 at 6 n.7.

FITS also argues that GAO erroneously found the protest argument asserting a negative determination of responsibility to be untimely. As stated above, in its October 6 comments on the agency report, FITS alleged for the first time that TSA's assessment of its proposed labor rates to ascertain whether there was risk to the agency that the required services could not be performed was a matter concerning FITS' responsibility that should have been referred to the SBA (FITS is a small business concern). We found, however, that FITS knew or should have known of this issue when it received its May 10 discussions letter indicating that the agency

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(...continued)

approximately [DELETED]%. Agency Report (AR), Tab 19, Business Clearance Memorandum, at 39. Further, FITS proposed the same labor rates for all twelve of the labor categories identified in its price proposal irrespective of the differences in skills, knowledge, abilities, and experience levels associated with the different labor categories.

believed its proposed rates were “unreasonably low,” such that it “increases the risk to the [g]overnment that you will be able to provide the required services for the life of the contract . . . .” As a result, FITS had all the information it needed to raise this issue in its initially-filed protest; FITS’ decision to first raise this issue in its comments on the agency report is untimely. See 4 C.F.R. § 21.2(a)(2) (2011).

FITS’ request for reconsideration in this regard essentially repeats arguments it made previously. See FITS Supplemental Comments, Oct. 27, 2011, at 1-4. FITS continues to argue that although the discussions letter informed the offeror that its unreasonably low rates caused a risk to the government that the offeror would be unable to successfully perform, the discussions made no mention of “why” TSA found the offeror’s rates caused performance risk. FITS contends that because it had no idea what TSA’s reasoning might have been until it received the agency report, its protest of this issue was timely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew or should have known of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). We find that the discussions letter provided FITS with sufficient information for the basis of protest subsequently raised. Quite simply, “why” TSA found FITS’ unreasonably low prices caused performance risk to the government was not necessary for FITS to assert that the agency finding here amounted to a nonresponsibility determination.<sup>2</sup> FITS’ request for reconsideration thus fails to demonstrate that our decision dismissing its protest in this regard as untimely was in error.

Lastly, FITS argues that GAO erred in finding that RFP Amendment No. 0005 did not require TSA to evaluate the feasibility (*i.e.*, realism) of offerors’ task order prices. The RFP established five evaluation factors related to both the indefinite-delivery, indefinite-quantity (ID/IQ) contract and Task Order (TO) #0001: Business Management Approach (Factor 1), Past Performance (Factor 2), Price--ID/IQ (Factor 3), Staffing Approach--TO #0001 (Factor 4), and Price--TO #0001 (Factor 5). Amendment No. 0005, which clarified the best value determination procedures, stated that the price/technical tradeoff analysis would be accomplished using an integrated assessment of Factors 1–3, and that Factors 4 and 5 would only be evaluated for acceptability and would not be included in the best value tradeoff analysis. The amendment also revised how TSA would evaluate and/or determine acceptability under Factor 5; the contracting officer would review the proposed

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<sup>2</sup> Moreover, because FITS elected to raise its rates in the final revised price proposal, the agency never made a negative responsibility determination regarding FITS that was required to be referred to the SBA.

TO #0001 prices to determine if the offeror had proposed rates which were equal to or less than its Price--ID/IQ (Factor 3) pricing.

As a result of this amendment, we determined that it was not necessary to consider FITS' argument that KCG's proposal should have been found unacceptable under the Price--TO #0001 factor because its low price demonstrated a lack of understanding of the requirements. First Info. Tech. Servs., Inc., supra, at 5 n.3. FITS argues that our decision apparently overlooked the clear language of the amendment which stated that "Factor 4 and 5 will be used to determine the feasibility of the Task Order #0001 staffing approach and pricing." RFP amend. 0005 at 8.

FITS' request for reconsideration again essentially repeats arguments it made previously.<sup>3</sup> See FITS Supplemental Comments, Oct. 27, 2011, at 11-13. Moreover, FITS ignores the express language in Amendment No. 0005 that stated how the agency would conduct the evaluation of the Price--TO #0001 factor: "[t]he Contracting Officer will review the proposed prices, including proposed options, to determine if the offeror proposed rates which are equal to or less than Factor 3, Price--ID/IQ." RFP Amend. 0005 at 8. We find TSA's interpretation--that it was required to evaluate an offeror's task order prices solely to determine whether the proposed rates were equal to or less than the offeror's ID/IQ prices--to be consistent with the solicitation's stated approach as set forth in Amendment No. 0005. In contrast, FITS's argument that the agency was also required to consider the realism of offerors' task order rates as part of its evaluation is inconsistent with the terms of the amendment, which specified a much narrower scope of assessment.

In any case, to the extent that there were any inconsistencies between the solicitation's evaluation provisions here, this constituted a patent ambiguity that was apparent prior to the time set for receipt of proposals. In accordance with our Bid Protest Regulations, 4 C.F.R. § 21.2(a), solicitation improprieties apparent prior to the time set for receipt of quotations must be filed prior to that time. Having failed to seek clarification or file a protest before the next closing time for receipt of proposals, FITS may not now assert that the only legally permissible interpretation

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<sup>3</sup> Likewise, we find FITS' last challenge with regard to TSA's evaluation of KCG's proposal under the Staffing Approach--TO #0001 factor merely repeats arguments previously made and need not be further addressed.

of the solicitation ambiguity is its own. Kellogg Brown & Root, Inc., B-291769, B-291769.2, Mar. 24, 2003, 2003 CPD ¶ 96 at 8-9.

The request for reconsideration is denied.

Lynn H. Gibson  
General Counsel