



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: I.T.S. Corporation

File: B-280431

Date: September 29, 1998

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DIGEST

Protest that contracting agency conducted prejudicially unequal discussions by asking some offerors--but not protester--questions related to the sufficiency of their proposed staffing levels during both rounds of discussions and asking the protester a similar question during the second round of discussions only is denied where the awardee was in the same position as the protester going into the second round of discussions, and where the key information supplied to all offerors did not come until that second round of discussions.

DECISION

I.T.S. Corporation protests the elimination of its proposal from the competitive range and the subsequent award of a contract to MCA Engineers, Inc. under request for proposals (RFP) No. F04684-98-R-0003, issued by the Department of the Air Force to obtain technical support for computer services at Vandenberg Air Force Base, California. I.T.S. contends that the Air Force conducted prejudicially unequal and misleading discussions with the firm.

We deny the protest.

The Air Force issued this solicitation on February 2, 1998, to obtain such services as the installation, operation, maintenance, programming, and management of computer resources; computer security; and life-cycle acquisition management. RFP § C-1, ¶ 1.1. The solicitation, set aside for small businesses, anticipated the award of a contract with fixed-price, labor hour, and cost-reimbursement line items to be performed over a 4-month base period, with up to four 1-year option periods. RFP §§ L-65C, F-12.

Award was to be made to the offeror that submitted the lowest-priced, technically acceptable proposal. RFP § M-601. Technical proposals were to be evaluated under five factors, only one of which, management, is at issue here. In evaluating proposals under the management factor, the agency planned to review, among other things, each offeror's proposed "organizational structure, manning levels and qualifications" in order to ascertain whether they were acceptable for the performance of the performance work statement (PWS). RFP § M-602(B)(2).

Amendment No. 01 included the Air Force's responses to questions posed by prospective offerors. In response to one firm's observation that it would be helpful to have a government staffing estimate, the Air Force stated that the solicitation did not specify staffing levels and that proposals were to be based upon the offerors' experience and understanding of the PWS, workload estimates, and technical exhibits. Amendment No. 01, Questions and Answers Section at 1. While the solicitation itself did not specify staffing levels, the Air Force's independent government estimate (IGE) was based upon a staffing level of 23 full-time equivalents (FTE), broken down by various tasks.¹ IGE at 2.

The Air Force received six proposals by the March 26 extended closing date. The technical evaluation team (TET) evaluated each proposal and prepared clarification requests (CR) and deficiency reports (DR) for each offeror. Relevant to this protest, two offerors were issued CRs which asked them to clarify that their staffing levels were sufficient to support the requirements of specific PWS paragraphs. MCA was issued a CR which referenced a figure and specific text in its proposal and asked the firm to clarify the total staffing offered--the record shows that the numbers in the figure and text were not the same. The only staffing-level-related CR issued to I.T.S. advised the firm that it had failed to describe how a certain support task would be performed and misunderstood certain related staffing requirements. All four of these offerors proposed staffing levels of substantially fewer than 23 FTEs, and only one offeror's proposed staffing level was lower than that of I.T.S.

The contracting officer included all six proposals in the competitive range and issued each offeror its respective CRs/DRs. The TET reviewed all of the CR/DR responses and forwarded its conclusions to the contracting officer, who found that each offeror had outstanding issues. Relevant to this protest, the four offerors above did not have satisfactory staffing levels when compared with the government's undisclosed standard. In this regard, neither offeror that was asked to clarify whether its staffing levels were sufficient to support certain requirements

¹This figure is exclusive of the five FTEs estimated necessary for the sustaining engineering task, which is not at issue here. All of the total staffing levels referenced in this decision are likewise exclusive of the FTEs for the sustaining engineering task.

increased its staffing levels--one sought to justify its staffing levels and the other merely stated that its staffing levels were sufficient. MCA did not increase its staffing level but did, as asked, clarify the discrepancy in its proposal. The only offeror that increased its staffing level--to [DELETED] FTEs--was I.T.S.

The contracting officer concluded that the workload estimates and technical exhibits used by the offerors to prepare their initial proposals, as well as the first round of discussions, had failed to resolve staffing issues. Contracting Officer's Statement of July 9 at 3. As a result, she issued amendment No. 04, which replaced the definition of the management factor with one that added the staffing levels used in the IGE: "The following government standards will be used to evaluate offeror's manning levels: Management (2), Security (2), Computer Support (9), Property Management (7), ADPE Training Specialist (2), MIPS Coordinator/Supervisor (1), Sustaining Engineer (5)." Amendment No. 04 at 2.

Each offeror was sent a copy of the amendment along with CRs and/or DRs. Relevant to this protest, each of the four offerors above was issued a discussion item which stated: "Offeror's staffing chart does not meet government standards. Offeror must submit revised staffing chart or sufficiently explain how all requirements of the contract can be met with staffing proposed."² See, e.g., I.T.S. CR-006. Each offeror was instructed to use amendment No. 04 for guidance in preparing its response to this instruction.

The CR/DR responses show that three of the four offerors increased their staffing levels to between 20 and 23 FTEs. I.T.S., on the other hand, increased its staffing level only to [DELETED] FTEs, as set forth in a table illustrating the comparison between the government staffing standards and its proposed staffing levels, and provided additional justification for its staffing levels. The firm also included a table which set forth its "effective" staffing level of [DELETED] FTEs, based upon its assumption that the government's staffing estimate utilized 1,776 annual productive hours as opposed to its own use of 2,000 annual productive hours.³

²I.T.S. makes much of the fact that two offerors were given this instruction in the form of DRs, while it was given this instruction in the form of a CR. The record shows that, for the sake of convenience, the instructions given the first two offerors were simply added to discussion items previously issued as DRs and as yet unresolved. I.T.S., in contrast, had no unresolved discussion items. In any event, I.T.S. was treated in the same way as MCA, the awardee, which also received this instruction in the form of a CR.

³The IGE actually utilized 1,886 annual productive hours to calculate staffing requirements. IGE at 1. I.T.S. apparently drew its assumption of 1,776 annual productive hours from OMB A-76 circulars, which are not applicable here. I.T.S. Letter of May 27 at 1.

The TET evaluated the CR/DR responses and concluded that all six offerors were technically acceptable. Accordingly, on May 14, the contracting officer asked all offerors to submit final proposal revisions. Each request stated that the offeror's proposal had been deemed technically acceptable; that negotiations were now closed; and that the firm was being given an opportunity to submit a new price proposal. See, e.g., I.T.S. Request for Final Proposal Revision at 1.

I.T.S.'s final proposal revision made no changes to its technical proposal but lowered its price to \$ [DELETED], the lowest price evaluated. On May 27, the contracting officer sent the following memorandum to I.T.S.:

We have evaluated your final proposal revision and . . . additional clarification is required. During discussions you amended your technical proposal by increasing staffing for the basic effort . . . from [DELETED] manyears to [DELETED]⁴ manyears. However, your final proposal revision shows a decrease in total price. Please provide cost data that supports pricing of the additional manyears in your final proposal revision.

In a telephone call later that day, I.T.S. told the contracting officer that it had actually increased its staffing from [DELETED] FTEs to [DELETED] FTEs. Its May 27 follow-up letter repeated this fact and added that it would provide the number and types of personnel necessary to support the mission, regardless of its proposal estimate; "[t]his is a firm, iron-clad guarantee."

In response to the contracting officer's query, the TET advised that, due to "ambiguities in I.T.S.'s response to CR-006, an interpretation error was made regarding staffing estimates. The government thought I.T.S. increased their staffing to approximately [DELETED]⁵ persons, when in fact [I.T.S.'s May 27 clarification] indicates increased staffing of only [DELETED] FTE. . . . the proposed staffing of [DELETED] is unacceptable." TET Memorandum of May 27. The TET subsequently explained that the portions of I.T.S.'s revised proposal concerning the computer support and property management tasks did not meet the minimum staffing level requirements when the workload data were considered. This remained true even

⁴As the agency now recognizes, this figure should have been [DELETED], calculated by subtracting the "effective" number of FTEs proposed for the sustaining engineering task (5.6) from the protester's total "effective" staffing level ([DELETED]).

⁵This figure appears to be a rounded-up reference to the total number of FTEs in the protester's "effective" staffing level--[DELETED].

when I.T.S.'s "effective" FTE levels were taken into account.⁶ TET Memorandum of May 29.

In a May 31 letter, I.T.S. repeated its pledge to provide the number and type of personnel necessary to support the mission regardless of its proposal estimate and stated that it would "staff with a minimum of [DELETED] additional service technicians at no increase in price. We will employ these additional personnel in the computer support functional area This brings our total proposed staffing level from [DELETED] to [DELETED] FTEs If additional resources are required, we will gladly provide them." I.T.S. Letter of May 31 at 1.

On June 3, the contracting officer advised I.T.S. that its proposal had been reevaluated and was no longer being considered for award. She explained that the firm's proposal had been eliminated from the competitive range when the government discovered that its staffing levels were not at the acceptable range, a fact that became known when I.T.S. responded to the request for clarification of its final proposal revision. The contracting officer concluded by stating that the government would not consider any further revisions of I.T.S.'s proposal. Award was made to MCA at a price of \$5,664,783, and I.T.S. filed this protest after its debriefing.

I.T.S. contends that the Air Force conducted prejudicially unequal discussions by asking three offerors questions related to their staffing levels during both rounds of discussions, while asking I.T.S. such a question during the second round of discussions only. As characterized by I.T.S., the Air Force gave these three offerors "two 'bites' at the total staffing 'apple' under circumstances where those offerors had to know the second time around that their proposal would not be accepted unless they substantially increased their proposed staffing. I.T.S. was not given the same two opportunities" I.T.S. Comments at 3-4. I.T.S. further contends that the Air Force misled it during that second round of discussions by issuing the firm's staffing level instruction as a CR--which implied that a clarification would suffice--instead of a DR--which would have implied that the firm's staffing level was technically unacceptable.

Solicitations issued after January 1, 1998, such as this one, are governed by the Federal Acquisition Regulation (FAR) as amended by Federal Acquisition Circular (FAC) No. 97-02, which includes the Part 15 rewrite. The Part 15 rewrite revised the procurement regulations that apply when an agency is contracting using negotiated procedures, including those regulations governing exchanges with offerors after the receipt of proposals, as set forth at FAR § 15.306. The organization of FAR § 15.306 corresponds with the possible stages of a negotiated

⁶I.T.S. has not challenged any aspect of the Air Force's conclusion that its staffing level was unacceptably low.

procurement: subsection (a) concerns situations where award without discussions is contemplated but clarifications are necessary; subsection (b) concerns communications with offerors before establishment of the competitive range; subsection (c) concerns the establishment of the competitive range itself; and subsection (d) concerns exchanges with offerors after the establishment of the competitive range. The exchanges at issue in this protest fall under this last category. Section 15.306(d) of the revised FAR defines these exchanges as follows:

Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. . . . When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.

Section 15.306(d) includes the following guidance with respect to the conduct of discussions:

(3) The contracting officer shall . . . indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. The scope and extent of discussions are a matter of contracting officer judgment.

Section 15.306(e) of the FAR sets forth specific limitations on these exchanges. Relevant to this protest, that section provides that government personnel involved in the acquisition shall not engage in conduct that favors one offeror over another. FAR § 15.306(e)(1).

The statutory and regulatory requirement for discussions with all competitive range offerors (10 U.S.C.A. § 2305(b)(4)(A)(i) (West Supp. 1998) and FAR § 15.306(d)(1)) means that such discussions must be meaningful, equitable, and not misleading. See, e.g., Ameriko/Omserv--Recon., B-252879.4, May 25, 1994, 94-1 CPD ¶ 341 at 3. In addition, as noted above, FAR § 15.306(e)(1) prohibits government personnel from engaging in conduct that favors one offeror over another. Notwithstanding the revisions in the FAR language, we do not view the rewrite as having changed the prior legal requirements governing discussions in any way relevant to this case. We have carefully considered the record here, including multiple submissions from both parties, and conclude that the agency's actions were consistent with these legal requirements.

It is true that, during the first round of discussions, only two of the four offerors with staffing levels substantially below the government standard were asked to

clarify that their staffing levels were sufficient to support the requirements of the principal tasks of the contract. We agree with the protester that the phrasing of the question casts doubt on the agency's assertion that it was focused on whether the proposals provided complete information relating to staffing levels, rather than on whether staffing levels were adequate to accomplish the effort. However, we are not persuaded that the question had any effect, since neither offeror raised its staffing level and only one even attempted to justify its staffing level. As I.T.S. itself states, "the offerors to whom the manning level CRs were issued did not 'get the message'" that the proposed staffing was too low. I.T.S. Comments at 7. The record shows, moreover, that the discussion item given to the most relevant offeror, the eventual awardee, at this time could not have put it on notice that its staffing levels were insufficient since it was only asked to clarify a discrepancy in its proposal. As a result, that offeror, MCA, was in exactly the same position as I.T.S. going into the second round of discussions. Most important, unlike the situation in National Medical Staffing, Inc., B-259402, B-259402.2, Mar. 24, 1995, 95-1 CPD ¶ 163, the principal precedent relied upon by I.T.S., the agency did eventually put the protester on notice of the precise issue of concern, thereby mitigating any inequity that might have initially occurred.

In this regard, the instruction given to all four offerors during the second round of discussions put each of them, including I.T.S., on notice that (1) the Air Force believed that 23 FTEs were required to perform the contract's requirements; (2) the Air Force planned to evaluate proposed staffing levels based upon this standard; and (3) offerors who did not propose 23 FTEs were required to supply a sufficient explanation for not doing so. In the face of this specific instruction, I.T.S. proposed a staffing level far below the standard it knew it would be evaluated against and opted, instead, to take the risk that the agency might find its explanation for doing so insufficient.

We simply do not agree with I.T.S. that two of the offerors here increased their staffing levels to approximate the government standard only because the second round discussion item somehow reinforced the first. It is clear that the key piece of information given to all of the offerors was the government standard. This point is reinforced by the fact that MCA, the awardee, was in the same position as I.T.S. and substantially increased its staffing level based solely on the same second round discussion item provided to I.T.S. As a result, we cannot conclude that the agency conducted prejudicially unequal discussions.

I.T.S. also argues that the Air Force misled it during that second round of discussions by issuing the firm's staffing level instruction as a CR--which implied that a clarification would suffice--instead of a DR--which would have implied that the firm's staffing level was technically unacceptable. However, as the agency points out, and as the discussion item makes plain, offerors were free to propose staffing levels based upon their own technical approach, experience, and professional judgment; I.T.S.'s proposed staffing was not per se unacceptable.

Moreover, as noted above, the eventual awardee also received this discussion point as a CR, not a DR.

Since I.T.S. does not challenge the Air Force's evaluation of its proposal as technically unacceptable, the agency properly eliminated its proposal from the competitive range, see FAR § 15.306(d)(4), and properly declined to consider any further revisions to its proposal. See FAR § 15.307(a).

The protest is denied.

Comptroller General
of the United States