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**Comptroller General
of the United States**

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

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Decision

Matter of: Creative Information Technology, Inc.

File: B-293073.10

Date: March 16, 2005

Dorn C. McGrath III, Esq., and Richard L. Moorehouse, Esq., Greenberg Traurig LLP, for the protester.

Richard J. Webber, Esq., and Lisa K. Miller, Esq., Arent Fox PLLC, for Daston Corporation, and Keith J. Harrison, Esq., and Rogelyn D. McLean, Esq., King Pagano & Harrison, for Focused Management, Inc., intervenors.

Robert L. Duecaster, Esq., and Capt. Kris M. Gawin, Department of the Army, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's discussions with protester were not meaningful where the agency estimated that the work under the solicitation required seven full-time-equivalent employees (FTE) (which resulted in a government estimate of approximately \$13 million), the protester initially proposed to staff the effort with 37 FTEs (which resulted in a price of approximately \$110 million) and the agency advised the protester during discussions merely that its price appeared to be "overstated."

DECISION

Creative Information Technology, Inc. (CITI) protests the award of contracts to Daston Corporation and Focused Management, Inc. by the Department of the Army under solicitation No. DASW01-03-R-0040, for information management/information technology support services to the Army's Information Management Support Center. CITI argues that the Army failed to conduct meaningful discussions.

We sustain the protest.

BACKGROUND

The Army issued the RFP on May 23, 2003 in an effort to acquire information management/information technology support services for more than 80 agencies and activities in Headquarters, Department of the Army. The RFP divided this overarching requirement into six separate lots, each constituting requirements for a separate functional area.¹

For all of the lots under the RFP, the solicitation sought performance-based solutions to address the agency's requirements, which were set forth, by lot, under the performance work statement (PWS). The RFP advised offerors that awards would be "based on a best value analysis" of three factors: management/technical, past performance, and cost/price, and that an offeror's cost/price must be determined to be fair and reasonable to be acceptable for award. RFP amend. 3, at 6. The RFP also advised that the management/technical factor was more important than the past performance factor, and that management/technical and past performance combined were more important than cost/price.

Lot V, "strategic analysis," which is the subject of this protest, was set aside for section 8(a) business concerns² and contemplated multiple awards of indefinite-delivery/indefinite-quantity contracts for a base period of 1 year, plus four 1-year options. RFP amend. 8, at 5. According to the PWS, lot V included requirements for "plans and policy," "technology assessment," "hardware/software testing," "research, analysis, and recommendations," "information resource management," and "technical writing." RFP § C.5.5. The solicitation advised that all task and delivery orders under the lot V contracts would be issued on either a fixed-price or time-and-materials (T&M) basis for either "on-site" or "off-site" locations. As a consequence, offerors were required to submit four separate prices as follows:

- (1) a fixed price for performing all the work on-site;
- (2) a fixed price for performing all the work off-site;
- (3) a T&M price for providing all the work on-site; and

¹ The six lots under the RFP were: (I) desktop support services; (II) application development; (III) audit and governance services; (IV) business unit requirements; (V) strategic analysis; and (VI) training.

² Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000), authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns.

(4) a T&M price for providing all the work off-site.

RFP amend. 8, at 5.

The RFP expressly advised that the total price for purposes of evaluation would be determined by adding the amount offered for each of the four price categories identified above. Id. The fixed and T&M prices were based on proposed labor categories for which offerors were instructed to submit fixed loaded hourly labor rates for the direct labor, and the numbers of hours per category required to perform the requirements set forth in the PWS. RFP § L, at 185-186. More specifically with regard to the labor hour estimates, in questions and answers incorporated in the RFP, one of the offerors asked and the agency answered as follows:

24. Our understanding from the Cost/Price Proposal Instructions is that we are to propose not only labor categories and labor rates but also the 'estimated number of hours' per labor category. Are we to assume that we will be given a task order for the particular [PWS] section involved (e.g. C.5.4) and that we are to estimate the number of hours per labor category to perform that task order? If not, what work is to serve as the basis for our estimate of the level of effort?

24. Answer: For the purpose of estimating hours on the IDIQ use the PWS and estimate hours to the lot/function area assuming all tasks within that lot were awarded to your company.

RFP amend. 2, at 25-26.

In addition, the solicitation directed offerors to assume that a full-time-equivalent (FTE) employee worked 2,080 hours per staff year, and to plan for providing support 12 hours per day, 5 days per week and to estimate 7,000 customers for the base period, with an estimated growth in customers of 5 percent per year, for each of the option years. RFP amends. 7 and 8. The Army also made available to potential offerors a "Cost-Benefit Analysis (CBA) Final Report" prepared by Booz, Allen & Hamilton, as well as other documents, through a "technical library" website. Contracting Officer's (CO) Statement at 5.

The Army received 12 timely proposals by the RFP's amended closing date of June 8, 2004.³ After an initial round of evaluations, the summary of the overall technical ratings and prices for the 12 offerors was as follows:

³ The initial closing date for receipt of proposals was July 7, 2003 and the agency received 12 timely proposals at that time. For reasons not relevant to resolution of this case, however, the agency issued several amendments and sought revised

(continued...)

Offeror	Technical Rating	Total Price
Offeror A	Very Good	\$18,725,622.13
Focused Management	Very Good	\$30,325,057.54
Daston	Very Good	\$10,603,679.20
CITI	Satisfactory	\$110,394,232.03
Offeror B	Satisfactory	\$49,697,128.00
Offeror C	Satisfactory	\$28,424,704.69
Offeror D	Satisfactory	\$13,689,475.97
Offeror E	Unsatisfactory	\$167,465,813.52
Offeror F	Unsatisfactory	\$30,651,734.76
Offeror G	Unsatisfactory	\$49,142,816.52
Offeror H	Unsatisfactory	Incomplete
Offeror I	Unsatisfactory	\$15,793,166

Agency Report (AR), Tab16, Memorandum of Competitive Range Determination at 6.

It is significant to note that CITI's June 8 price was based on a total of 37 FTEs per year across 11 labor categories for performing the requirements of lot V, while Daston's price was based on only 3.75 FTEs per year across 6 labor categories, and Focused Management proposed 12 FTEs per year across 12 labor categories. The independent government cost estimate (IGCE) prepared for the lot V requirement estimated a total cost of \$13,062,405.60 based on using seven FTEs across four labor categories. AR, Tab 4, IGCE.

After the initial evaluation, the Army set a competitive range and eliminated from the competition the five offerors with overall unsatisfactory technical ratings. The agency sent written discussion letters to the seven firms remaining, seeking responses to identified weaknesses, deficiencies, and questions/clarifications. In its letter to CITI, the agency identified several technical weaknesses, past performance deficiencies, and under the heading "Questions/Clarifications" included the following statement:

(...continued)
proposals from the 12 original offerors and all 12 submitted timely revised proposals.
CO Statement at 1.

Based on the Government[']s initial review of your proposed revised price/cost it appears that CITI's total proposed price/cost is overstated for this requirement. Please review your revised price/cost proposal.

AR, Tab 16, Discussion Letter from Contracting Officer to CITI, Sept. 3, 2004, at 3.

In the discussion letter to Focused Management, the agency included an identical statement regarding Focused Management's total proposed price/cost. See AR, Tab 16, Discussion Letter from Contracting Officer to Focused Management, Sept. 3, 2004 at 2.

The agency received revised proposals from the firms in the competitive range on September 10 and final proposal revisions were received on September 20. The final overall technical ratings and prices for the six firms that remained in the competition were as follows:⁴

Offeror	Technical Rating	Total Price
Daston	Very Good	\$10,603,679.20
Focused Management	Very Good	\$19,389,897.00
B	Very Good	\$38,716,236.00
CITI	Satisfactory	\$89,847,300.35
C	Satisfactory	\$24,359,544.00
D	Satisfactory	\$13,689,475.97

CITI's final total price was based on a total of 27 FTEs per year across 11 labor categories, while Focused Management's final total price was based on 9 FTEs across 9 labor categories and Daston's total price remained unchanged from its initial price, which was based on 3.75 FTEs per year across 6 labor categories.

When the agency conducted its evaluation of the final proposals and made its best value determination, it mistakenly used CITI's initial total price of \$110,394,232.03, rather than its final price of \$89,847,300.35. Based on CITI's initial higher price, the source selection official concluded that CITI's total price was "unreasonably high" and "unrealistic," while concluding that the total prices of the other five firms were reasonable and realistic. AR, Tab 18, Award Decision Memorandum, Sept. 24, 2004, at 4. Concluding that the proposals from Daston and Focused Management were the best value, the Army made award to these firms on September 30. After receiving a debriefing from the agency on October 6, CITI filed a protest with our Office on October 8 arguing that the agency improperly evaluated CITI's price and that the

⁴ One of the firms in the competitive range lost its section 8(a) status and was therefore no longer eligible for award. As a consequence, only six firms remained in the final stage of the competition. CO Report at 2.

agency's evaluation of its technical proposal was flawed. Recognizing the error with regard to CITI's price, the agency informed our Office that it was taking corrective action and indicated that it would re-evaluate CITI's proposal and revise the award decision, if necessary. Based on the agency's corrective action, we dismissed CITI's protest as academic on November 2.

Based on its re-evaluation of CITI's final proposal, the agency did not disturb the awards to Daston and Focused Management. The Army concluded that CITI's technical proposal contained several weaknesses and that its overall technical rating of "satisfactory" remained unchanged. The Army also noted that CITI's total price of \$89,847,300.35 was the highest of the offerors in the competitive range and that its lower-rated technical proposal did not justify award at its higher price. AR, Tab 20, Final Technical Evaluation Report and Addendum, Dec. 1, 2004, at 6. Unlike the award determination of September 24, the Army's revised award determination did not address the question of whether it considered CITI's total price to be reasonable.

The Army informed CITI of its decision with regard to the re-evaluation and revised determination on December 10 and this protest followed.

DISCUSSION

CITI argues that the agency failed to engage in meaningful discussions when it informed CITI that its total price appeared to be "overstated."⁵ The Army, however, contends that its discussions with CITI were meaningful because it essentially informed CITI that its price was too high and thereby satisfied its obligation to inform CITI of the general area of concern with its proposal.

When contracting agencies conduct discussions with offerors in the competitive range, such discussions must be meaningful. Kaneohe Gen. Servs., Inc., B-293097.2, Feb. 2, 2004, 2004 CPD ¶ 50 at 3. In order for discussions to be meaningful, agencies must advise an offeror of weaknesses, excesses, or deficiencies in its proposal,

⁵ CITI also challenged the agency's evaluation of its technical proposal. Because we are sustaining the protest and recommending that the agency obtain revised proposals, this issue has been effectively rendered academic. In addition, CITI argued that Daston's price was "unrealistically low," thus challenging the Army's price realism analysis. This argument is without merit. First, the RFP only indicated that the Army would evaluate price for reasonableness. To the extent the record reflects that the Army did in fact perform a price realism analysis, and determined that Daston's prices were realistic, the Army's conclusions in this regard were reasonable since they were based on extensive price analysis of the offerors' labor rates, which included among other things, comparing them with rates under other multi-vendor contracts, U.S. Department of Labor statistics, and information technology salary surveys. AR, Tab 18, Award Decision Memorandum, at 4-5.

correction of which would be necessary for the offeror to have a reasonable chance of being selected for award. In this regard, the actual content and extent of discussions are matters of judgment primarily for determination by the agency involved, and we generally limit our review of the agency's judgments to a determination of whether they are reasonable. J.G. Van Dyke & Assocs., B-248981, B-248981.2, Oct. 14, 1992, 92-2 CPD ¶ 245 at 4. Specifically, with regard to the adequacy of discussions of price, an agency generally does not have an obligation to tell an offeror that its price is high, relative to other offers, unless the government believes the price is unreasonable. State Mgmt. Servs., Inc.; Madison Servs., Inc., B-255528.6 et al., Jan. 18, 1995, 95-1 CPD ¶ 25 at 5-6; Marwais Steel Co., B-254242.2, B-254242.3, May 3, 1994, 94-1 CPD ¶ 291 at 6.

The issue here is whether the Army's discussions with CITI were meaningful where the Army advised CITI merely that its total price appeared "overstated," given the unique circumstances of this case—specifically, the extraordinary disparity between CITI's proposed level of effort and price as compared to the government estimate as well as the level of effort and prices of the other offerors in the competitive range. We conclude that they were not. In addressing this issue, we recognize that it is within the agency's discretion to decide whether to inform an offeror that its price is considered too high and to reveal the results of the analysis supporting that conclusion or to indicate to all offerors the cost or price that the government's price analysis, market research, and other reviews have identified as reasonable. See FAR 15.306(e). The question is whether the agency's judgment in this instance was reasonable.

While an agency is not required to "spoon-feed" an offeror during discussions as to each and every item that could be revised to improve its proposal, see ITT Fed. Sys. Int'l Corp., B-285176.4, B-285176.5, Jan. 9, 2001, 2001 CPD ¶ 45 at 6, agencies must impart sufficient information to afford offerors a fair and reasonable opportunity to identify and correct deficiencies, excesses or mistakes in their proposals. Matrix Int'l Logistics, Inc., B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89 at 9. In this case, we conclude that CITI could not be reasonably expected to have understood the true nature and magnitude of the agency's concern with its proposal based upon the information provided by the Army during its discussions with CITI, thus rendering those discussions essentially meaningless.

The record reflects that the lot V requirement was subject to wide price disparities among the initial 12 offerors, where the highest price was more than \$160 million and the lowest price was barely \$10.6 million. CITI's initial price of approximately \$110 million was the second highest price, more than eight times the Army's estimate of approximately \$13 million, and ultimately found to be unreasonably high, as noted above. Despite the difference in prices, the record does not reflect any effort by the agency to address the wide disparity.

In reviewing CITI's initial price as well as CITI's revised price of approximately \$90 million,⁶ it is readily apparent that CITI's much higher price was the result of its higher level of staffing for lot V when compared with the Army's and the awardees's staffing.⁷ CITI's final price was based on a staffing plan utilizing 27 FTEs per year, which amounted to 56,100⁸ staff hours per year dedicated to completion of the lot V requirement, compared with the Army's estimate of 7 FTEs per year totaling 14,560 staff hours, Daston's proposal of 3.75 FTEs per year totaling 7,800 staff hours, and Focused Management's proposal of 9 FTEs totaling 18,720 staff hours per year. In addition, CITI's staffing was spread across 11 different labor categories, compared with the Army's use of 4 labor categories in preparing its estimate, Daston's proposal based on 6 labor categories, and Focused Management's use of 9 categories.

By informing CITI only that its total price was "overstated," the Army failed to convey, in any meaningful way, the magnitude of the disparity in prices. Moreover, by characterizing the issue simply as one of price, the agency failed to address the underlying cause of CITI's unreasonable pricing⁹—CITI's misconception of the level

⁶ In a supplemental submission from the agency requested by our Office, the Army notes that it has never characterized CITI's revised price of nearly \$90 million as "unreasonably high" or "unrealistic." Supplemental Report, Feb. 1, 2005, at 2. The fact is that the agency's reevaluation simply never addressed the issue of the reasonableness of CITI's revised price; moreover, while it is lower than CITI's initial price, CITI's revised price appears unreasonably high on its face since it remained nearly 7 times the government estimate, was nearly 9 times higher than Daston's price and was more than 4.6 times higher than Focused Management's price. In fact, the agency's report in response to the protest described CITI's revised price as "unrealistically high." AR, Tab 1, Legal Memorandum, at 3.

⁷ CITI indicates that when it prepared its proposal, it relied on the Booz, Allen & Hamilton Cost Benefit Analysis report from the Army's technical library and that the report suggested a much higher level of effort for the lot V requirement than that assumed by the Army's cost estimate. CITI further maintains that by including the report in the technical library, the Army effectively misled CITI where the report deviated from the government estimate. While CITI may have relied upon the report to its detriment in the preparation of its proposal, the record does not suggest that this error was the result of any improper action by the agency, since the Army did not make any representations about the report in the RFP or suggest to offerors that they should base their proposals on the findings contained in the report.

⁸ The number of staff hours per year is determined by multiplying the number of FTEs by 2,080 hours (the number of hours set by the agency as representing one FTE for the purpose of evaluating proposals).

⁹ As noted above, the Army also described Focused Management's substantially lower initial price of approximately \$30 million as "overstated."

of effort anticipated by the Army for the lot V requirements. As a consequence, CITI could not reasonably have understood the agency's concern with its proposal or the fact that its proposal required fundamental changes in order to have a reasonable chance of being selected for award. Accordingly, the agency's discussions were not meaningful.

The Army argues that CITI's protest should not be sustained because CITI has failed to establish that it was prejudiced by the lack of meaningful discussions, given that its price was significantly higher and its technical ratings lower than those of the two awardees. However, where, as in this case, an agency fails in its duty to hold meaningful discussions and argues that the protester was not prejudiced as a result of that failure, we will not substitute speculation for discussions and we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester; a reasonable possibility of prejudice is a sufficient basis for sustaining the protest. The Jonathan Corp.; Metro Mach. Corp., B-251698.3; B-251698.4, May 17, 1993, 93-2 CPD ¶ 174. In other words, it must be clear from the record that the protester was not prejudiced in order to deny the protest. See American Dev. Corp., B-251876.4, July 12, 1993, 93-2 CPD ¶ 49. That is not the case here.

RECOMMENDATION

We recommend that the agency reopen discussions, advise CITI that its price is unreasonably high and reflects a level of effort substantially in excess of the level of effort contemplated for lot V, and request new final proposal revisions. The agency should document its evaluation and its new source selection decision. If the agency concludes that either of the awardees is no longer in line for award, the agency should terminate their respective contracts and make award to the appropriate offeror. We also recommend that the protester recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d) (2004). The protester should submit its certified claim for costs detailing the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel