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Decision

Matter of: Multimax, Inc.; NCI Information Systems, Inc.; BAE Systems Information Technology LLC; Northrop Grumman Information Technology, Inc.; Pragmatics, Inc.

File: B-298249.6, B-298249.7, B-298249.8, B-298249.9, B-298249.10, B-298249.11, B-298249.12, B-298249.13, B-298249.14, B-298249.15, B-298249.16, B-298249.17, B-298249.18, B-298249.19, B-298249.20

Date: October 24, 2006

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Raymond M. Saunders, Esq., Karl M. Ellcessor, Esq., and Lt. Col. Frank A. March, Department of the Army, for the agency.

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DIGEST

Where agency identified certain proposed hourly labor rates as significantly higher than independent government cost estimate (IGCE) labor rates, offerors reasonably

deduced--incorrectly, as record shows--that rates not identified were not significantly higher than IGCE rates, which led offerors to leave those rates unchanged in their final proposal revisions; discussions therefore were misleading and protest is sustained on that basis.

DECISION

Multimax, Inc., NCI Information Systems, Inc., BAE Systems Information Technology LLC, Northrop Grumman Information Technology, Inc. (NGI), and Pragmatics, Inc. protest the Department of the Army's award of 11 contracts to other offerors, under request for proposals (RFP) No. W91QUZ-05-R-0004, under the agency's Information Technology Enterprise Solutions-2 Services (ITES-2S) procurement for information technology (IT) services. The protesters assert that the agency failed to conduct meaningful discussions, and that its evaluation of proposals and resulting source selection were unreasonable.

We sustain the protests.

BACKGROUND

The solicitation provided for award of multiple indefinite-delivery/indefinite-quantity contracts for a 3-year base period, with three 2-year options, to furnish IT services worldwide in support of Army enterprise infrastructure goals. Specifically, as set forth in the solicitation's statement of objectives (SOO),

ITES-2S contemplates services-based solutions under which contractors may be required to provide a full range of IT equipment. Therefore, end-to-end solutions to satisfy worldwide development, deployment, operation, maintenance, and sustainment requirements are included. Additionally included is support to analyze requirements, develop and implement recommended solutions, and operate and maintain legacy systems, and equipment. It is the intention of the Government to establish a scope that is broad, sufficiently flexible to satisfy requirements that may change over the period of performance, and fully comprehensive so as to embrace the full complement of services that relate to IT.

SOO at C.2.0. The solicitation provided for work to be accomplished through the issuance of task orders, primarily on a fixed-price or time-and-materials basis, awarded generally on the basis of a competition among the ITES-2S contract holders. RFP § J, attach. 4, Task Order Procedures.

Offerors were required to propose fully-loaded hourly labor rates for a minimum of 104 required labor categories at both a government site and a contractor site (for a total of 208 rates in the base year), which would be used by the contractors in competing for task orders (unless the contractors proposed lower rates). These

rates, subject to an annual escalation rate proposed by each offeror, were applied to the annual estimated hourly requirements for each labor category, with the resulting totals combined with annual other direct costs (ODC) as specified in the solicitation and increased by a fixed markup proposed by each offeror for each ODC category, to yield an overall Total Proposed Contract Price (TPCP).

Eight awards were contemplated (including up to four to small businesses), but the RFP also stated that “[t]he Government reserves the right to make no, one or multiple awards; the Government also reserves the right to make more than eight awards.” RFP § M.1. The awards were to be made to the offerors whose proposals were determined to be the “best value” on the basis of three evaluation factors: (1) mission support (with subfactors for performance-based approach, performance-based task approach, and small business participation); (2) performance risk (past performance, corporate experience, and financial; and (3) price. The non-price factors were significantly more important than price.

Seventeen proposals were received. The Army entered into discussions with all 17 offerors, issuing written items for negotiation (IFN) and affording each offeror the opportunity to make an oral presentation. Subsequently, the agency determined that all proposals (one offeror withdrew) had no weaknesses or deficiencies, and that none of the TPCPs was unreasonably high, and requested final proposal revisions (FPR). Based on her evaluation of the FPRs, the source selection authority (SSA) selected 11 proposals for award: Apptis, Inc., Booz Allen Hamilton (BAH), CACI-ISS, Inc., Computer Sciences Corporation (CSC), QSS, STG, Inc., EDS Corporation, General Dynamics, IBM, Inc., Lockheed Martin (LM), and SAIC, Inc.

Upon learning of the awards, Multimax, NCI, BAE, NGI, and Pragmatics filed protests in our Office (B-298249.1, B-298249.2, B-298249.3, B-298249.4, B-298249.5). The Army subsequently advised us that its evaluation ratings for the financial subfactor under the performance risk evaluation factor failed to account for all information received during discussions, and that it thus would reevaluate the proposals and make new price/technical tradeoff decisions. We dismissed the protests as academic on May 12, 2006.

The agency's reevaluation led to the following results:

	Mission Support (Performance, Performance/Task, Small Business)	Performance Risk (Past Performance, Corporate Experience, Financial)	TPCP
BAH	Good (Good, Outstanding, Good)	Low (Low, Very Low, Low)	\$12,891,797,818
Apptis	Good (Good, Good, Good)	Low (Very Low, Low, Low)	13,048,326,171
QSS	Good (Good, Good, Outstanding)	Low (Moderate, Very Low, Low)	13,121,880,799
CACI-ISS	Good (Good, Good, Good)	Very Low (Very Low, Low, Low)	13,391,706,671
IBM	Good (Good, Good, Outstanding)	Low (Low, Very Low, Low)	13,709,298,174
CSC	Good (Good, Outstanding, Outstanding)	Low (Low, Low, Low)	13,788,431,819
STG	Good (Good, Good, Acceptable)	Very Low (Very Low, Very Low, Very Low)	13,848,350,913
Pragmatics	[REDACTED]	[REDACTED]	[REDACTED]
EDS	Good (Good, Good, Outstanding)	Low (Moderate, Low, Low)	14,109,977,896
Lockheed Martin	Good (Good, Outstanding, Acceptable)	Very Low (Very Low, Very Low, Very Low)	14,306,616,917
General Dynamics	Good (Good, Good, Good)	Low (Very Low, Low, Low)	14,421,393,555

SAIC	Good (Good, Outstanding, Acceptable)	Low (Low, Low, Low)	\$14,554,346,258
Multimax	[REDACTED]	[REDACTED]	[REDACTED]
BAE	[REDACTED]	[REDACTED]	[REDACTED]
NGI	[REDACTED]	[REDACTED]	[REDACTED]
NCI	[REDACTED]	[REDACTED]	[REDACTED]

Based on her review of the revised evaluation reports and a new series of 77 head-to-head comparisons among the proposals, the SSA made awards to the 11 original awardees. Multimax, NCI, BAE, NGI, and Pragmatics thereupon filed these protests with our Office.

CHANGE IN REQUIREMENTS

Multimax, NCI, BAE and NGI assert that the Army improperly failed to amend the solicitation to reflect an increase in its requirements and permit offerors to submit revised proposals. The protesters maintain that the Army was required to amend the solicitation because it apparently decided to mandate, rather than merely authorize, use of ITES-2S for the acquisition of IT services. In this regard, in the source selection decision (SSD), the SSA explained her determination to award 11 rather than 8 contracts as based, in part, on the fact that “it has come to my attention that senior leadership within the Army is considering the possibility of mandating the use of ITES-2S for information technology services acquisitions. If that scenario were to arise, there is a possibility that more work might be performed under ITES-2S than was estimated when the Government developed its acquisition strategy.” SSD at 28. According to the SSA, “[h]aving three additional contractors would provide the Army a larger base of contractors to handle this potential increase in workload.” *Id.* The protesters assert that, had they known of the loss of any future opportunity to market IT services to the Army outside of the ITES-2S contract vehicle, and of the additional work to be ordered under ITES-2S when it was made mandatory, they would have proposed lower prices.

Where an agency’s requirements change materially after a solicitation has been issued, it must issue an amendment notifying offerors of the change and affording them an opportunity to respond. Federal Acquisition Regulation (FAR) § 15.206(a); Northrop Grumman Info. Tech., Inc. et al., B-295526 et al., Mar. 16, 2005, 2005 CPD ¶ 45 at 13; Symetrics Indus., Inc., B-274246.3 et al., Aug. 20, 1997, 97-2 CPD ¶ 59 at 6. This rule applies even after the submission of final proposal revisions, up until the

time of award. Northrop Grumman Info. Tech., Inc. et al., *supra*; Digital Techs., Inc., B-291657.3, Nov. 18, 2004, 2004 CPD ¶ 235 at 3; NV Servs., B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64 at 17. Amending the solicitation provides offerors an opportunity to submit revised proposals on a common basis that reflects the agency's actual needs. Dairy Maid Dairy, Inc., B-251758.3 *et al.*, May 24, 1993, 93-1 CPD ¶ 404 at 7-9.

We find that there was no material change in the Army's requirements. While it is clear from the SSD that the SSA believed there was a possibility that use of the contract would be made mandatory, there is no evidence that this ever occurred. The Army states that "[t]here is not currently nor was there ever any proposal or initiative to make use of ITES-2S mandatory," Agency Comments, Aug. 28, 2006, at 10, and the SSA asserts that she was never advised that use of the ITES-2S was to be made mandatory. Specifically, she explains, while she had understood from informal conversations prior to the initial awards in April 2006 that the Army's Chief Information Officer (CIO) was "considering the possibility of directing Army personnel to use ITES-2S," the Army CIO "did not consult with me directly on this matter . . . Nor were any written materials ever presented to me regarding this issue." Declaration of SSA, Aug. 8, 2006, at 1.¹

The Director of the Army Small Computer Program (ASCP), which includes the ITES-2S procurement, also states that she was never advised that use of the ITES-2S was to be mandatory. She has submitted a declaration in which she states as follows:

I am unaware of any Army policy or initiative that mandates the use of ITES-2S for Army IT services procurements. To my knowledge, the Army is not currently planning any proposed policy or initiative that would require ITES-2S to be used for IT services procurements. Nor, to my knowledge, has such a policy previously been under development. It is highly unlikely, in my view, that such a policy will ever be implemented, as there are serious questions about its desirability and feasibility.

Declaration of Director of ASCP, Aug. 28, 2006.

Finally, the Deputy Principal Director for Governance, Acquisition and Chief Knowledge Office, Office of the Army CIO, who is responsible for initiating and developing IT contracting policy for the Army, has submitted a declaration in which he states that he is "unaware of any proposal or initiative to make use of the ITES-2S contract mandatory--either . . . as of July 12, 2006, or at any time in the past. In fact,

¹ The SSA has further stated that there was no intention to raise the \$20 billion contract ceiling set forth in the solicitation. Declaration of SSA, Aug. 7, 2006, at 1.

if such a proposal or initiative existed, my office would either have the lead or be actively involved.” Declaration of Deputy Principal Director, Aug. 28, 2006.

The protesters note that current Army policy establishes such a strong preference for the use of ASCP contract vehicles such as ITES-2S, that its use is tantamount to mandatory. In this regard, for example, a draft version of the agency’s “Department of the Army IT Purchasing Guide: How to Procure Commercial Information Technology Hardware, Software and Services,” dated Summer 2006, provides that “the ASCP office is the primary source for hardware, software and services,” and that

[i]f your purchase is other IT products [–i.e., other than software, desktops or notebooks–] or services and the cost is greater than \$25K, or if the required item or service is available on an ASCP contract, but you have justification, such as better pricing, for purchasing the item or service from another source, you must request a waiver from ASCP. See [Department of the Army Pamphlet] 25-1-1, para 11-2.

Army IT Purchasing Guide at 5-6.

As noted by the Army, however, the draft Army IT Purchasing Guide reflects the same policy as it existed prior to the closing date for receipt of FPRs (March 27, 2006). Thus, for example, the November 2005 version of Army Pamphlet 25-1-1, referenced above in the draft Army IT Purchasing Guide, provides as follows:

Army customers must look to meet their requirements using ASCP contracts before making commercial IT purchases from other sources.

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If there is an existing ASCP indefinite delivery indefinite quantity contract or blanket purchase agreement (BPA) available, the system or service is obtained from that contract to the maximum extent practical.

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The ASCP is the main source for commercial IT purchases greater than \$25K. ASCP has an array of fully competed contract vehicles to meet most Army requirements. These contract vehicles must be considered before buying from contract vehicles from other sources. If an Army customer chooses other than an ASCP contract vehicle, ASCP must first grant a waiver.

Army Pamphlet 25-1-1, §§ 11-1, 11-2.

We conclude that there is no evidence that, at the time of the awards, there was any likelihood of a material change in existing Army policy favoring use of ITES-2S. It

follows that there was no significant change in the Army's requirements that would necessitate amending the ITES-2S solicitation and affording offerors an opportunity to propose to the new requirements.

PRICE

The protesters assert that the Army applied an unreasonable, mechanistic formula in evaluating proposed labor rates. In addition, they assert that this resulted in a failure to conduct meaningful discussions. We agree.

Price Evaluation Methodology

Multimax, BAE and Pragmatics assert that the Army's evaluation of proposed labor rates was unreasonable. In this regard, the Army reports that it employed a two-step approach to evaluating labor rates for purposes of determining price reasonableness, detecting unbalanced pricing, and identifying labor rates to question during discussions: first, it compared an offeror's rate for a labor category to the IGCE rate for that category, and then it compared the rate to the mean of all offerors' evaluated rates for each labor category using a two-standard-deviation measure. The agency's price evaluator explained the second step as follows:

Next, the Price evaluation team calculated the mean of all offerors' evaluated labor rates for each labor category. The mean evaluated labor rates were then used to calculate the standard deviation from the mean. In order to determine the most appropriate measure of comparison, the following were calculated: mean plus and minus one standard deviation, mean plus and minus two standard deviations, and mean plus and minus three standard deviations. A comparison was made, using the three separate standard deviations, to determine which offerors' average labor rates for each labor category fall outside the range of each standard deviation. The majority of the offerors' average labor rates fell outside the range of one standard deviation and no offeror's average labor rates fell outside the range of three standard deviations. Therefore, it was determined that two standard deviations was the most appropriate measure of comparison to use for the reasonableness assessment.

Memorandum of Agency Price Evaluator to Source Selection Evaluation Board (SSEB) Chairperson, Nov. 29, 2005, at 2-3; Agency Comments, Sept. 21, 2006, at 3.²

² According to the Department of Defense's (DOD) Contract Pricing Reference Guides, the standard deviation is a measure of dispersion of the samples or observations using the square root of the variance (with the variance of a sample being the average of the squared deviations between each observation and the

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Under this two-step approach, the agency would issue an IFN to an offeror questioning a proposed labor rate as significantly overstated (or understated) only if the rate both exceeded (or was lower than) the IGCE rate, and was more than two standard deviations greater (or less) than the mean rate of all offerors for that category. According to the contracting officer (who was responsible for conducting discussions and determining overall price reasonableness), the two-step evaluation was used to identify “extraordinary outlier rates,” that is, “rates that were significantly overstated or understated and which might pose a risk to the Government of paying an unreasonable amount during performance. . . . Rates that did not meet [both] tests were not considered outliers and were not questioned.” Second Declaration of Contracting Officer at 1; see Agency Comments, Sept. 8, 2006, 3-8, 16; Agency Comments, Sept. 21, 2006, at 3; Declaration of Agency Price Evaluator, Aug. 18, 2006, at 1.³

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mean). In a distribution that is approximately normal, plus or minus one deviation will include approximately 68 percent of the total observations in the sample; plus or minus two deviations will include approximately 95 percent of the total observations; and plus or minus three deviations will include approximately 99.7 percent of the total observations. However, of particular importance here, because all values are squared, a single observation that is far away from the mean can substantially affect both the variance and the standard deviation. DOD Contract Pricing Reference Guides, vol. 2, ch. 3.3.

³ The record indicates that, in a limited number of instances during the first of the two rounds of price discussions, the agency questioned an offeror’s rate for a particular labor category as being overstated even though it did not exceed the IGCE rate for that category. Specifically, during the initial round of price discussions, the Army questioned 123 of the offerors’ over 3,500 labor rates as being significantly higher than the IGCE rates for the categories questioned (as well as 28 labor rates for being significantly understated); in 9 of these cases, however, the rates were questioned as being significantly in excess of the IGCE even though they only exceeded the range of acceptable rates established by the mean-plus-two-standard-deviation test, and in fact were not higher than the IGCE rates for those categories. Agency Comments, Sept. 8, 2006, at 10; Agency Comments, Sept. 21, 2006, at 3. (During the second round of price discussions, the Army questioned 69 labor rates as being significantly higher than the IGCE and 25 as being significantly understated. Agency Comments, Sept. 8, 2006, at 10.)

The two-standard-deviation formula resulted in an extremely wide range of acceptable rates for the labor categories.⁴ For example, looking just at the initial labor rates for government site labor, some of the more extreme ranges were as follows:

	IGCE Rate	Acceptable Range Mean-plus-two-standard- deviation Test
Program Manager-Senior	[\$REDACTED]	[\$REDACTED]
Project Administrator	[REDACTED]	[REDACTED]
Applications Systems Analyst-Senior	[REDACTED]	[REDACTED]
Systems Engineer-Senior	[REDACTED]	[REDACTED]
Software Engineer-Senior	[REDACTED]	[REDACTED]
Software Engineer- Intermediate	[REDACTED]	[REDACTED]
Software Engineer- Associate	[REDACTED]	[REDACTED]
IT Certified Professional- Senior	[REDACTED]	[REDACTED]
Disaster Recovery Contingency Administrator	[REDACTED]	[REDACTED]
Information Security Specialist-Senior	[REDACTED]	[REDACTED]
Information Security Specialist-Intermediate	[REDACTED]	[REDACTED]
Information Security Specialist-Associate	[REDACTED]	[REDACTED]
Systems Administrator- Senior	[REDACTED]	[REDACTED]

SSA Initial Briefing Materials, Nov. 28, 2005, app. A; SSA Final Briefing Materials, June 14, 2006, app. B.⁵

⁴ The extremely wide range of acceptable labor rates appears to have resulted from the fact that, as noted above, rates that were far from the mean disproportionately increased the range described by the two-standard-deviation calculation.

⁵ Application of the formula also resulted in a wide range of acceptable hourly rates for some labor categories at contractor sites, such as, for example, [\$REDACTED] to [\$REDACTED] for Program Manager-Intermediate, where the IGCE was

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As illustrated by the chart, the upper end of the range was significantly above the IGCE for some of the labor categories, and in some instances was nearly, or more than, twice the IGCE (such as \$[REDACTED] versus the \$[REDACTED] IGCE rate for Application System Analyst-Senior, \$[REDACTED] versus the \$[REDACTED] IGCE rate for Software Engineer-Senior, and \$[REDACTED] versus the \$[REDACTED] IGCE rate for Information Security Specialist-Senior). Likewise, the lower end, in some instances, was below the federal minimum wage or was even a negative number (such as \$[REDACTED] for Project Administrator, \$[REDACTED] for Information Security Specialist-Senior, and \$[REDACTED] for Information Security Specialist-Associate). There is no indication that the agency ever reviewed the results of the formula to assure that the prices at the extreme end of the ranges reflected reasonable pricing; rather, the agency mechanically applied the formula and accepted the results without further analysis. We conclude that the agency's methodology did not provide a valid means for identifying "outlier" (questionable) rates, and this aspect of the evaluation therefore was unreasonable. See generally Metro Mach. Corp., B-297879.2, May 3, 2006, 2006 CPD ¶ 80 at 9-10 (mechanical application of an agency's own estimates for labor hours or costs to determine evaluated costs, without the exercise of informed judgment by the contracting agency in independently analyzing the offeror's proposed costs based upon its particular approach and circumstances, was unreasonable); The Jonathan Corp.; Metro Machine Corp., B-251698.3, B-251698.4, May 17, 1993, 93-2 CPD ¶ 174 at 11-13; United Int'l Eng'g, Inc. et al., B-245448.3 et al., Jan. 29, 1992, 92-1 CPD ¶ 122 at 11. We therefore sustain the protests of Multimax, BAE and Pragmatics on the basis that the Army failed to reasonably evaluate proposed labor rates.

Misleading Price Discussions

The price evaluation also is problematic because the results of the agency's analysis were used to determine which prices to bring to offerors' attention during discussions as possibly being unreasonably high, and thus potentially determined which prices offerors would adjust in their FPRs. In this regard, NGI and Multimax assert that the price IFNs they received during discussions failed to reasonably advise them of numerous labor rates that should have been brought to their attention as significantly overstated and, moreover, that they were misled into believing that only the few rates identified in the IFNs significantly exceeded the IGCE rates. The protesters maintain that, had they known that numerous of their proposed rates not identified during discussions were significantly higher than the corresponding IGCE rates, they would have reduced those rates in their FPRs, just as they reduced the rates that were identified in the IFNs as overstated.

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\$[REDACTED]. SSA Initial Briefing Materials, Nov. 28, 2005, app. A; SSA Final Briefing Materials, June 14, 2006, app. B.

It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award. PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8; Spherix, Inc., B-294572, B-294572.2, Dec. 1, 2004, 2005 CPD ¶ 3 at 13. An agency fails to conduct meaningful discussions where it fails to apprise an offeror that its prices were viewed as unreasonably high. Price Waterhouse, B-220049, Jan. 16, 1986, 86-1 CPD ¶ 54 at 6-7. Further, an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns; misinform the offeror concerning a problem with its proposal; or misinform the offeror about the government's requirements. Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6. In conducting exchanges with offerors, agency personnel also may not "engage in conduct that . . . favors one offeror over another," FAR § 15.306(e)(1); in particular, agencies may not engage in what amounts to disparate treatment of the competing offerors. Front Line Apparel Group, B-295989, June 1, 2005, 2005 CPD ¶ 116 at 3-4.

Here, in the discussions questions issued to NGI and Multimax (as well as to other offerors such as BAE) questioning the proposed rates for particular labor categories as significantly overstated, the agency advised as follows: "Your proposed labor rates are significantly higher than the Independent Government Cost Estimate (IGCE) rates for the following labor categories The offeror should consider revising the price proposal. If you do not revise the identified rates, please provide an explanation for the basis of the rate." See IFN to NGI no. 51, Nov. 3, 2005; IFN to NGI no. 298, Jan. 6, 2006; IFN to BAE no. 50, Nov. 3, 2005; IFN to BAE no. 297, Jan. 6, 2006; IFN to Multimax no. 49, Nov. 11, 2006. Thus, there was no reference in the IFNs to the agency's reliance on the two-standard-deviation calculation, but instead only to the proposed labor rate being "significantly higher than" the IGCE as the basis for the IFN.

The Army's price discussions with NGI and Multimax (as well as with BAE) were inadequate because, due to the agency's reliance on the two-standard-deviation formula to identify "outlier" rates--and the broad range of acceptable prices resulting from the formula--it failed to bring to the protesters' attention numerous rates that reasonably should have been considered significantly overstated. In this regard, the record shows that proposed rates that were not questioned in the IFNs could actually exceed the IGCE rates by a greater percentage than the rates that were identified. Thus, for example, although NGI's rate for [REDACTED] at the contractor site was [REDACTED] percent higher than the IGCE rate, this rate was not identified in an IFN because it was within the wide range of acceptable prices established under the formula. At the same time, although NGI's proposed rate for [REDACTED] at the contractor site was only [REDACTED] percent higher than the IGCE rate, because it fell outside the range established by the two-standard-

deviation test, NGI was advised that its rate was “significantly higher” than the IGCE. There simply is no reasonable basis for bringing the former rate to the offeror’s attention, but not the latter.

The above example is not an isolated one. NGI calculates that [REDACTED] of its proposed labor rates that were not identified during price discussions were similar to this example—they exceeded the corresponding IGCE rate by a higher percentage than one or more of the rates identified in its price IFNs. NGI notes further that [REDACTED] of its unquestioned rates exceeded the IGCE rates by a greater percentage than did some rates that were questioned in other offerors’ IFNs. Likewise, the record indicates that Multimax was not advised that its proposed rates for a significant number of labor categories were higher than the corresponding IGCE rates, despite the fact that these proposed rates deviated from the IGCE by a greater percentage than rates that were identified in discussions with Multimax or other offerors. Multimax calculates that [REDACTED] of its unquestioned rates (only [REDACTED] of its rates were identified in IFNs) exceeded the IGCE rates by a greater percentage than the rates that were questioned in other offerors’ IFNs (during initial price discussions).

We conclude that not only were offerors not adequately advised of all of their significantly overstated rates, but the agency’s failure to identify the additional rates actually misled the offerors into believing that those rates did not require further adjustment.⁶ In these circumstances, we conclude that the agency failed to conduct meaningful discussions with the protesters.

⁶ We note that, with respect to NGI, the agency confirmed during discussions that only the identified labor rates were overstated. Specifically, during NGI’s oral presentation, the contracting officer explained the IFN to NGI as follows: “We’re basically identifying the proposed labor rates that are significantly higher than the IGCE rates.” Videotape of NGI Oral Presentation/Discussions at 1:15-1:16. The contracting officer confirmed NGI’s interpretation of his explanation in this regard when answering the following questions from NGI:

NGI : . . . I was just curious what significantly meant in terms of the delta between the cost estimate and what you saw here.

Contracting Officer: Yeah . . . we generally . . . I mean . . . we can’t really give you that.

NGI: Right, but I guess my question is, is it just these [REDACTED] rates?

Contracting Officer: It’s just the rates we’ve identified.

(continued...)

The Army questions whether the protesters have established that they suffered competitive prejudice as a result of the agency's approach to discussions. A reasonable possibility of prejudice is a sufficient basis for sustaining a protest. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996); Creative Info. Tech., Inc., supra; The Jonathan Corp.; Metro Mach. Corp., supra, at 10. The record includes the protesters' calculation of the price reductions they would have proposed had the agency identified the additional labor rates during discussions; these calculations show total price reductions of \$[REDACTED] for NGI and \$[REDACTED] for Multimax. Based on these reductions, the protesters' prices would have been lower than one or more awardees with equal or lower technical ratings. Since the protesters' calculations are consistent with their responses to the price IFNs they received—i.e., they lowered their rates in response to the price IFNs—and their lower prices may have affected the award determination, we find that there is a reasonable possibility that the protesters were prejudiced by the agency's actions.

The Army argues that, had it advised the protesters of additional labor rates that significantly exceeded the IGCE rates, it also would have provided similar information to the awardees, thus affording them a similar opportunity to reduce their rates. The Army suggests that the result would have been a "wash." However, the Army's speculation as to what would have occurred if all offerors had been provided the same opportunity to revise their proposals is insufficient to rebut the apparent prejudice to the protesters from the misleading discussions. See Creative Info. Tech., Inc., supra; The Jonathan Corp.; Metro Mach. Corp., supra, at 10. Accordingly, we sustain NGI's and Multimax's protests on the ground that the agency provided inadequate, misleading discussions.

Unequal Discussions

NCI and BAE assert that they were not afforded meaningful discussions with respect to their proposed labor rates, and instead were denied the opportunity provided other offerors to enhance their proposals' potential for award by addressing labor rates that significantly exceeded the IGCE rates. We agree.

During discussions, the Army identified as significantly higher than the corresponding IGCE rates proposed rates that were as little as 3.67 percent (during the initial price discussions) or 3.27 percent (during the second round of price discussions) higher than the IGCE rates. Meanwhile, as alluded to above, the agency

(...continued)

Id. at 1:17-1:18.

did not identify other labor rates that were very much higher than the IGCE rates.⁷ For example, [REDACTED] of NCI's initially proposed labor rates was identified as significantly higher than the IGCE rates, despite the fact that NCI proposed rates that exceeded the IGCE by as much as [REDACTED] percent. Likewise, only [REDACTED] of BAE's proposed rates were identified as significantly higher than the corresponding IGCE rates, despite the fact that other of BAE's proposed rates exceeded the IGCE by as much as [REDACTED] percent. In contrast, one of the awardees had 69 of its proposed rates identified as significantly higher than the IGCE rates, another had 27 rates identified, and another 20 rates.

Again, this example is not an isolated one. NCI calculates that [REDACTED], and BAE [REDACTED], of their unquestioned labor rates exceeded the IGCE rate by a higher percentage than rates brought to the attention of other offerors. NCI has calculated that it would have lowered its labor rates in a manner that would have reduced its TPCP by \$[REDACTED] had it been advised of these additional overstated rates; BAE calculates that it would have reduced its price by \$[REDACTED]. These price reductions--which have not been brought into question by the agency--would have resulted in the protesters' prices being lower than those of one or more awardees with equal or lower technical ratings. NCI Comments, Sept. 13, 2006, ex. 1; BAE Comments, Sept. 8, 2006, at 7, chart 3. Accordingly, we sustain the protests of NCI and BAE on the ground that the agency failed to provide them meaningful discussions.

RECOMMENDATION

We recommend that the Army reopen discussions with offerors, consistent with our conclusions above, and then request revised proposals. The agency may then determine the number of awards it deems appropriate. If the evaluation of revised proposals results in a determination that one or more of the current awardees' proposals no longer represent the best value to the government, the agency should terminate such contracts. We also recommended that Multimax, NCI, BAE, NGI, and Pragmatics be reimbursed their costs of filing and pursuing their protests, including reasonable attorneys' fees, with regard to the price evaluation and discussions issues. 4 C.F.R. § 21.8(2)(1) (2006). In accordance with 4 C.F.R. § 21.8(f)(1), the protesters' certified claims for such costs, detailing the time expended and costs

⁷ The reference above to labor rates identified during discussions as being overstated but exceeding the IGCE rates by as little as 3.27 and 3.67 percentage does not account for the proposed labor rates identified during discussions as being overstated but which in fact were less than the IGCE rates. The Army maintains that these rates were erroneously identified as being overstated. Agency Comments, Sept. 8, 2006, at 10; Agency Comments, Sept. 21, 2006, at 3.

incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protests are sustained.

Gary L. Kepplinger
General Counsel