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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548



# Decision

**Matter of:** Engineering Services Unlimited, Inc.

**File:** B-291275; B-291275.2

**Date:** December 17, 2002

Howell Roger Riggs, Esq., for the protester.
John J. Fausti, Esq., and Monica C. Parchment, Esq., John J. Fausti & Associates, for Mainthia Technologies, Inc., an intervenor.
H. Gray Marsee, Esq., and Sumara M. Thompson-King, Esq., National Aeronautics and Space Administration, for the agency.
Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Contracting agency did not induce or coerce the protester into raising its proposed labor rates where the agency was reasonably concerned with protester's ability to attract and retain incumbent personnel, as the protester proposed, due to its low proposed labor rates and asked the protester during discussions to explain how it intended to attract and retain incumbent personnel at the rates proposed; the protester's decision to increase its proposed labor rates reflected the exercise of the firm's business judgment.

2. Protest that agency's negotiating techniques led to an impermissible auction is denied; agency's disclosure that an offeror's proposed labor rates were in certain instances materially lower than current wage rates did not constitute prohibited communications.

## DECISION

Engineering Services Unlimited, Inc. (ESU) protests the award of a contract to Mainthia Technologies, Inc. under request for offers (RFO) No. 8-1-2-CD-D7142, issued by the National Aeronautics and Space Administration (NASA) for administrative support services at the Marshall Space Flight Center, Alabama. ESU alleges that the agency improperly induced ESU to raise its offered price and that the agency's negotiating techniques with ESU led to an improper auction.

We deny the protest.

The RFO, issued on December 19, 2001, as a section 8(a) set-aside, contemplated the award of a fixed-price, indefinite-quantity contract for 2 years, with three 1-year options for "center-wide" administrative services. The solicitation established three evaluation factors: understanding the performance work statement (PWS) (also referred to as the baseline requirement), value characteristics, and price.[1] The RFO stated that the first two factors together established the qualitative merit of the offer, which was approximately equal in importance to price. The solicitation also notified offerors that the basis for award was "best value," based on the agency's determination of the "best combination of price and qualitative merit of the offers submitted." RFO at 12.

The agency received 26 offers by the January 15, 2002, closing date. Prior to the evaluation of proposals, NASA provided all offerors with a revised Department of Labor (DOL) area wage determination and the opportunity to revise previously submitted labor rates as necessary to comply with the revised wage determination. Agency Report, Tab BB, Agency Request for Additional Cost Information and Cost Forms, at 2. In its response ESU proposed wage rates for each labor classification that were equal to the revised wage determination. Agency Report, Tab W, ESU's Initial Proposal Cost Form Submission, at 4.

The initial evaluation of proposals resulted in NASA establishing a competitive range consisting of five offers, including those from ESU and Mainthia. As part of its initial proposal ESU set forth its goal of hiring 90 percent of the incumbent personnel. Agency Report, Tab FF, ESU Original Proposal, Vol. B, at 27. Prior to holding discussions with ESU, the agency asked, "Given the revised [w]age [d]etermination . . . previously provided and the seniority level of the incumbent staff you anticipate retaining, are your proposed base labor rates sufficient to attract and retain those incumbent personnel?"[2] Agency Report, Tab T, Agency Determination of Finalists

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[1] The "understanding the PWS" factor consisted of four subfactors: management approach, safety and health, past performance, and information technology security. The six value characteristics identified by the solicitation were: program manager and supervisory staff with extensive experience and outstanding performance record directly related to office administrative services; autonomy of program manager to make decisions affecting contract performance; demonstrated experience in managing government service contracts with a value greater than $5 million; demonstrated experience with contract phase-in, including capturing incumbent personnel; demonstrated experience in managing a workforce in excess of 50 employees to include established procedures and policies for recruiting and retaining qualified personnel; and demonstrated record of meeting financial obligations to include payroll, retirement plan, and accounts payable.

[2] The agency asked similar questions of the other offerors, including Mainthia. See Agency Report, Tab U, Agency Determination of Finalists Letter to Mainthia, at 4.

Letter to ESU, at 4. ESU submitted its final proposal revision on June 12 using the same labor rates as initially proposed. Agency Report, Tab N, ESU's First Final Proposal Revision, at 10.

On July 16 the source selection authority (SSA) approved the reopening of discussions with offerors because of the evaluators' inability to reach consensus on the evaluation of certain proposals. As part of its notice to ESU to reopen discussions and request a second revised proposal, the agency asked,

> It appears that the base labor rates proposed for the [nine] labor categories listed below are low if your intention is to capture the incumbent employees in these classifications. . . . How do you plan to mitigate any potential performance risk, if you cannot capture the percentage of incumbent employees anticipated in your management approach due to the lower base labor rates being proposed?

Agency Report, Tab K, Agency Notification of the Reopening of Discussions to ESU, at 3.

NASA held a second round of discussions with ESU on July 29, of which an audiotape recording was made. As part of its oral presentation to the agency, ESU stated that while it originally planned to hire 90 percent of the incumbent workforce, it had since increased that goal; instead, ESU now planned to "capture 100 percent of the incumbent workforce."[3] Audiotape of Agency Discussions with ESU, July 29, 2002; see also Agency Report, Tab I, ESU's Second Oral Presentation, at 4.

In order to accomplish its revised management approach of attracting all incumbent personnel, ESU proposed to raise its wage rates for all labor categories.[4] Agency Report, Tab I, ESU's Second Oral Presentation, at 5-6. ESU recognized that there would be "a cost impact to [its] proposal based on these rate differences." Audiotape of Agency Discussions with ESU, July 29, 2002. However, by attracting 100 percent of the incumbent employees, ESU believed its proposal would result in a "seamless transition," thereby mitigating any potential performance risk or disruption. Id.

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[3] In ESU's oral presentation, its president repeatedly emphasized this point, stating, for example: "We're very committed to picking up each and everyone of [the incumbent employees] . . . and I see absolutely no 'show-stoppers' on why we can't do that . . . ." Audiotape of Agency Discussions with ESU, July 29, 2002.

[4] As part of its oral presentation ESU explained how its revised wage rates for each labor category were based upon the average of the DOL area wage determination, a local chamber of commerce wage survey, and regional wage rates. Audiotape of Agency Discussions with ESU, July 29, 2002.

After ESU completed its oral presentation, the agency asked the firm various questions, including, "Please explain how you will capture 100 percent of the incumbent workforce given you are, in [the agency's] view, materially lower than the hourly wage" for certain enumerated labor categories.[5] Id. In a subsequent reply ESU's president stated,

> I do want to make this statement and this pledge. We are 100 percent committed to retaining 100 percent of the incumbent personnel. If they are amenable to coming to work to join us, we're going to make that available to them at or above the rates that they are currently making. Under no circumstances will we bring on anyone below that . . . . We will again retain, every single one of them, at or above the rates that they are currently making.

Id.

ESU's planned method to accomplish this stated intention was two-fold: first, ESU asserted that its proposed wage rates for certain labor categories were higher than current rates and could be used to offset those labor categories where its proposed rates were low. Additionally, ESU stated its intention to use its proposed profit rate (i.e., "biting into corporate fee") as needed in order to retain 100 percent of the incumbent workforce at or above current rates. Id. NASA informed ESU that as the firm had not addressed all labor categories where its proposed wage rates were low, other than to say that it would use labor rate offsets and corporate profits, the agency still had a concern about how ESU would in fact capture 100 percent of the incumbent workforce. Id.; Agency Report, Tab G, Agency Request for ESU's Revised Final Proposal Revision, at 1.

Five offerors, including ESU and Mainthia, submitted revised final proposals by the August 12 due date. As part of its proposal, ESU raised its proposed wage rates in the labor categories that the agency had indicated were low. ESU's proposal explained, "We have again conducted more recent extensive wage surveys and analyses, to ensure all incumbent retainability is achievable . . . . As a result of this new survey data, we have adjusted our labor rates . . . to enable us to attract incumbents at or above their current compensation." Agency Report, Tab E, ESU's Second Final Proposal Revision, at 10.

Even after raising its proposed labor rates in its revised final proposal revision, ESU's average labor rate ([DELETED]) was lower than that of Mainthia

[5] While the agency pointed out to ESU the specific wage rates that the agency believed were materially low, the protester does not allege that the agency ever directed it to propose specific wage rates for any labor categories.

([DELETED]).[6] Agency Report, Tab D, Source Selection Authority Presentation (Second Round), at 21. By contrast, both ESU's indirect cost rate ([DELETED]) and its profit rate ([DELETED], which was the same as in ESU's initial proposal) were higher than the indirect cost and profit rates proposed by Mainthia ([DELETED] and [DELETED], respectively). Id.

An agency evaluation team (i.e., the "Buying Team") rated the technical proposals using a pass/fail standard for the baseline requirement factor, and an adjectival rating system (of significant, modest, limited, or none) for the value characteristics factor. The ratings of the proposals of Mainthia and ESU as determined by the SSA were as follows:

| | | Mainthia | ESU |
|---|---|---|---|
| Factor | Subfactor | | |
| **Understanding the PWS** | | **Meets** | **Meets** |
| | Management Approach | Meets | Meets |
| | Past Performance | Meets | Meets |
| | Safety & Health | Meets | Meets |
| | Information Technology Security | Meets | Meets |
| **Value Characteristics** | | | |
| | Program Manager Experience | Significant | Modest |
| | Program Manager Autonomy | Significant[7] | Significant |
| | Government Service Contract (Over $5M) Experience | Modest | None |
| | Contract Phase-In Experience | Significant | Significant |
| | Workforce Management (over 50 employees) Experience | Significant | Significant |
| | Demonstrated Record of Meeting Financial Obligations | Significant | Limited |
| **Price** | | $18,176,129 | $18,343,935 |

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[6] In fact, ESU's average labor rate was the lowest of all five offerors' average rates within the competitive range. Agency Report, Tab D, Source Selection Authority Presentation (Second Round), at 21.

[7] While the Buying Team rated Mainthia's proposal as Significant/Modest with regard to value characteristic 2, the SSA determined that Mainthia's proposal warranted a rating of Significant. Likewise, while the Buying Team rated Mainthia's proposal as Modest with regard to value characteristic 6, the SSA determined that Mainthia's proposal should be rated as Significant. Agency Report, Tab C, Source Selection Decision, at 5-6.

Agency Report, Tab D, Source Selection Authority Presentation (Second Round), at 20.

Based on the conclusion that Mainthia's proposal was lower priced and higher rated than that of ESU, and offered the best value to the government after consideration of all relevant factors, the agency selected Mainthia's proposal for award. This protest followed.

ESU protests that NASA's discussions with the firm improperly induced it to raise its price. ESU argues that while its price was approximately [DELETED] at the conclusion of the first round of discussions, ESU raised its final proposed price to approximately $18.3 million--above that offered by Mainthia--in order to comply with directions from agency personnel. ESU asserts that it reasonably believed that unless it raised its proposed labor rates, the agency would not look favorably on ESU's proposal.

An agency may not consciously coerce or mislead an offeror into raising its price. Professional Landscape Mgmt. Servs., Inc., B-286612, Dec. 22, 2000, 2000 CPD ¶ 212 at 5. Where an agency's discussions, however, merely reflect a reasonable concern that an offeror's low proposed labor rates may affect its ability to attract and retain qualified personnel, and the agency requests that the offeror explain how it intends to attract and retain qualified personnel at the rates proposed, the discussions are not coercive or misleading. Research Analysis & Maint., Inc., B-272261, B-272261.2, Sept. 18, 1996, 96-2 CPD ¶ 131 at 11.

Here, as set forth above, the record establishes that the agency did not coerce or mislead ESU into raising its proposed labor rates. Rather, the record demonstrates that the agency merely informed ESU of the agency's belief that a number of ESU's labor rates were low in relation to the firm's stated intention to retain most if not all incumbent personnel, and as a result, asked ESU in discussions to substantiate how it intended to attract and retain incumbent personnel at the rates proposed. We note that it was ESU's decision to propose attracting the entire incumbent workforce as the means by which to mitigate any performance risk or disruption. Additionally, it was ESU's decision to propose retaining all incumbent employees at wage rates at or above current ones. Likewise, it was ESU's decision, in response to the agency's discussions, to raise its proposed labor rates so as to be able to attract and retain all incumbent personnel.[8] Quite simply, we find nothing improper in the agency's inquiry during discussions into the perceived inconsistency between ESU's stated intent to attract and retain all incumbent personnel at or above current labor rates, and the labor rates that ESU had in fact proposed.

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[8] Similarly, it was ESU's decision to propose the indirect and profit rates that it used in its proposal.

We are unpersuaded by ESU's argument that since it could not overcome the agency's concerns during discussions about the feasibility of ESU's ability to attract and retain 100 percent of the incumbent workforce while still proposing labor rates for a number of labor classifications that were lower than those currently being paid, it was pressured by the agency into raising its proposed labor rates. On the contrary, ESU could have provided appropriate explanatory material in its final proposal revision to address NASA's concerns. See Marine Transp. Lines, Inc.; Lant Shipping, Inc., B-238223.2, B-238223.3, July 30, 1990, 90-2 CPD ¶ 80 at 7. That ESU instead chose to raise its proposed labor rates, and the degree to which it did so, reflect the exercise of the firm's independent business judgment, not improper conduct by the agency.

ESU also contends that the agency's negotiating techniques led to an improper auction. We find no merit in this portion of the protest.

The Federal Acquisition Regulation (FAR) provides:

> (e) Limits on exchanges: Government personnel involved in the acquisition shall not engage in conduct that--
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> . . . . .
>
> (3) Reveals an offeror's price without that offeror's permission. However, the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion . . . .

FAR § 15.306(e)(3).

We first note that, while the FAR generally prohibited "auction techniques" until 1997, due to revisions made in October 1997, the current FAR provision which addresses limitations on the disclosure of offerors' prices during discussions, quoted above, no longer includes language regarding the prevention of auctions.[9] See Korrect Optical, Inc., B-288128, B-288128.2, Sept. 21, 2001, 2001 CPD ¶ 171 at 6. Further, it is clear that, here, the agency's communications with ESU regarding the agency's belief that ESU's proposed labor rates were in certain areas materially lower than the current hourly wage rates, in light of ESU's stated pledge to retain the entire incumbent workforce at or above current wage rates, were wholly consistent with, and not violative of, FAR § 15.306(e)(3). Quite simply, there is no evidence or even allegation that the agency revealed ESU's price during discussions with

[9] Moreover, as set forth above, there is no evidence that the agency engaged in any activity here that would have previously constituted an improper auction (e.g., indicating to an offeror a price it must meet in order to receive further consideration).

offerors.  Accordingly, on this record we find no merit in ESU's protest that the agency's negotiating techniques led to what ESU characterizes as an impermissible auction.

Lastly, ESU also protests that the agency's evaluation of its proposal with regard to value characteristics 3 and 6 was unreasonable.  Given our conclusion that the agency did nothing improper with regard to ESU's decision to raise its price, we need not address ESU's remaining challenges to the technical evaluation of its proposal, since the upward adjustments ESU contends are necessary in these areas would have no impact on the relative standing of the two offerors. That is, even assuming that ESU received ratings of significant for value characteristics 3 and 6, ESU would remain the higher-priced offeror among proposals having similar qualitative merit, and thus there is no basis to conclude that the award decision would have changed.  Accordingly, ESU has not demonstrated that it was prejudiced by the agency's actions it challenges here.  Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99 at 6.

The protest is denied.

Anthony H. Gamboa
General Counsel