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**Comptroller General
of the United States**

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

Decision

Matter of: Patricia A. Thompson – Agency Tender Official

File: B-310910.4

Date: January 22, 2009

Patricia A. Thompson, Agency Tender Official, the protester.
Col. Neil S. Whiteman, Maj. Robert Ballenger, and Gary R. Allen, Esq., Department of the Air Force, for the agency.
Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where agency responded to earlier protest, in which the agency tender official (ATO) challenged the adequacy of the solicitation's workload information, by stating that it would provide additional workload data, and earlier protest was withdrawn, ATO was required to re-file a protest challenging the ongoing alleged inadequacy of information prior to submitting agency tender.
2. The solicitation contained no ambiguity regarding inclusion of vehicle fuel costs where it specifically stated that "fuel is considered Government-furnished," and agency confirmed this provision in responding to ATO question regarding the cost of fuel.

DECISION

Patricia A. Thompson, Agency Tender Official (ATO), protests the Department of the Air Force's selection of Defense Support Services, LLC (DSS) to perform civil engineering base operating services at Sheppard Air Force, Texas, pursuant to a public-private competition conducted under Office of Management and Budget (OMB) Circular A-76. The ATO asserts that the agency failed to provide adequate information regarding the competed workload requirements.

We dismiss the protest in part and deny it in part.

BACKGROUND

On September 29, 2006, the Air Force published an announcement on the Federal Business Opportunities (FedBizOpps) Internet website, publicizing the agency's intent to conduct a standard competition to compare the cost of continued in-house performance of the requirements at issue with the cost of obtaining those services by contract.¹ Agency Report (AR), Tab 13, FedBizOpps Public-Private Competition Notice, Sept. 29, 2006. Following the FedBizOpps publication, the agency published a draft performance work statement (PWS), seeking input from potential offerors and posting responses to questions presented.

For example, on June 4, 2007, the agency posted several hundred questions and answers, including the following ATO question and agency response:

Question T-0092-CE: Does the government expect the SP [service provider] to rent vehicles for special events? Please clarify SP responsibility in this area, to include the events the SP is expected to support in the workload data.

Agency Response: All support for special events is captured in the work load data in Section 11, Operation and Maintenance, Appendix 11B, Workload Data. Unable to locate this workload data: Cunningham.

AR, Tab 7, attach. 1; Second ATO Protest, Oct. 16, 2008, at 3-4.

Similarly, on July 7, 2007, the agency posted another set of questions and answers, including the following response to another ATO question:

Question T-16-405-CE: The workload in appendix 16B is not sufficient to determine an estimate of the amount of work that the SP will be responsible for, making it impossible for the SP to determine staffing and prepare a bid. Please provide workload for section 16 commensurate with other workload appendices containing a description of the task, the estimated quantity, and frequency.

¹ OMB Circular A-76 establishes the standard competition procedures at Attachment B, Section D. Under this process, the agency issues a solicitation, obtains offers from private-sector firms and an agency tender (which includes a staffing plan--referred to by the Circular as a most efficient organization (MEO)), performs a source selection, and then, based on the results of the competition, either makes award to a private-sector offeror or enters into a letter of obligation with the agency official responsible for performance of the MEO.

Agency Response: Please review the final RFP upon posting for the workload information necessary to prepare a proposal.

AR, Tab 7, attach. 2; Second ATO Protest, Oct. 16, 2008, at 2-3.

Thereafter, on September 19, 2007, the agency issued request for proposals (RFP) No. FA3002-07-R-0021, along with the final PWS.² Among other things, the RFP contained the following provision:

H-019 Government Provided Fuel

The service provider is authorized to use the self-serve base service station on Sheppard AFB to refuel Government furnished and service provider acquired vehicles and equipment that are used solely to perform the requirements of this contract. This fuel is considered Government-furnished.

AR, Tab 6, RFP at 53-54.

Following the September 2007 publication of the solicitation, the agency continued to respond to questions regarding the solicitation requirements. On October 18, 2007, the agency posted another set of questions and answers, including the following response to an ATO question regarding the historical costs of vehicle operations contained in RFP appendix 2FF:

Question T-02-626-CE: Please clarify the amount of time that is represented for each entry in the column entitled "Total Operations and Maintenance Cost." Does each entry represent a full year, or do some represent partial years? Does the cost shown include the cost of Fuel?

Agency Response: The "Total Operations and Maintenance Cost" represents the cost required to maintain the vehicles for the year of October 2005 to September 2006. Fuel costs are not represented in this figure.

AR, Tab 7, attach. 5; Second ATO Protest, Oct. 16, 2008, at 4.

On November 29, 2007, the ATO filed a protest with this Office, asserting that the solicitation was defective "due to undefined requirements and ambiguities,"

² The RFP identified the various evaluation factors to be applied and provided that "[t]he performance decision will be based on the lowest cost of all offers and tenders determined to be technically acceptable after application of the OMB A-76 adjustment factors." AR, Tab 6, RFP, at 98.

complaining that “repeated requests for clarification have gone unanswered” and maintaining that “[w]ith bids due on December 18, 2007, it’s too late for [the agency] to post the needed information.” First ATO Protest, Nov. 29, 2007, at 1-2.

In response to that protest, the agency agreed to take corrective action by extending the deadline for submission of proposals and to fully respond to all relevant questions. See Second ATO Protest, Oct. 16, 2008, at 1. Following the agency’s proposed corrective action, this Office conducted a conference call with the parties, advising them that we intended to dismiss the protest based on the agency’s pending action; based on that discussion, the ATO withdrew the November 29, 2007 protest. The record shows that, following submission of the ATO’s November 29 protest, the agency continued to publish questions and answers addressing the solicitation requirements.³

In February 2008, the ATO submitted its tender and private-sector offerors submitted their proposals; the ATO did not renew its protest regarding allegedly insufficient information prior to submitting its tender. Thereafter, the agency conducted multiple rounds of discussions with the ATO and the private-sector offerors. The record does not indicate, nor does the ATO assert, that during these discussions the ATO sought any additional information regarding the questions and responses quoted above.

Final revisions to the proposals and the agency tender were submitted in August 2008. DSS’s proposal was evaluated as offering a cost/price of \$143,467,968; the agency tender/MEO was evaluated as reflecting a cost/price of \$191,953,021. AR, Tab 12, at 1.

On September 2, the agency announced its selection of DSS to perform the competed activities. The ATO filed this protest on October 16.

DISCUSSION

Echoing its November 29, 2007 protest, the ATO again asserts that the PWS was “contradictory, confusing, and inaccurate” and that “[d]espite consistent, good-faith efforts by the . . . MEO team, the agency consistently failed to correct mistakes.” Second ATO Protest, Oct. 16, 2008, at 2. The protest maintains that, despite the agency’s actions taken in response to the ATO’s November 2007 protest, the agency “continued to fail to fully and accurately answer questions.” Id. at 1. The ATO’s

³ Prior to the ATO’s November 19, 2007 protest, the agency published questions and answers on June 4, June 18, July 30, August 2, October 18 and October 31, 2007. Following the ATO’s November 19, 2007 protest, the agency posted questions and answers on November 25, December 3, December 5, December 19, and December 20, 2007, and on January 16, 2008.

protest is based entirely on the adequacy of the agency's responses to the three ATO questions quoted above. As discussed below, the protest is dismissed in part and denied in part.

First, the ATO's protest refers to Question T-0092-CE, concerning the solicitation requirements to provide support for special events.⁴ The protest asserts that "[t]he MEO attempted to meet all service requirements in support of special events in the most comprehensive manner," but maintains that "the data provided . . . in Appendix 11B was inaccurate, ambiguous and incomplete." *Id.* at 3. The protest notes that, in response to the ATO's question, the agency stated that it was "[u]nable to locate this workload data." Based on this response, the ATO asserts that "even the agency was confused about the work load data." *Id.* at 4.

In November 2008, the agency submitted a report responding to the ATO's October 2008 protest, stating that, although the agency did not have the data to respond to the ATO's question on June 4, 2007--that is, at the time it published the response to Question T-0092-CE--the agency subsequently obtained the required information, compiled that data in appendix 11B, and posted it to the FedBizOpps website on June 20. The contracting officer further states that appendix 11B was thereafter published as an attachment to the RFP in September 2007. Finally, the contracting officer states that, following the ATO's first protest in November 2007, the agency published a notice advising offerors that additional comprehensive data regarding the special events workload requirements was available on the Federal Technical Data Solutions (FedTeDS) Internet website.⁵ Contracting Officer's Summary of Facts, Nov. 25, 2008, at 3-5.

⁴ As noted above, the question and response were as follows:

Question T-0092-CE: Does the Government expect the SP [service provider] to rent vehicles for special events? Please clarify SP responsibility in this area, to include the events the SP is expected to support in the workload data.

Agency Response: All support for special events is captured in the work load data in Section 11, Operation and Maintenance, Appendix 11B, Workload Data. Unable to locate this workload data:
Cunningham.

AR, Tab 7, attach. 1; Second ATO Protest, Oct. 16, 2008, at 3-4.

⁵ The contracting officer further explains that the FedBizOpps website has file size limitations; accordingly, comprehensive data regarding each special event was provided as part of the electronic technical library made available to offerors on the FedTeDS website. Contracting Officer's Summary of Facts, Nov. 25, 2008, at 4.

As noted above, the ATO did not re-file its protest challenging the adequacy of the solicitation information prior to submitting the agency tender in February 2008. Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposal must be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (2008). Thus, if the ATO believed that the additional information provided by the agency in response to the ATO's first protest continued to be inadequate to facilitate preparation of the agency tender, the ATO was required to protest that matter before submitting its tender. Since it did not, to the extent its protest is based on the alleged inadequacy of solicitation information, the protest is untimely and, therefore, must be dismissed.⁶ 4 C.F.R. § 21.2(a)(1).

Next, the protest refers to Question T-16-405-CE, in which the ATO questioned the sufficiency of the workload data in appendix 16B related to the solicitation requirements to manage environmental matters.⁷ As discussed above, the agency responded to this question on July 30, stating the offerors should "review the final RFP upon posting for the workload information necessary to prepare a proposal." The protest asserts that this is another example of the agency's "fail[ure] to provide a proper answer." Second ATO Protest, Oct. 16, 2008, at 3.

⁶ We note that, in its comments following receipt of the agency report, the ATO did not dispute any of the contracting officer's representations regarding the agency's preparation and publication of RFP appendix 11B following the June 4, 2007 response, or the agency's direction that additional data regarding the special events workload requirements could be accessed on the FedTeds website. Indeed, in its post-agency-report comments, the ATO does not in any way discuss its protest allegations regarding the alleged inadequacy of information related to the special events workload requirements. On this record, even if we considered the protest allegation to have been timely raised, given the ATO's failure to respond to the agency report regarding this matter, we would consider the allegation to have been abandoned. See, e.g., Dynamic Instruments, Inc., B-291071, Oct. 10, 2002, 2002 CPD ¶ 183 at 4.

⁷ As noted above, the ATO asked the following question:

Question T-16-405-CE: The workload in appendix 16B is not sufficient to determine an estimate of the amount of work that the SP will be responsible for, making it impossible for the SP to determine staffing and prepare a bid. Please provide workload for section 16 commensurate with other workload appendices containing a description of the task, the estimated quantity, and frequency.

AR, Tab 7, attach. 2; Second ATO Protest, Oct. 16, 2008, at 2-3.

Again, in responding to the protest, the contracting officer points out that the agency published its response to Question T-16-405-CE in July 2007—more than a month before the agency published the solicitation in September 2007. The contracting officer further states that, following the agency’s July 2007 response, appendix 16B was revised and republished with the RFP, and that, following that republication, the ATO did not again question the sufficiency of the data. Contracting Officer’s Summary of Facts, Nov. 25, 2008, at 1-3.

As noted above, the ATO did not re-file its protest challenging the adequacy of the solicitation information prior to submitting the agency tender in February 2008. Further, in its post-agency report comments, the ATO has not further addressed this matter in anyway. Accordingly, as discussed above with regard to question T-0092-CE, this protest issue is dismissed as not timely raised and, in any event, has been abandoned. 4 C.F.R. § 21.2(a)(1); Dynamic Instruments, Inc., *supra*.

Finally, the ATO’s protest refers to Question T-02-626, and the agency response, regarding the historic data for vehicle operation and maintenance provided by the agency in RFP appendix 2FF.⁸ The ATO asserts that the agency’s response regarding fuel costs was misleading and/or ambiguous and that the MEO reasonably concluded that additional costs for vehicle fuel had to be included in the agency tender.

The record does not support this assertion. Specifically, as discussed above, section H-019 of the solicitation, titled “Government Provided Fuel,” explicitly advised the offerors: “[t]he service provider is authorized to use the self-service base service station to Sheppard AFB to refuel Government furnished and service provider acquired vehicles and equipment. . . . This fuel is considered Government-furnished.” AR, Tab 6, RFP at 53-54. Consistent with this unambiguous solicitation provision, the agency’s response to

⁸ As noted above, the agency posted the following question and response on October 18, 2007:

Question T-02-626-CE: Please clarify the amount of time that is represented for each entry in the column entitled “Total Operations and Maintenance Cost.” Does each entry represent a full years, or do some represent partial years? Does the cost shown include the cost of Fuel?

Agency Response: The “Total Operations and Maintenance Cost” represents the cost required to maintain the vehicles for the year of October 2005 to September 2006. Fuel costs are not represented in this figure.

AR, Tab 7, attach. 5.

Question T-02-626-CE confirmed the directions of that provision, stating that the historic data in appendix 2FF, which had been provided for use in preparing proposals, did not include the cost of fuel.

On this record, the ATO cannot persuasively argue that it reasonably believed the agency tender should include the cost of vehicle fuel.⁹ To the contrary, the solicitation expressly provided that such costs were not to be included in proposals because the fuel would be provided by the government, and the agency re-enforced the solicitation provision in responding to the ATO's question. On the record here, we find no merit in the ATO's assertion that the solicitation information and/or the agency response to Question T-02-626-CE was misleading or created ambiguity with regard to the service provider's fuel costs; the ATO's protest to the contrary is denied.¹⁰

The protest is dismissed in part and denied in part.

Gary L. Kepplinger
General Counsel

⁹ We note that the protester's various submissions in this matter do not identify with any specificity where the additional fuel costs, allegedly included in the tender's cost/price, are reflected in that tender; nor does the agency's evaluation record indicate that the agency understood that the tender included such additional costs. Based on our review of the record, we have been unable to determine that additional fuel costs were, in fact, included in the agency tender.

¹⁰ The ATO elsewhere asserts that appendix 2FF did, in fact, include fuel costs, and that the agency's response to the contrary was factually inaccurate. Second ATO Protest, Oct. 16, 2008, at 4; ATO Comments, Dec. 5, 2008, at 6. In responding to this protest, the contracting officer has categorically reiterated the agency's earlier response, declaring, "[s]imply stated the Appendix 2FF . . . information did not contain the fuel costs," elaborating that "[o]fferors were instructed to use Appendix 2FF as their template for vehicle operations cost and nowhere in this appendix did it list fuel as one of the costs." Contracting Officer's Summary of Facts, Nov. 25, 2008, at 6. With regard to the ATO's allegation that the agency's response constituted factual misrepresentation, government officials are presumed to act with honesty and in good faith, and a protester's contention that contracting official have acted dishonestly or in bad faith must be supported by convincing proof; we will not attribute dishonesty or prejudicial motives to procurement officials on the basis of inference or supposition. *See, e.g., Worldwide Language Res., Inc.*, B-297210 *et al.*, Nov. 28, 2005, 2005 CPD ¶ 211 at 4. Here, the record does not contain the requisite support for the ATO's accusation.