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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: TDS, Inc.

File: B-292674

Date: November 12, 2003

William A. Roberts, III, Esq., Philip J. Davis, Esq., Phillip H. Harrington, Esq., Timothy W. Staley, Esq., and Jonathan L. Kang, Esq., Wiley Rein & Fielding, for the protester.

Rafael A. Madan, Esq., John L. Pensinger, Esq., Linda Fallowfield, Esq., and Alan Fisher, Esq., Office of Justice Programs, Department of Justice, for the agency. Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's proposed subcontractor has an impermissible "impaired objectivity" organizational conflict of interest by virtue of another contract with the agency, is denied where record fails to show that firm will be in a position to evaluate the performance or activities of the prime contractor as part of its responsibilities under that other contract.
 2. Where agency personnel comment on, or raise substantive questions or concerns about, vendors' quotations or proposals in the course of an oral presentation, and either simultaneously or subsequently afford the vendors an opportunity to make revisions in light of the agency personnel's comments, questions, and concerns, discussions have occurred.
 3. Protest that agency failed to engage in meaningful, equitable discussions is sustained where agency personnel, during course of at least one vendor's oral presentations, asked detailed, substantive questions relating to the vendor's quotation, yet agency failed to alert protester to any of the numerous weaknesses identified in its quotation.
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DECISION

TDS, Inc. protests the issuance of a task order to Northrop Grumman Information Technology under request for quotations (RFQ) No. OJP-2003-Q-014, issued by the Department of Justice, Office of Justice Programs (OJP), to acquire help desk operation services. TDS maintains that one of Northrop's subcontractors has an

impermissible organizational conflict of interest and that the agency misevaluated quotations and failed to engage in meaningful discussions.

We sustain the protest.

The RFQ contemplated the issuance of a task order under the successful firm's federal supply schedule (FSS) contract, for a 1-year base period with three 1-year options, to perform "help desk" operations services in support of the agency's information technology (IT) requirements. Two primary tasks were contemplated: help desk support services (essentially help desk services for agency end-users of computing and telecommunications resources), and system administration and network engineering (the administration and management of all UNIX-based resources at the agency, and hardware and software engineering necessary to accomplish the agency's design goals for its computer network). RFQ, attachment No. 1, Statement of Objectives (SOO), at 2-4.¹

Firms were advised that quotations would be evaluated under six equally-weighted criteria: past performance, corporate experience, technical understanding, quality control, professional staff and team, and management approach. RFQ at 2-4. The submissions would be assigned adjectival ratings of either exceptional, acceptable, marginal or unacceptable. Firms were further advised that the agency would make award on a "best value" basis, considering price and the non-price criteria, with the non-price considerations deemed more important than price.

The agency received three timely quotations. After reviewing the submissions, the agency invited the firms to make oral presentations. In the course of the oral presentations, the agency posed questions to the vendors. Agency Report (AR), exh. 23. After concluding the oral presentations, the agency invited firms to submit final quotation revisions (FQR), advising them that they could submit technical revisions to their quotations in the areas mentioned by the agency during oral presentations, and also could submit revised pricing.

The agency received FQRs from all three vendors. After evaluating the submissions, the agency assigned final adjectival ratings. Northrop's quotation received adjectival ratings of [deleted] under four of the six evaluation areas, and an [deleted] rating

¹ Because the agency is using a performance-based contracting method, the RFQ does not include specifications. Instead, the agency provided prospective contractors with an SOO, and required them to submit quotations describing how they intend to meet the agency's objectives through their proposed technical and management approaches. Firms also were required to submit a service level agreement (SLA) describing the level of service to be provided, performance measures to evaluate the level of service provided, and a list of financial incentives and disincentives associated with varying levels of performance. RFQ at 5.

under the technical understanding and professional staff and team criteria; Northrop submitted a final price of [deleted]. TDS received [deleted] ratings under five of the evaluation criteria, and an [deleted] rating under the past performance criterion; it submitted a final price of [deleted].² On the basis of these evaluation results, the agency made award to Northrop as the firm submitting the quotation offering the best value to the government.

ORGANIZATIONAL CONFLICT OF INTEREST

TDS asserts that one of Northrop's subcontractors, [deleted], has an impermissible organizational conflict of interest (OCI) that should have precluded award to Northrop. The record shows that [deleted] has another contract with OJP to provide various IT services to the agency (referred to in the record as the management system contract), and TDS maintains that [deleted] role under that contract, coupled with its responsibilities under the help desk contract, creates an "impaired objectivity" OCI.

An impaired objectivity OCI exists where a firm's work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of a proposal submitted to obtain another contract. Aetna Gov't. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13. The concern in such situations is that the firm's ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated. Id.

[deleted] management system contract is for the provision of services relating to the agency's effort to update its computer systems and develop certain agency-wide enterprise systems. The contract calls for [deleted] to perform eight defined tasks. The first three of these tasks relate to the modification, build out, troubleshooting, integration and maintenance of one of OJP's computer systems known as the grants management system (GMS), as well as the migration of several other preexisting contemporary and legacy grants management systems, to the GMS enterprise framework. AR, exh. 17, at 2-3. The fourth and sixth tasks require [deleted] to research, document and implement an enterprise architecture for all of OJP's

² The agency's technical evaluation report reflected an adjectival rating of [deleted] for TDS under the past performance criterion. AR, exh. 10, at 2; Source Evaluation Board Award Recommendation Report, July 8, 2003, appendix No. 1, at 1. By e-mail dated July 15, 2003, the contracting officer specifically advised the chairman of the technical evaluation board that TDS should have received an [deleted], rather than an [deleted], rating for past performance. AR, exh. 10, at 5. The agency's source selection document does not reflect the revised rating for TDS in the past performance area. AR, exh. 11 at 2.

business activities and computer systems, and to implement an enterprise portal that will provide a single point of access for all of OJP's core computer systems (including, for example, the GMS). Id. at 4-5. The seventh task requires [deleted] to evaluate the existing communications infrastructure between OJP and the office of the chief information officer (OCIO), to identify any barriers to communications between OJP and OCIO, and to develop and implement an "internal communications campaign" to ensure effective two-way communication between OJP and OCIO. Id. at 5-7. The eighth task requires [deleted] to develop and execute a "change management process" to be used to essentially train agency users in the use of newly-implemented IT systems so as to optimize the use of the newly-implemented systems. Id. at 7.

The fifth task--the focus of much of TDS's OCI allegation--requires [deleted] to provide comprehensive guidance to OCIO on infrastructure refreshment, migration, security and other related projects. AR, exh. 17, at 4-5. This task requires [deleted] to provide guidance on projects that require constant monitoring and expert technical guidance, including the agency's migration of its system from a Novell-based environment to a Microsoft Windows-based environment, and the roll-out of new desktop computers configured for Microsoft networking. Id.

Under the help desk task order to be awarded under the current RFQ, the contractor is essentially responsible for providing operational support and system availability to the users of the OJP system enterprise architecture by installing and upgrading system hardware and software and by successfully migrating existing software, files and databases from the Novell-based operating environment to the Microsoft Windows-based operating environment; by providing administration and management of all UNIX-based resources in OJP including moving, adding, changing and maintaining system resources; by providing hardware and software engineering services necessary to accomplish the design goals of the agency's computer network; and by providing network and system administration support for OJP's two major systems, GMS (discussed above) and the integrated financial management information system (IFMIS). SOO at 3-7. In effect, the help desk contractor is responsible for assisting the agency in maintaining its existing system assets, providing support to system users, implementing the agency's new enterprise architecture, migrating system assets from a Novell-based environment to a Microsoft Windows-based environment and providing support for the agency's two major systems, GMS and IFMIS.

The thrust of TDS's allegation is that, because [deleted] is responsible under its management system contract for monitoring the activities of the help desk contractor in its implementation of the new system architecture and the migration from one operating environment to another, and because the firm provides advice and guidance to the agency in support of these activities, the firm has an impaired objectivity OCI. TDS maintains that [deleted] management contract duties conflict with the duties it may be called upon to perform as Northrop's subcontractor under

the help desk task order, for example, implementation of the agency's migration from a Novell-based environment to a Microsoft Windows-based environment.

We have no basis on the record before us to find that [deleted] has an impaired objectivity OCI. Contrary to TDS's position, there is nothing inherently improper in a firm's monitoring the activities of a team member such as Northrop here (or its own activities); monitoring, standing alone, does not necessarily create the potential for impaired objectivity. Rather, as noted above, an impaired objectivity conflict typically arises where a firm is evaluating its own activities because the objectivity necessary to impartially evaluate performance may be impaired by the firm's interest in the entity being evaluated. See Johnson Controls World Servs., B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 at 11-12. While we do not exclude the possibility in a different context of monitoring activities resulting in an impaired objectivity OCI, here there is no evidence that [deleted] will be evaluating the performance of the help desk contractor, and there is nothing otherwise objectionable in the interrelationship of activities performed by [deleted] on the two contracts. Instead, the record shows that the help desk contractor's performance must at least meet the minimum standards outlined in the RFQ and that the contracting officer's technical representative will be responsible for evaluating the adequacy of the firm's performance for purposes of assessing the firm's overall performance, deciding whether or not to award option year requirements, and determining the firm's compensation under the SLA. SOO at 8-9. We find no indication in the record--and TDS has not directed our attention to any information--showing that [deleted] will have any input whatsoever into the evaluation of the help desk contractor's performance. Under these circumstances, we have no basis to find that the awardee, or its subcontractor, has an impaired objectivity OCI.

DISCUSSIONS

TDS asserts that the agency improperly failed to conduct meaningful discussions with it during the acquisition. In support of its position, TDS directs our attention to the relatively large number of weaknesses and risks identified during the agency's evaluation of its quotation; TDS maintains that the agency failed to meaningfully bring virtually any of these matters to its attention. TDS maintains that the agency was required to conduct meaningful discussions, since it opened discussions by eliciting information from the firms during the oral presentation and then providing them an opportunity to revise their quotations.

The agency responds that it properly conducted the firms' oral presentations and, in the course thereof, sought only clarifications. OJP maintains that it did not open discussions, and thus was under no legal obligation to engage in meaningful discussions and thereby bring the weaknesses and risks identified in the TDS quotation to the firm's attention.

We find, despite the agency's characterization of the exchanges, that discussions occurred here.³ The FAR anticipates "dialogue among the parties" in the course of an oral presentation, FAR § 15.102(a), and we see nothing improper in agency personnel expressing their view about vendors' quotations or proposals, in addition to listening to the vendors' presentations, during those sessions. Once the agency personnel begin speaking, rather than merely listening, in those sessions, however, that dialogue may constitute discussions. As we have long held, the acid test for deciding whether an agency has engaged in discussions is whether the agency has provided an opportunity for quotations or proposals to be revised or modified. See, e.g., Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. Accordingly, where agency personnel comment on, or raise substantive questions or concerns about, vendors' quotations or proposals in the course of an oral presentation, and either simultaneously or subsequently afford the vendors an opportunity to make revisions in light of the agency personnel's comments and concerns, discussions have occurred. See FAR § 15.102(g).

That plainly is the case here. Following the oral presentations, the agency specifically advised the firms:

Technical revisions may only be made, at your selection where you feel necessary, to the questions presented in Oral Presentations, along with those specifically requested, such as the percent of discount offered from the GSA Schedule rates, Performance Evaluation Questionnaire.

AR, exh. 24, at 7. The record thus shows that the agency afforded the firms an opportunity to revise their quotations, in particular in the areas raised by agency personnel during the oral presentations, and the record further shows that the firms in fact made revisions to their submissions, both as to technical matters and as to price. AR, exh. 8, TDS Final Submission, June 19, 2003; AR, exh. 9, Northrop Final Submission, June 19, 2003. Based on these considerations, we conclude that the agency engaged in discussions.

The FAR requires at a minimum that contracting officers discuss with each firm being considered for award "deficiencies, significant weaknesses, and adverse past

³ Since the RFQ provided for the issuance of a task order against the selected vendor's FSS contract, the provisions of Federal Acquisition Regulation (FAR) subpart 8.4 (governing FSS acquisitions) apply. However, the record establishes that OJP treated the vendors' responses as if it were conducting a negotiated procurement. Under these circumstances, while the provisions of FAR part 15 (governing contracting by negotiation, including requirements concerning meaningful discussions) do not directly apply, we will analyze TDS's contentions by the standards applicable to negotiated procurements. Uniband, Inc., B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 at 3-4.

performance information to which the offeror has not yet had an opportunity to respond.” FAR § 15.306(d)(3). The FAR also encourages contracting officers to discuss other aspects of the firm’s proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award. Id. Discussions must be meaningful, equitable, and not misleading. ACS Gov’t Solutions Group, Inc., B-282098 et al., June 2, 1999, 99-1 CPD ¶ 106 at 13-14. Discussions cannot be meaningful unless they lead a firm into those weaknesses, excesses or deficiencies in its quote or proposal that must be addressed in order for it to have a reasonable chance of being selected for contract award. Id.

We find on the record before us that DOJ failed to engage in meaningful discussions with TDS. The agency’s source selection decision document summarizes the weaknesses identified by the agency’s technical evaluators relating to the TDS quote:

[deleted]

AR, exh. 11, at 3.

Despite this rather considerable list of weaknesses identified by the agency, TDS was given only two general questions during its oral presentation, neither of which actually addressed the weaknesses noted. TDS was asked only: “What performance based standards will your operation use?” and “How do you propose to ensure that technical issues that come up are properly reported to OJP and then handled by the correct people?” AR, exh. 23. Based on the foregoing, we conclude that the agency failed to afford TDS meaningful discussions giving the firm a reasonable opportunity to address the weaknesses in its quote, and thereby giving it a reasonable chance of being selected for award.

We also find that the agency’s discussions were not equitable. ACS Gov’t Solutions Group, Inc., supra. Both of the other firms received questions that were far more detailed, and related far more specifically to the agency’s concerns about their quotes. Northrop received a list of seven questions that were tailored to its proposed technical and management approach:

[deleted]

[deleted]

[deleted]

[deleted]

[deleted]

[deleted]

[deleted]

AR, exh. 23. The third firm also received a list of seven similarly detailed questions relating to its proposed technical and management approach. *Id.* The record contains no explanation from the agency regarding why it provided TDS a substantially lower level of specificity in its communications.

In view of the foregoing, we sustain TDS's protest.⁴ We recommend that the agency reopen the acquisition, engage in meaningful discussions with all of the firms, obtain and evaluate revised quotations and make a new source selection decision. We further recommend that if, at the conclusion of these activities, the agency determines that a firm other than Northrop is properly in line for award, it should terminate the task order issued to Northrop for the convenience of the government, and make award to the eligible firm if otherwise proper. Finally, we recommend that TDS be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees, insofar as those costs were incurred in pursuit of its protest allegation relating to the adequacy of discussions. 4 C.F.R. § 21.8(d)(1). TDS's certified claim for costs, detailing the time spent and the costs incurred must be submitted to the agency within 60 days of receiving of our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁴ TDS's protest also raises additional arguments relating to the agency's evaluation findings and source selection decision. We dismiss these aspects of its protest as academic because we recommend that the agency reopen the acquisition, engage in meaningful discussions and receive and evaluate revised quotations. ACS Gov't Solutions Group, Inc., *supra*, at 14 n.7.