



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Quality Software Services, Inc.

File: B-400206.2

Date: November 19, 2008

Andrew Mohr, Esq., and John O'Brien, Esq., Cohen Mohr, for the protester.
Brenda D. Joseph-Chambers, Esq., Department of Housing and Urban Development, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of cancellation of task order for maintenance and development services in support of information technology system is denied where record indicates that order was issued under solicitation that did not accurately reflect agency's minimum needs, but instead was more restrictive of competition than necessary; where an agency issues purchase order based on solicitation that does not accurately reflect agency's minimum needs, the order should be canceled and the procurement reopened to allow competing firms an opportunity to respond to agency's actual requirements.

DECISION

Quality Software Services, Inc. (QSSI), of Gaithersburg, Maryland, protests the Department of Housing and Urban Development's (HUD) cancellation of task order No. C-OPC-23303, issued to QSSI under request for quotations (RFQ) No. R-OPC-23247 (RFQ-23247), for system development and maintenance services for HUD's Office of Public and Indian Housing's (PIH) Inventory Management System (IMS). HUD canceled the order after Citizant, Inc., of Chantilly, Virginia, protested the selection of QSSI. QSSI asserts that the cancellation was improper.

We deny the protest.

HUD's IMS is an Internet-based information technology system that facilitates data collection and report generation for PIH. Prior to 2008, IMS was supported by two contractors: Catapult Technology, performing IMS development work, and Visionary Integration Professionals, with QSSI as a subcontractor, performing IMS operations and maintenance services. On February 14, 2008, HUD issued RFQ-23247,

providing for issuance of a single multi-year follow-on order to furnish both maintenance and development services in support of IMS. The RFQ incorporated HUD Acquisition Regulation (HUDAR) § 2452.239-70, Access to HUD Systems, which provides that contractor employees who require access to a HUD information system or systems shall be either (1) a U.S. citizen, (2) a national of the U.S. (see 8 U.S.C. § 1408), or (3) an alien lawfully admitted into the U.S. for permanent residence, as evidenced by an Alien Registration Receipt Card Form. HUDAR § 2452.239-70(c) (Nov. 2005) (Deviation). However, in response to a number of questions from Citizant—which, along with QSSI, was among the six vendors responding to the RFQ—concerning whether various key positions must be filled with U.S. citizens or “green card” holders, HUD responded as follows:

Please note that in the past, HUD has granted waivers of citizenship requirements on an exceptional basis to specific contractor employees. Offerors who propose any non-U.S. national employee for a position requiring access to HUD systems in performing the contract must justify why no other employee who meets the citizenship requirements can perform the work. HUD may consider such proposed employees on a case-by-case basis. In no case will HUD grant access to a non-U.S. national for whom sufficient background information is unavailable to complete an appropriate background investigation (as described in clause 2452.239-70).

RFQ-23247, Citizant Questions.

On May 30, after learning of the task order issued to QSSI, Citizant filed a protest with our Office asserting that the selection was improper because QSSI proposed key personnel who failed to meet the citizenship requirements under HUDAR § 2452.239-70(c). In this regard, the record indicates that QSSI proposed key personnel with H-1B non-immigrant visas for foreign workers in specialized occupations who had previously worked on HUD’s IMS as contractor employees. See, e.g., Declarations of [REDACTED]. In response to Citizant’s protest, HUD proposed to take corrective action by canceling QSSI’s task order and resoliciting the requirement. We determined that this proposed action rendered Citizant’s protest academic, and we dismissed it (B-400206, June 19, 2008).

On June 23, in order to obtain interim support services for IMS, HUD issued RFQ No. C-OPC-23317 (RFQ-23317) to the vendors participating in the prior procurement; it requested quotations for issuance of a 6-month task order, with two 1-month option periods. As issued, this RFQ included the HUDAR § 2452.239-70(c) citizenship requirement. On June 25, however, HUD amended the RFQ to expand the categories of contractor employees who may have access to HUD information systems to include not only U.S. citizens or nationals, but also

[a]n alien lawfully admitted into, and lawfully admitted to be employed in the United States, provided that for any such individual, the Government is able to obtain sufficient background information to complete the investigation as required by this clause.

HUDAR § 2452.239-70(c) (June 2008) (Deviation). (The reference to the original third category, “an alien lawfully admitted into the United States for permanent residence,” was deleted.) HUD also issued a deviation to HUDAR § 2452.239-70 to incorporate similar language. HUDAR § 2452.239-70 (June 2008) (Deviation).

On June 27, QSSI filed an agency-level protest challenging the cancellation of its task order issued under RFQ-23247. HUD denied its protest, and QSSI then filed this protest with our Office asserting that the cancellation was improper.

In its report responding to the protest, HUD states that, because it had not first followed the required regulatory procedures for obtaining a deviation from the citizenship requirements of HUDAR § 2452.239-70 (*see* HUDAR § 2401.403), its offeror question response—that the agency would consider granting waivers of the HUDAR § 2452.239-70 citizenship requirements on an exceptional basis—introduced an ambiguity into RFQ-23247 regarding whether or not offerors would be able to propose non-U.S. nationals. The agency concludes that this created an unfair competitive environment that rendered the selection of QSSI improper. QSSI disagrees that the solicitation was defective.

It is evident from the record that, whether or not ambiguous, RFQ-23247 did not accurately reflect the agency’s minimum needs, but instead was more restrictive of competition than necessary. In this regard, where an agency issues a purchase order to a firm based on a solicitation that does not accurately reflect the agency’s minimum needs, the purchase order should be canceled and the procurement reopened to allow competing firms an opportunity to respond to the agency’s actual requirements. *See Freedom Graphic Sys., Inc.*, B-277305, Sept. 22, 1997, 97-2 CPD ¶ 82 at 2; *Budney Indus.*, B-252361, June 10, 1993, 93-1 CPD ¶ 450 at 3-4.

Here, the amended bridge solicitation (RFQ-23317) unambiguously expanded the categories of contractor employees who may have access to HUD information systems to include not only U.S. citizens or nationals, but also aliens lawfully admitted to be employed in the U.S., eliminating the prior requirement that an offeror could only propose such non-U.S. national employees on an exceptional basis (*i.e.*, where it could demonstrate that no other employee who meets the citizenship requirements could perform the work for which the non-U.S. national employee was proposed). It is clear from this RFQ that HUD has determined that non-U.S. national employees may have access to HUD information systems, so long as the government is able to obtain sufficient background information to complete a background investigation for the employee, without the requirement for a showing of exceptional circumstances that was called for under RFQ-23247.

Since QSSI's task order was issued under a solicitation that did not accurately reflect the agency's minimum needs, but instead was more restrictive of competition than necessary, and thus may have deterred some firms from competing or submitting a more advantageous quotation, we conclude that HUD properly terminated QSSI's order.

The protest is denied.

Gary L. Keplinger
General Counsel