

ORIGINAL

FILED
NOV 6 2009
U.S. COURT OF
FEDERAL CLAIMS

**In the United States Court of Federal Claims
Bid Protest**

HYPERION, INC.)
1660 International Drive, Suite 470)
McLean, Virginia 22102-4855)
)
Plaintiff,)
)
v.)
)
THE UNITED STATES,)
)
Defendant.)
_____)

09-758 C

No. 09- C
Judge

PRE-AWARD PROCUREMENT PROTEST COMPLAINT

Plaintiff, Hyperion, Inc., 1660 International Drive, Suite 470, McLean, Virginia 22102-4855 (Hyperion), a Virginia Corporation and a qualifying Small Business teamed with six other Small Businesses, as and for its Pre-Award Procurement Protest Complaint against the Defendant, the United States, alleges as follows:

INTRODUCTION

1. This is a Pre-Award Procurement Protest, a Civil Action alleging clear and prejudicial violations of Statute and Regulation in connection with a Federal Agency Acquisition, Solicitation Number HHM402-09-R-0050, the Defense Intelligence Agency's (DIA's) Solutions for the Information Technology Enterprise (SITE) Acquisition, a Solicitation for Competitive Proposals which promises up to eight separate multiple Awards, four to be made through full and open competition, and four to be made to qualifying Small Businesses, these all to be Indefinite Delivery/Indefinite Quantity Task Order Contracts for a Base Period of one year with four one-year Options, a Federal Agency Acquisition over which this Court has jurisdiction under 28 U.S.C. § 1491(b)(1).

2. The Solicitation is issued by Defendant DIA's Virginia Contracting Activity (AE-2C), Bolling Air Force Base, Building 6000, Washington, D.C. 23040-5100. These eight proposed Indefinite Delivery/Indefinite Quantity Task Order Contracts will allow the SITE Contractors to provide worldwide coverage for information tech-

nology requirements and technical support services which will support system design, development, fielding, and sustainment of global intelligence and Command and Control assets. Support is required for contingency and exercise operations in areas where forces are deployed, including locations considered high risk, crisis/danger areas. The majority of the SITE multiple-award Task Order Contract work will be on Top Secret networks and will support both classified and unclassified programs. Support requirements range from per call and "on-call" support to full-time attendant support at sites around the world. The maximum ceiling amount of the SITE Acquisition is \$6,600,000,000 and the minimum amount of any Task Order to be issued under these eight multiple-award Task Order Contracts is \$50,000.

3. This Civil Action is brought to obtain a Declaration that Defendant DIA's Competitive Range Determination of Thursday, October 8th, 2009 lacks a rational basis and is unreasonable or irrational, and thus arbitrary and capricious because: (1) Hyperion's initial Competitive Proposal of July 16th, 2009 was at the least readily cor-

rectible through discussions; (2) Defendant DIA violates Federal Acquisition Regulation 15.305(a)(2)(i) and Federal Acquisition Regulation 15.308 when Defendant DIA's rating of Hyperion's Technical/Management section cannot be reconciled with Defendant DIA's rating of Hyperion's Past Performance section; (3) Defendant DIA violates Federal Acquisition Regulation 15.308 when Defendant DIA's rating of Hyperion's Price is based on an unannounced "standard deviation" and when Hyperion's Price is ranked by Defendant DIA against a predetermined and undisclosed quantity of hours which will not be provided by Defendant DIA to any of the Offerors; (4) Defendant DIA violates 10 U.S.C. § 2304(a)(1)(A) and 41 U.S.C. § 403(6) because the ejection of Hyperion's initial Competitive Proposal from the Competitive Range precludes Defendant DIA's ability to maximize competition limited to qualifying Small Business Offerors; and (5) Defendant DIA is in breach of its obligation to act with integrity, fairness, and openness, and to treat Offerors fairly.

4. This Civil Action seeks further a Permanent Injunction ordering Defendant DIA to make a new Competitive Range determination from among the existing initial Competitive Proposals submitted in response to the SITE Acquisition.

NATURE OF THE ACTION

5. Hyperion here challenges a Competitive Range Determination of Thursday, October 8th, 2009 made under the SITE Acquisition, Solicitation Number HHM402-09-R-0050. This DIA Determination unlawfully concludes that Hyperion's initial Competitive Proposal "does not provide detailed information and evidence that demonstrates an ability to successfully perform in 12 of 16 functional areas of the SOO [Statement of Objectives]." Yet at the same time Hyperion's initial Competitive Proposal is rated by Defendant DIA on Past Performance as "minimum doubt exists, based on the Offeror's performance record, that the offeror can successfully perform the proposed effort."

6. Hyperion seeks a Declaration that this Competitive Range Determination lacks a rational basis and is arbitrary and capricious in violation of applicable procurement

Statutes and Regulations. There is no reasoned judgment which can support this Competitive Range Determination by Defendant DIA.

7. Hyperion seeks also a Permanent Injunction ordering that Defendant DIA conduct a new Competitive Range Determination under the SITE Acquisition, Solicitation Number HHM402-09-R-0050, this new Competitive Range Determination to be made after first reconciling the adjectival ratings for Hyperion's Technical/Management section and the adjectival rating for Hyperion's Past Performance section, this reconciliation to be made in accordance with Federal Acquisition Regulation 15.305(a)(2)(i) ("Past performance information is one indicator of an offeror's ability to perform the contract successfully. . .").

8. Hyperion seeks a proper review of this Acquisition on the contemporaneous record, 5 U.S.C. § 706(2)(A), and meaningful relief for clear and prejudicial procurement process errors and clear errors of judgment.

9. Such a review will demonstrate that this Competitive Range Determination lacks a rational basis and is unreasonable or irrational and thus arbitrary and capri-

cious because Hyperion's initial Competitive Proposal of July 16th, 2009 was at the least readily correctible through discussions and will demonstrate that this Competitive Range Determination violates Federal Acquisition Regulation 15.305(a)(2)(i) and Federal Acquisition Regulation 15.308 because Defendant DIA's rating of Hyperion's Technical/Management section cannot be reconciled with Defendant DIA's rating of Hyperion's Past Performance section.

10. Such a review will demonstrate that this Competitive Range Determination violates Federal Acquisition Regulation 1.102(b)(3) and 1.102-2(c)(3) because Defendant DIA is in breach of its obligation to act with integrity, fairness, and openness, and to treat Offerors fairly.

11. Hyperion, a responsible Contractor, a qualifying Small Business with three-year averaged annual receipts under \$25,000,000 per year, and an actual Offeror whose initial Competitive Proposal is in a position to receive an Award of one of the four SITE multiple-award Task Order Contracts promised to Small Businesses, is an

appropriate “interested party” under 28 U.S.C. § 1491(b)(1), and Hyperion has a direct economic interest in the outcome of this Pre-Award Procurement Protest.

12. Hyperion is a proper party for purposes of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii), i.e., Hyperion is a private party and a Corporation which at the time this Pre-Award Procurement Protest is filed has not more than 500 employees and whose net worth does not exceed \$7,000,000 averaged over the past three years.

13. This Pre-Award Procurement Protest is timely filed. Hyperion received on October 8th, 2009 written notice of the Competitive Range Determination. On October 27th, 2009 Hyperion received its final written Debriefing by Defendant DIA, this provided in accordance with 10 U.S.C. § 2305(b)(6)(A).

14. Defendant DIA is a Defense Agency within DoD, 10 U.S.C. § 101(a)(11); DoD is an Executive Department of the United States, 10 U.S.C. § 111; and Defendant DIA and its Virginia Contracting Activity are instrumentalities of the United States. Defendant DIA is a Combat Support Agency within DoD, 10 U.S.C. § 193(f)(2). Defen-

dant DIA and its Virginia Contracting Activity is an "Agency" just as this term is defined in 28 U.S.C. § 451, and thus Defendant DIA and its Virginia Contracting Activity is also a "Federal agency" as is required by 28 U.S.C. § 1491(b)(1).

15. Defendant DIA's violations of procurement Statute and Regulation have had a direct and prejudicial effect on Hyperion. Hyperion has been denied a proper evaluation of its initial Competitive Proposal, and Hyperion has asked for, but has not received, a reasoned judgment which can support Hyperion's ejection from the Competitive Range. As a result of Defendant DIA's breach of the implied-in-fact Contract of good faith, fair dealing, and honest consideration, Hyperion is wasting time and proposal preparation costs. Ultimately, Hyperion is being unfairly denied the opportunity to compete, on the announced Evaluation Criteria, for an Award of one of the four Indefinite Delivery/Indefinite Quantity Task Order Contracts to be issued to qualifying Small Businesses under the SITE Acquisition, Solicitation Number HHM-402-09-R-0050.

FACTUAL ALLEGATIONS

THE SITE ACQUISITION, SOLICITATION NUMBER HHM402-09-R-0050

16. The SITE Acquisition, Solicitation Number HHM402-09-R-0050 was issued on May 26th, 2009. The SITE Acquisition is authorized by 10 U.S.C. § 2304a(a) and promises up to eight separate multiple Awards, four to be made through full and open competition, and four to be made to qualifying Small Businesses. While Defendant DIA announced its intent to make an award on initial Competitive Proposals, without discussions, Defendant DIA reserved the right to establish a Competitive Range under Federal Acquisition Regulation 15.306(c)(1) and to hold discussions after initial Competitive Proposals had been evaluated. Defendant DIA likewise reserved the right to limit the Competitive Range for purposes of efficiency, this in accordance with 10 U.S.C. § 2304(b)(4) and Federal Acquisition Regulation 15.306(c)(2).

17. There are four announced non-Price Evaluation Factors. In descending order of importance, these four announced non-Price Evaluation Factors are Technical/Management, Past Performance, Small Business Plan, and Security. The Small

Business Plan Evaluation Factor is not to be rated for qualifying Small Businesses. The Technical/Management Evaluation Factor is comprised of five elements: experience and expertise performing as a prime or subcontractor in sixteen functional areas; the Offeror's proposed SITE Organization/Management Team and Proposed Management Structure; the Offeror's proposed Recruiting, Training, and Employee Retention Plan; the Offeror's Transition Experience; and the Offeror's Logistics Administration and Worldwide Support Capability. Past Performance is to be evaluated based on performances under ten Contracts within the last three years, five of which must have been performed by the Offeror, and five of which have been performed by Team Members. These combined Past Performance efforts must have been valued in excess of \$10,000,000. The Security Evaluation Factor is "pass/fail" and it requires that Offerors and their Team Members must possess a Top Secret facility clearance and that they must demonstrate experience and ability in providing Top Secret cleared personnel under DoD Contracts.

18. The Price Evaluation Factor for the SITE Acquisition requires that Offerors provide fully-loaded labor rate ceilings for the Base Year and for each of the four Option Years. These fully-loaded labor rate ceilings are to be provided for each labor category and for both CONUS and OCONUS locations. Offerors are to provide fully-loaded labor rate ceilings for fifty-one labor categories. These fully-loaded labor rate ceilings for the Base Year and for each of the four Option Years are also to be provided for locations in Japan, Okinawa, Korea, and Djibouti and country-wide rates are to be provided for Columbia, Kosovo, Thailand, and Turkey. These fully-loaded labor rate ceilings are to be evaluated against a predetermined and undisclosed quantity of hours which will not be provided by Defendant DIA to any of the Offerors.

HYPERION'S INITIAL COMPETITIVE PROPOSAL

19. Hyperion has over nineteen years' experience in designing, installing, and maintaining classified and unclassified information technology systems and services in secure and in non-secure areas. Hyperion has deployed technical teams to consult, survey, install, maintain, and/or operate automated systems throughout the United

States, Europe, the Pacific Rim, the Middle East, and Southwest Asia. Hyperion submitted its past performances on five Contracts and Hyperion's Small Business Team Members submitted their past performances on five additional Contracts. These combined Past Performance references exceed \$114,000,000.

20. In the Technical/Management section of its initial Competitive Proposal, Hyperion focused on demonstrating its expertise in the sixteen functional areas required for the SITE Acquisition. Hyperion did this by showing the tools, personnel, and mature approach taken by Hyperion and its Small Business Team Members. Hyperion did not understand Defendant DIA to request simply a narrative of past performances, this since Defendant DIA had mandated a separate Past Performance section. In only one Technical/Management section of the SITE Acquisition did Defendant DIA explicitly request a "narrative of . . . experiences in transitioning work from an incumbent contractor to a new contract." Defendant DIA nowhere requested narratives of past performances in other Technical/Management sections of the SITE Acquisition.

21. In its initial Competitive Proposal for the SITE Acquisition, Hyperion uses ninety-seven of the one-hundred pages allowed for the Technical/Management section and thirty-two of the thirty-five pages allowed for the Past Performance section.

DEFENDANT DIA'S RATING OF HYPERION'S INITIAL COMPETITIVE PROPOSAL

22. Defendant DIA rated Hyperion's initial Competitive Proposal as a "pass" on the Security Evaluation Factor: Hyperion's initial Competitive Proposal was deemed to have demonstrated all security requirements. Defendant DIA rated Hyperion's initial Competitive Proposal as "Acceptable" on the Past Performance Evaluation Factor; Defendant DIA concluded that "minimum doubt exists, based on the Offeror's performance record, that the offeror can successfully perform the proposed effort" and Defendant DIA there reported that Hyperion had "[a]cceptable performance ratings in most functional areas."

23. On Thursday, October 8th, 2009 Defendant DIA wrote Hyperion that Hyperion's initial Competitive Proposal had been ejected from the Competitive Range "based on significant weaknesses and weaknesses across major components of the 16

Technical and Management Functional Areas Price [Sic].” Defendant DIA wrote that

Hyperion’s initial Competitive Proposal:

does not provide detailed information and evidence that demonstrates an ability to successfully perform in 12 of 16 functional areas The proposal lacked sufficient evidence to demonstrate depth or breadth to successfully execute major components of the SITE Statement of Objectives. In addition, your evaluated price was not competitive. . . .

24. Hyperion received a written debriefing on Monday, October 26th, 2009 and a final debriefing on Tuesday, October 27th, 2009. In the written debriefing of Monday, October 26th, 2009 Defendant DIA announces, for the first time, that Hyperion’s initial Competitive Proposal is ejected from the Competitive Range “[b]ased upon the ratings received for non-cost factors, the trade-off with the evaluated price *and the need to conduct an efficient competition.*” (Emphasis added). Now Hyperion is told that its proposed labor rate ceilings are “outside the range of one standard deviation for small business proposals.” Hyperion has asked Defendant DIA for an explanation of this observation, but no explanation has been provided.

25. The written debriefing of Monday, October 26th, 2009 reveals numerous inconsistencies in the criteria used by Defendant DIA's evaluators to form their determinations about Hyperion's supposed failure to demonstrate adequate depth and breadth of experience in the Technical/Management section of Hyperion's initial Competitive Proposal. In some instances a single narrative of experience is sufficient and in other instances, it is not. In one case, a DIA evaluator finds that the statement that an approach was "used for numerous Federal customers" is not sufficient because without specifics he cannot check to see how well Hyperion has performed. Defendant DIA's evaluators disregard demonstrations of expertise in the Technical/Management section of Hyperion's initial Competitive Proposal which are so specific that they must reflect intimate knowledge of information technology standards and processes applied during past performances. Defendant DIA has ejected Hyperion's initial Competitive Proposal from the Competitive Range because its evaluators have concluded that the "expertise demonstrated within the proposal was high, however the experience cited was minimal. . . ."

FIRST CLAIM FOR RELIEF

26. Hyperion herewith incorporates and re-alleges paragraphs numbers 1. through 25. hereinabove as if fully set forth herein.

27. Defendant DIA violates 10 U.S.C. § 2304(a)(1)(A) and 41 U.S.C. § 403(6) because the ejection of Hyperion's initial Competitive Proposal from the Competitive Range precludes Defendant DIA's ability to maximize the competition already limited to qualifying Small Business Offerors—Hyperion's initial Competitive Proposal of July 16th, 2009 was at the least readily correctible through discussions.

28. Competitive Proposals with minor deficiencies or weaknesses which can be readily corrected through discussions are required to be retained within the Competitive Range, and Offerors are to be afforded an opportunity to repair such Competitive Proposals through the submission of revised Competitive Proposals. *Dehler Manufacturing Co.*, B-250850, February 17th, 1993, 1993 U.S. Comp. Gen. LEXIS 152, *3-*4.

SECOND CLAIM FOR RELIEF

29. Hyperion herewith incorporates and re-alleges paragraphs numbers 1. through 25. hereinabove as if fully set forth herein.

30. Defendant DIA violates Federal Acquisition Regulation 15.305(a)(2)(i) and Federal Acquisition Regulation 15.308 because Defendant DIA's rating of Hyperion's Technical/Management section cannot be reconciled with Defendant DIA's rating of Hyperion's Past Performance section—Federal Acquisition Regulation 15.305(a)(2)-(i) provides that “[p]ast performance information is one indicator of an offeror's ability to perform the contract successfully. . . ,” ergo an Offeror's Past Performance rating must be reconciled with an Offeror's Technical/Management rating.

31. It cannot be that Hyperion's initial Competitive Proposal “does not provide detailed information and evidence that demonstrates an ability to successfully perform in 12 of 16 functional areas of the SOO [Statement of Objectives],” yet at the same time Hyperion's initial Competitive Proposal is rated by Defendant DIA on

Past Performance as “minimum doubt exists, based on the Offeror’s performance record, that the offeror can successfully perform the proposed effort.”

THIRD CLAIM FOR RELIEF

32. Hyperion herewith incorporates and re-alleges paragraphs numbers 1. through 25. hereinabove as if fully set forth herein.

33. Defendant DIA’s rating of Hyperion’s Price is pretextual and nonsensical and in violation of Federal Acquisition Regulation 15.308. A trade-off of a five-year ceiling Price under a Competitive Proposal for a multiple-award Task Order Contract is a reflection only of an Offeror’s willingness to absorb the price risk of future performance and not a reflection of the value of a particular Competitive Proposal as is required by Federal Acquisition Regulation 15.101-1(c). A trade-off premised on an unannounced (and later unexplained) “standard deviation” and against a predetermined and undisclosed quantity of hours which will not be provided by Defendant DIA to any of the Offerors is pretextual.

FOURTH CLAIM FOR RELIEF

34. Hyperion herewith incorporates and re-alleges paragraphs numbers 1. through 25. hereinabove as if fully set forth herein.

35. Defendant DIA has breached the implied-in-fact Contract of good faith, fair dealing, and honest consideration that Defendant DIA entered into with Hyperion when the Competition under the SITE Acquisition, Solicitation Number HHM402-09-R-0050 commenced.

36. An evaluation which reveals numerous inconsistencies in the criteria used by Defendant DIA's evaluators to form their determinations about Hyperion's supposed failure to demonstrate adequate depth and breadth of experience in the Technical/Management section of Hyperion's initial Competitive Proposal is not an evaluation conducted in good faith, and such an evaluation is a breach by Defendant DIA of its obligation under Federal Acquisition Regulation 1.102(b)(3) and 1.102-2(c)(3) to act with integrity, fairness, and openness, and to treat Offerors fairly.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Hyperion respectfully requests the Court to grant Judgment for Hyperion in this Civil Action, and to Order the following relief:

1. a Declaration that Defendant DIA's Competitive Range Determination of Thursday, October 8th, 2009 lacks a rational basis and is unreasonable or irrational, and thus arbitrary and capricious; and
2. a Permanent Injunction ordering Defendant DIA to make a new Competitive Range Determination from the existing initial Competitive Proposals submitted in response to the SITE Acquisition, Solicitation Number HHM402-09-R-0050; and
3. a Declaration that Hyperion is entitled to equitable relief, and money damages, for Defendant DIA's breach of the implied-in-fact Contract of good faith, fair dealing, and honest consideration that Defendant DIA's Virginia Contracting Activity entered into with Hyperion when the Competition under the SITE Acquisition, Solicitation Number HHM402-09-R-0050 commenced; and

4. such further and other relief as the Court may deem just and proper.

Respectfully submitted,



Cyrus E. Phillips IV
Virginia State Bar Number 03135

November 6th, 2009

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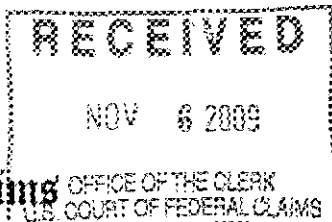
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FORM 2
COVER SHEET



In The United States Court of Federal Claims

Cover Sheet

Plaintiff(s) or Petitioner(s)
HYPERION, INC.

09-758 C

If this is a multi-plaintiff case, pursuant to RCFC 20(a), please attach an alphabetized, numbered list of all plaintiffs.

Name of the attorney of record (See RCFC 83.1(c)): CYRUS E. PHILLIPS IV
Firm Name: ATTORNEY-AT-LAW
Post Office Box: _____
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Is the attorney of record admitted to the Court of Federal Claims Bar? Yes No

Does the attorney of record have a Court of Federal Claims ECF account? Yes No
If not admitted to the court or enrolled in the court's ECF system, please call (202) 357-6402 for admission papers and/or enrollment instructions.

Nature of Suit Code: 1 3 8
Select only one (three digit) nature-of-suit code from the attached sheet.
If number 213 is used, please identify partnership or partnership group. If numbers 118, 134, 226, 312, 356, or 528 are used, please explain.

Agency Identification Code: 1 0 0
See attached sheet for three-digit codes.

Amount Claimed: \$ _____
Use estimate if specific amount is not pleaded.

Disclosure Statement:
Is a RCFC 7.1 Disclosure Statement required? Yes No
If yes, please note that two copies are necessary.

Bid Protest:
Indicate approximate dollar amount of procurement at issue: \$ 6,600,000.000
Is plaintiff a small business? Yes No

Vaccine Case:
Date of Vaccination: _____

Related Cases:
Is this case directly related to any pending or previous case? Yes No
If yes, you are required to file a separate notice of directly related case(s). See RCFC 40.2.