United States Court of Appeals for the Federal Circuit

2010-5003

PAI CORPORATION
(doing business as Professional Analysis),

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee,

and

INNOVATIVE TECHNOLOGY PARTNERSHIPS, LLC,

Defendant.

Appeal from the United States Court of Federal Claims in 09-CV-411,
Senior Judge John P. Wiese.

REPLY BRIEF OF PLAINTIFF-APPELLANT PAI CORPORATION

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March 29th, 2010

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THE CONTRACTING OFFICER'S ADJUSTMENTS OF JULY 2008 ARE NOT THE ISSUE; INSTEAD, THE ISSUE HERE IS THE LACK OF AUTHORITY FOR THE CONTRACTING OFFICER'S JUNE 2009 ANALYSIS

Defendant-Appellee's argument would have this Court focus on its Contracting Officer's adjustments of July and September 2008, A692 through A693, and by looking at these adjustments of Solicitation requirements made in 2008, would have this Court conclude that Defendant-Appellee Contracting Officer's actions were reasonable. Defendant-Appellee's Brief, at 10. But Defendant-Appellee conveniently "forgets" the promise made by Defendant-Appellee to the United States Government Accountability Office on February 17th, 2009, *viz.* Defendant-Appellee's promise that the unequal access to information Organizational Conflict of Interest issues raised in the Post-Award Procurement Protest of January 12th, 2009 filed with the United States Government Accountability Office, A601 through A603, would be "clarify[ied], and resolv[ed] where appropriate . . . ." A616.

Defendant-Appellee's Contracting Officer undertook to discharge this obligation with a thirteen page "Organization Conflict of Interest Analysis" of June 8th, 2009. A691 through A703. In this Analysis, Defendant-Appellee's Contracting Officer recognized, for the first time, the unequal access to information Organization-

al Conflict of Interest issues raised as a result of Innovative Technology Partnerships, LLC's (ITP's) role as the incumbent audits/assessments Contractor for Defendant-Appellee's Program Office of Independent Oversight (POIO). A693 through A695. Defendant-Appellee's Contracting Officer's Analysis wrongly relied on information submitted by the Offerors and their self-serving assessments that no Organizational Conflicts of Interest were present. A693. And while Defendant-Appellee's Contracting Officer's Analysis revealed that she had investigated these unequal access to information Organizational Conflicts of Interest issues by speaking with other Government personnel, at no time did Defendant-Appellee's Contracting Officer interview ITP personnel to ensure that information learned from ITP's performance as the incumbent audits/assessments Contractor for Defendant-Appellee's POIO had been kept confidential. A702 though A703.

Thus there is a problem with Defendant-Appellee's Contracting Officer's Analysis of June 8th, 2009. The United States Government Accountability Office holds that Agency reliance on Offerors' self-serving assessments for resolution of Organizational Conflicts of Interest is "inconsistent" with the mandates of the Federal Acquisition Regulation, *McCarthy/Hunt, JV*, B-402229.2, February 16th, 2010, slip op. at 7, and the United States Government Accountability Office holds that it is un-

reasonable for an Agency to assume that it has mitigated an unequal access to information Organizational Conflict of Interest when the Agency has not first obtained Declarations from affected Contractor personnel who may have had access to competitively useful information, these Declarations showing that non-public information was properly safeguarded:

> The agency asserts that, to the extent that AECOM had access to competitively useful information through its work on the design contract, that information was fully disclosed to other offerors. Moreover, the agency argues that the open-ended nature of the procurement prevented AECOM from being able to supply EB with competitively useful information. In our view, it was precisely the breadth of the discretion left to the offerors in the Phase II competition that would have made any competitively useful, non-public information known to AECOM valuable to EB. To illustrate: had the competition been for an automobile, with a particular carrying capacity, towing capacity, and performance characteristics, there would likely have been a minimal chance that AECOM would have competitively useful information; the specifications, if not the precise vehicle, would be largely established and communicated to all the offerors on an equal basis through the solicitation. In such a situation, the range of possible responses would be relatively limited. In this procurement, in contrast, the requirement was to design and build a replacement hospital of 700,000 square feet costing several hundred million dollars. AECOM was in a position to obtain information regarding the agency's priorities, preferences, and dislikes relating to this broadly defined project. AECOM knew what the agency communicated to the offerors about the type of facility that it preferred—as well as what the agency did not communicate. On this record, we think it was unreasonable for the agency to assume that AECOM did not possess competitively useful information based on its role in the procurement.

McCarthy/Hunt, JV, slip op. at 9.

HEAD OF THE CONTRACTING ACTIVITY APPROVAL WAS REQUIRED FOR THE CONTRACTING OFFICER'S JUNE 2009 ANALYSIS

Defendant-Appellee argues that because its Contracting Officer's June 8th, 2009 Analysis was not completed until a year after the Solicitation was issued and a second, confirming Source Selection had been made, Head of the Contracting Activity Approval was not required for the Contracting Officer's Analysis, here relying on Federal Acquisition Regulation 9.504(d), 48 C.F.R. § 9.504(d) (2008). Defendant-Appellee's Brief, at 16 through 18.

Federal Acquisition Regulation 9.504, 48 C.F.R. § 9.504 (2008) provides, in pertinent part:

> . . . .
>
> (c) Before issuing a solicitation for a contract that may involve a significant potential conflict, *the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.506).*
>
> (d) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. *The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.*
>
> . . . .

Federal Acquisition Regulation 9.504, 48 C.F.R. § 9.504 (2008) (Emphasis added).

Federal Acquisition Regulation 9.506, 48 C.F.R. § 9.506 (2008) provides, in pertinent part:

> . . . .
>
> (b) *If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer shall*, before issuing the solicitation, *submit for approval to the chief of the contracting office (unless a higher level official is designated by the agency)—*
>
> (1) *A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section*;
>
> (2) A draft solicitation provision (see 9.507-1); and
>
> (3) If appropriate, a proposed contract clause (see 9.507-2).
>
> (c) *The approving official shall—*
>
> *(1) Review the contracting officer's analysis and recommended course of action, including the draft provision and any proposed clause;*
>
> *(2) Consider the benefits and detriments to the Government and prospective contractors; and*
>
> *(3) Approve, modify, or reject the recommendations in writing.*
>
> (d) *The contracting officer shall—*
>
> (1) Include the approved provision(s) and any approved clause(s) in the solicitation or the contract, or both;
>
> (2) Consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and
>
> (3) *Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity.*
>
> . . . .

Federal Acquisition Regulation 9.506, 48 C.F.R. § 9.506 (2008) (Emphasis added).

Defendant-Appellee's argument would have this Court read Federal Acquisition Regulation 9.504(d) in isolation, ignoring Federal Acquisition Regulation 9.504(c) which mandates Head of the Contracting Activity approval for Contracting Officer adjustments meant to resolve an Organizational Conflict of Interest, and ignoring Federal Acquisition 9.506(d)(3), which recognizes that prior Head of the Contracting Activity approval or direction is required when a potential Organizational Conflict of Interest is resolved by a Contracting Officer before Contract Award.

Just as Defendant-Appellee promised the United States Government Accountability Office on February 17th, 2009, Defendant-Appellee's Contracting Officer recognized, and documented in June 2009, her judgments and recommendations concerning resolution of the unequal access to information Organizational Conflict of Interest issues raised in the Post-Award Procurement Protest of January 12th, 2009 filed with the United States Government Accountability Office. But these Contracting Officer judgments and recommendations were not reviewed and approved by the Head of the Contracting Activity prior to Contract Award as was required by Federal Acquisition Regulation 9.504(c), by Federal Acquisition Regulation 9.506(c), and by Federal Acquisition Regulation 9.506(d)(3).

This Court cannot read Federal Acquisition Regulation 9.504(d) in isolation from the remainder of Federal Acquisition Regulation 9.504, and this Court may not render any part of Federal Acquisition Regulation 9.504, or any part of Federal Acquisition Regulation 9.506, or even any part of Federal Acquisition Regulation Subpart 9.5, superfluous. *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000). The drafters of the Federal Acquisition System say what they mean in the Federal Acquisition Regulations and the Federal Acquisition Regulation means what it says there. *Geo-Seis Helicopters, Inc. v. United States*, 77 Fed. Cl. 633, 640 (2007). Full effect is to be given to all of the words contained within Federal Acquisition Regulation Subpart 9.5, with as little of this regulatory language as possible rendered superfluous. *Glover*, 185 F.3d, at 1332.

THERE CANNOT BE A CONTRACT WHEN THE CONTRACTING OFFICER LACKED ACTUAL AUTHORITY TO CREATE ONE

As is explained in *McCarthy/Hunt, JV*, slip op. at 12, the ordinary remedy for an unmitigated unequal access to information Organizational Conflict of Interest is elimination of that Offeror from the Competition. Here, Defendant-Appellee's Contracting Officer's judgments and recommendations concerning resolution of the unequal access to information Organizational Conflict of Interest issues raised

in the Post-Award Procurement Protest of January 12th, 2009 were never reviewed and approved by the Head of the Contracting Activity before Contract Award as was required by Federal Acquisition Regulation 9.504(c), by Federal Acquisition Regulation 9.506(c), and by Federal Acquisition Regulation 9.506(d)(3). An un-reviewed and unapproved mitigation of an unequal access to information Organizational Conflict of Interest is not different from an unmitigated unequal access to information Conflict of Interest. These were not minor deviations from the Federal Acquisition Regulations.

Defendant-Appellee's Contracting Officer acted outside the bounds of her actual authority and contrary to the Federal Acquisition Regulation when on June 8th, 2009, A704 through A705, she awarded ITP and its Large Business teaming partner, Wackenhut Services, Incorporated, a five-year Cost Plus Award Fee (no Base Fee) Indefinite-Delivery/Indefinite Quantity Task Order Contract to satisfy support service requirements of the U.S. Department of Energy's National Nuclear Security Administration's Service Center. This Task Order Contract is void. *CACI, Inc. v. Stone*, 900 F.2d 1233, 1236-37 (1993).

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to FED. R. APP. P. 25(d)(1)(B), the undersigned hereby certifies, under the penalty of perjury, that on Monday, March 29th, 2010 he caused to be sent, by Overnight Delivery, expenses prepaid, two copies of the foregoing Reply Brief of Plaintiff-Appellant PAI Corporation to counsel for the United States at the following address:

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/s/ Cyrus E. Phillips IV

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Cyrus E. Phillips IV

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(B)(ii), the undersigned hereby certifies, under the penalty of perjury, that this Reply Brief is set in Adobe's Minion® Pro Opticals, a proportionally-spaced Garalde Oldstyle face; that this Reply Brief is set in face 14-point or larger; and that this Reply Brief contains no more than 7,000 words, *viz.*, that exclusive of the Table of Contents and the Table of Authorities, FED. R. APP. P. 32(a)(7)(B)(iii) and FED. CIR. R. 32(b), it contains 2,794 words out of 338 lines and 16,810 characters. I make this representation based on the "Word Count" Dialog Box as presented on the Status Bar at the bottom of the workspace in Microsoft® Office Word 2007 (12.0.6514.5000) SP2 MSO (12.0.6521.1000).

/s/ Cyrus E. Phillips IV

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