

for its Post-Award Procurement Protest Complaint against the Defendant, the United States, alleges as follows:

INTRODUCTION

1. This is a Post-award Procurement Protest, a Civil Action alleging clear and prejudicial violations of Statute and Regulation in connection with a Federal Agency Acquisition, Solicitation Number DE-RP52-08NA28558, a small business set-aside Solicitation for Competitive Proposals which promises an Award, a single cost plus award fee Contract for a base period of two years with one three-year option period, a Federal Agency Acquisition over which this Court has jurisdiction under 28 U.S.C. § 1491(b)(1).

The Solicitation is issued by the United States Department of Energy's National Nuclear Security Administration's Service Center, South Campus-4, Kirtland Air Force Base, New Mexico (DoE). The proposed Contract requires support services for the National Nuclear Security Administration's Office of Secure Transportation (OST), these including a range of paramilitary training, curriculum development,

logistical management, property management, administrative management, transportation of critical equipment, and other related technical and administrative activities. Included with the proposed Contract is a requirement to transition from the support services currently being provided by a large business support services Contractor, Wackenhut Services, Incorporated (Wackenhut).

This Civil Action is brought to obtain a Declaration that the selection of Innovative Technology Partnerships, LLC, #2 San Rafael Avenue NE, Albuquerque, New Mexico 87122-1167 (ITP) for an Award of the Contract proposed by Solicitation Number DE-RP52-08NA28558 lacks a rational basis and is unreasonable or irrational, and thus arbitrary and capricious because: (1) DoE failed to mitigate the unfair competitive advantage accruing to ITP by reason of ITP's teaming partner Wackenhut's knowledge of non-public information regarding the three sample Task Orders which were a principal focus of the DoE evaluation of the Competitive Proposals; (2) DoE ignored one of three PAI projects and one of two projects from a proposed PAI subcontractor, projects offered by PAI in support of DoE's evaluation of Criterion 3,

“Corporate Experience and Capabilities;” (3) contrariwise, DoE’s rating of ITP’s “Corporate Experience and Capabilities” is grossly overstated because DoE credits ITP with Wackenhut’s previous experience when in fact, under the Limitation on Subcontracting provision of the proposed Contract, Wackenhut may provide only less than half of the labor value; (4) DoE unfairly evaluated PAI’s response to Criterion 1, “Technical Approach to Task Orders,” this by reason of an obvious typographical mistake by PAI and by reason of DoE focus on the title of a particular table in the PAI Competitive Proposal rather than on the overall content of the PAI Competitive Proposal responding to Criterion 1, “Technical Approach to Task Orders;” and (5) DoE is in breach of its obligation to act with integrity, fairness, and openness, and to treat Offerors fairly.

This Civil Action seeks further a Permanent Injunction ordering: (a) that ITP be determined currently ineligible for an Award of the Contract proposed by Solicitation Number DE-RP52-08NA28558 by reason of this unmitigated conflict of interest; and (b) that Solicitation Number DE-RP52-08NA28558 be revised to provide a slate

of labor categories and estimated hours required to perform the sample Task Orders; that Offerors already determined to be within the competitive range be given an opportunity to submit revised Competitive Proposals; and thereafter that a proper Award is to be made from these revised Competitive Proposals.

NATURE OF THE ACTION

2. PAI here challenges the selection on or about June 8th, 2009 of ITP for an Award of the Contract proposed by Solicitation Number DE-RP52-08NA28558. This selection for Award was made on the basis of supposed “best value” because ITP’s Competitive Proposal is claimed to have been the highest technically-rated and to offer the lowest evaluated price, \$3,993,889.

PAI seeks a Declaration that this selection for Award lacks a rational basis and is arbitrary and capricious in violation of applicable procurement Statutes and Regulations.

PAI seeks a Permanent Injunction ordering that that ITP be determined currently ineligible for an Award of the Contract proposed by Solicitation Number DE-RP52-08NA28558.

PAI seeks also a Permanent Injunction ordering that Solicitation Number DE-RP52-08NA28558 be revised to provide a slate of labor categories and estimated hours required to perform the sample tasks; that Solicitation Number DE-RP52-08-NA28558 be re-opened; that Offerors already determined to be in the competitive range be given an opportunity to submit revised Competitive Proposals; and that thereafter a proper Award is to be made from these revised Competitive Proposals.

3. PAI 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.

Such a review will demonstrate that this selection for Award violates Federal Acquisition Regulation 9.504(a)(2) because prior to rating the Competitive Proposals, DoE did not avoid, neutralize, or mitigate the significant competitive advantage en-

joyed by ITP by reason of ITP's access to non-public information regarding the three sample tasks which were a principal focus of the DoE evaluation of the Competitive Proposals.

Such a review will demonstrate that this selection for Award violates Federal Acquisition Regulation 15.308 because there has not been a proper comparative assessment of the Competitive Proposals against the Source Selection Criteria set out in the Solicitation and that this Award violates 41 U.S.C. § 253b(d)(3) because this Award is not made to the Competitive Proposal "most advantageous to the United States" considering "the factors included in the solicitation."

Such a review will demonstrate that this selection for Award violates Federal Acquisition Regulation 1.102(b)(3) and 1.102-2(c)(3) because DoE is in breach of its obligation to act with integrity, fairness, and openness, and to treat Offerors fairly.

This selection for Award lacks a rational basis because this selection for Award is made in violation of Statute and Regulation. There is no reasoned judgment which

can support this selection for Award which is erroneously said to have been made on a “best value” basis.

4. PAI, a responsible contractor, a small and woman-owned business, and an actual Offeror whose Competitive Proposal is in the competitive range and in a position to receive Award of the proposed Contract, is an appropriate “interested party” under 28 U.S.C. § 1491(b)(1), and PAI has a direct economic interest in the outcome of this Post-Award Procurement Protest. *Impreza Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334 (Fed. Cir. 2001).

This Post-Award Procurement Protest is timely filed. PAI received on June 8th, 2009 written notice of the selection of ITP for an Award of the Contract proposed by Solicitation Number DE-RP52-08NA28558. On June 17th, 2009 PAI received an oral debriefing provided in accordance with 41 U.S.C. § 253b(e)(1).

DoE is an Executive Department. 42 U.S.C. § 7131. DoE has the authority to enter into and administer Contracts. 42 U.S.C. § 7256(a). DoE is an “agency” just as that term is defined in 28 U.S.C. § 451, and thus DoE is also a “Federal agency” as is

required by 28 U.S.C. § 1491(b)(1). *Hewlett-Packard Co. v. United States*, 41 Fed. Cl. 99, 103 (1998).

DoE's violations of procurement Statute and Regulation have had a direct and prejudicial effect on PAI. PAI has been denied a proper evaluation of its Competitive Proposal, PAI has been denied a proper "best value" determination, and PAI has not received a reasoned judgment which can support an Award to ITP. As a result of DoE's breach of the implied-in-fact Contract of good faith, fair dealing, and honest consideration, PAI is wasting time and proposal preparation costs. Ultimately, PAI is being unfairly denied the opportunity to compete, on the announced evaluation criteria, for the Award of the Contract proposed by Solicitation Number DE-RP52-08-NA28558.

FACTUAL ALLEGATIONS

SOLICITATION NUMBER DE-RP52-08NA28558

5. Solicitation Number DE-RP52-08NA28558 was issued on August 30th, 2008. This Acquisition is set-aside for small businesses and seeks Competitive Proposals for

support services to be provided to DoE's Office of Secure Transportation (OST). DoE's Office of Secure Transportation (OST) provides safe and secure ground transportation of nuclear weapons, nuclear weapons components, and special nuclear material. And DoE's Office of Secure Transportation (OST) provides safe and secure air transportation of nuclear weapons components.

The Contract proposed by Solicitation Number DE-RP52-08NA28558 requires support services in sixteen discrete Task Areas, these ranging from Training Programs Support through providing Equipment Operators, Munitions Support, Armorer Support, unarmed transportation support, Fleet Vehicle Management Support, and Program and Management Analysis.

The proposed Contract is new. Support services are currently being provided by a large business security support services Contractor, Wackenhut. Wackenhut has provided these support services for the last fifteen years. Because DoE has now set aside this work exclusively for small businesses, Wackenhut is precluded from competing as a prime Contractor.

6. DoE has announced that it will review Competitive Proposals submitted in response to Solicitation Number DE-RP52-08NA28558 against five evaluation criteria: “Technical Approach,” “Key Personnel,” “Corporate Experience,” “Past Performance,” and “Cost.” Technical Approach is evaluated through an Offeror’s narrative of its plans to accomplish three sample Task Orders: Conduct Agent Candidate Training, Conduct Operational Readiness Training, and Provide Commercial, Unarmed Transportation Support. On information and belief, these three sample Task Orders are modeled upon Task Orders already performed by Wackenhut. The Solicitation explains that it is likely that Conduct Agent Candidate Training and Support Operational Readiness Task Orders will be issued concurrently with the Contract proposed by Solicitation Number DE-RP52-08NA28558. Offerors are to provide the resumes of three proposed Key Personnel: “Program Manager,” “Logistics Program Manager,” and “Training Program Manager.” The Corporate Experience criterion is evaluated by DoE review of a narrative describing experience related to the sixteen discrete Task Areas. Past Performance is evaluated based on the experiences of an Offeror and

its team members. Although cost or pricing data is not required by the Solicitation, Cost is evaluated to determine whether proposed costs are reasonable, realistic, and reflect a clear understanding of Solicitation requirements.

7. Offerors are to submit Competitive Proposals in three volumes: Offer and Other Documents, Technical and Management Information, and Cost Proposal. The Technical volume may not exceed seventy pages, but the other volumes are not limited as to size. DoE has announced that it will make a formal Source Selection. Technical Approach, Key Personnel, and Corporate Experience are each worth a maximum of three hundred points. Past Performance is worth a maximum of one hundred points.

8. Solicitation Number DE-RP52-08NA28558 provides this explanation of the basis for Award:

Selection of the best value to the Government will be achieved through a process of evaluating and assessing the strengths and weaknesses of each Offeror's proposal against the evaluation criteria described below. In determining the best value to the Government, the Technical Approach to the Task Orders, Key Personnel, and Corporate Experience are of equal impor-

tance. Each is more important than Past Performance. When combined, the Technical Approach to the Task Orders, Key Personnel, Corporate Experience, and Past Performance are significantly more important than Cost. The Government is more concerned with obtaining a superior technical proposal than making an award at the lowest cost. However, the Government will not make an award at a price premium it considers disproportionate to the benefits associated with the evaluated superiority of one Offeror over another. Thus, to the extent that Offeror's evaluated Technical Approach to the Task Orders, Key Personnel, Corporate Experience, and Past Performance are close or similar in merit, Cost is more likely to be a determining factor.

Solicitation Number DE-RP52-08NA28558, M002 BASIS OF CONTRACT AWARD

(FEB 2005) (TAILORED) (b).

SELECTION FOR CONTRACT AWARD

9. The due date for submission of Competitive Proposals was October 8th, 2008. On December 23rd, 2008 DoE announced that ITP had been selected for an Award. DoE then also announced that the value of the three sample Task Orders as proposed by ITP was evaluated by DoE at \$3,596,026. DoE then evaluated ITP's Competitive Proposal as having obtained two-hundred seventy points for Technical Approach, two-hundred eighty-two points for Key Personnel, three hundred points for Corpo-

rate Experience, and one hundred points for Past Performance. DoE then announced that ITP's Competitive Proposal had obtained the highest technical rating and that ITP's Cost Proposal had been evaluated as the lowest.

ITP'S UNMITIGATED COMPETITIVE ADVANTAGE

10. Again, on information and belief, Wackenhut is a teaming partner and a proposed subcontractor for ITP. Wackenhut has already performed Task Orders for DoE's Office of Secure Transportation (OST) similar, or nearly identical, to the three sample Task Orders set out in Solicitation Number DE-RP52-08NA28558. Wackenhut had likely submitted under its DoE prime Contract plans for the Conduct Agent Candidate Training and Support Operational Readiness Task Orders which will be issued concurrently with the Contract proposed by Solicitation Number DE-RP52-08NA28558. Neither Wackenhut nor ITP nor DoE has provided to other Offerors incurred performance labor categories or cost data for these Task Orders. DoE has not provided the Offerors baseline cost data for these three sample Task Orders to be

used in the DoE evaluation of Competitive Proposals submitted in response to Solicitation Number DE-RP52-08NA28558.

11. ITP itself for the last three years has performed a DoE Contract that includes oversight of the Wackenhut prime Contract and allows ITP access to the details of Wackenhut's performance. One of the members of the Source Evaluation Board appointed to review the Competitive Proposals submitted in response to Solicitation Number DE-RP52-08NA28558 has supervisory responsibilities for the Wackenhut prime Contract.

GAO PROTEST

12. On January 12th, 2009 another of the Offerors which had submitted a Competitive Proposal in response to Solicitation Number DE-RP52-08NA28558 filed with the United States Government Accountability Office (GAO) a timely Post-Award Procurement Protest challenging, among other things, ITP's competitive advantage, a competitive advantage which was unmitigated by DoE.

CORRECTIVE ACTION

13. DoE determined to take corrective action, and on February 23rd, 2009 the GAO Protest (including a successor GAO Protest filed on February 5th, 2009) was withdrawn. On March 18th, 2009 DoE asked the eligible Offerors responding to Solicitation Number DE-RP52-08NA28558 to extend the period for acceptance of their Competitive Proposals; changes or revisions to these Competitive Proposals were neither entertained nor evaluated by DoE.

SECOND SELECTION FOR CONTRACT AWARD

14. On June 8th, 2009 DoE again announced that ITP had been selected for Award of the Contract proposed by Solicitation Number DE-RP52-08NA28558. The DoE evaluated value of the three sample Task Orders as proposed by ITP was increased from \$3,596,026 to \$3,993,889. But there were no changes in the DoE evaluation of the point scores for the ITP Competitive Proposal. Again DoE announced that ITP's Competitive Proposal had obtained the highest technical rating and that ITP's Cost Proposal had been evaluated as the lowest.

15. PAI received its debriefing on June 17th, 2009 and DoE then announced that DoE had not re-evaluated or re-scored Offeror's Competitive Proposals on any of the five evaluation criteria except Cost. It turned out that in scoring PAI's Competitive Proposal on the Corporate Experience criterion, DoE ignored one of three PAI-submitted projects and one of two submitted projects from a proposed PAI subcontractor, while at the same time DoE gave ITP a perfect score on the Corporate Experience criterion, and DoE did not change this score for ITP when DoE purportedly took corrective action.

16. Likewise, DoE misevaluated PAI's Competitive Proposal on the Technical Approach criterion by reason of an obvious typographical mistake by PAI and by reason of DoE focus on the title of a particular table in the PAI Competitive Proposal rather than on the overall content of the PAI Competitive Proposal responding to the Technical Approach criterion.

FIRST CLAIM FOR RELIEF

17. PAI herewith incorporates and re-alleges paragraphs numbers 1. through 16. hereinabove as if fully set forth herein.

18. DoE failed to mitigate the unfair competitive advantage accruing to ITP by reason of ITP's teaming partner Wackenhut's knowledge of non-public information regarding the three sample Task Orders which were a principal focus of the DoE evaluation of the Competitive Proposals.

SECOND CLAIM FOR RELIEF

19. PAI herewith incorporates and re-alleges paragraphs numbers 1. through 16. hereinabove as if fully set forth herein.

20. DoE misevaluated PAI's Competitive Proposal under the Technical Approach criterion and under the Corporate Experience criterion.

THIRD CLAIM FOR RELIEF

21. PAI herewith incorporates and re-alleges paragraphs numbers 1. through 16. hereinabove as if fully set forth herein.

22. DoE's re-evaluation of the value of the three sample Task Orders as proposed by ITP is arbitrary and capricious because the increase from \$3,596,026 to \$3,993,889 is unexplained.

FOURTH CLAIM FOR RELIEF

23. PAI herewith incorporates and re-alleges paragraphs numbers 1. through 16. hereinabove as if fully set forth herein.

24. Selection of ITP for Award of the Contract proposed by Solicitation Number DE-RP52-08NA28558 violates 41 U.S.C. § 253b(d)(3) because this selection for Award is not made to the Competitive Proposal "most advantageous to the United States" considering "the factors included in the solicitation."

FIFTH CLAIM FOR RELIEF

25. PAI herewith incorporates and re-alleges paragraphs numbers 1. through 16. hereinabove as if fully set forth herein.

26. DoE did not equally assess and rate the Corporate Experience of PAI in comparison with DoE's rating of the Corporate Experience of ITP.

SIXTH CLAIM FOR RELIEF

27. PAI herewith incorporates and re-alleges paragraphs numbers 1. through 16. hereinabove as if fully set forth herein.

28. DoE has breached the implied-in-fact Contract of good faith, fair dealing, and honest consideration that DoE entered into with PAI when the Competition under Solicitation Number DE-RP52-08NA28558 commenced.

PRAYER FOR RELIEF

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

1. a Declaration that the selection of ITP for an Award of the Contract proposed by Solicitation Number DE-RP52-08NA28558 lacks a rational basis and is unreasonable or irrational, and thus arbitrary and capricious; and

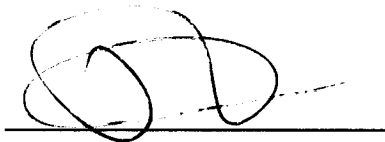
2. a Declaration that ITP is currently ineligible for any Award of the Contract proposed by Solicitation Number DE-RP52-08NA28558 by reason of the unmitigated unfair competitive advantage enjoyed by ITP; and

3. a Permanent Injunction ordering: (a) that Solicitation Number DE-RP52-08NA28558 be revised to provide a slate of labor categories and estimated hours required to perform the sample Task Orders; and (b) that the Solicitation Number DE-RP52-08NA28558 be re-opened, that Offerors already within the competitive range be given an opportunity to submit revised Competitive Proposals, and thereafter that a proper Award is to be made from these revised Competitive Proposals; and

4. a Declaration that PAI is entitled to equitable relief, and money damages, for DoE's breach of the implied-in-fact Contract of good faith, fair dealing, and honest consideration that DoE's National Nuclear Security Administration's Service Center entered into with PAI when the Competition under Solicitation Number DE-RP52-08NA28558 commenced; and

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

Respectfully submitted,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned above a solid horizontal line.

Cyrus E. Phillips IV

Virginia State Bar Number 03135

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