



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Meridian Management Corporation; Consolidated Engineering Services, Inc.

File: B-271557; B-271557.2; B-271557.3

Date: July 29, 1996

Michael A. Gordon, Esq., and Fran Baskin, Esq., Holmes, Schwartz & Gordon, for Meridian Management Corporation; and David M. Nadler, Esq., C. Ernst Edgar IV, Esq., and Robert J. Moss, Esq., Dickstein, Shapiro & Morin, for Consolidated Engineering Services, Inc., the protesters.

Gregory S. Hill, Esq., Tate Facilities Service, Inc., an intervenor.

Charles A. Walden, Esq., Department of Justice, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement for facility management, the contracting agency improperly waived mandatory solicitation requirements regarding the on-site status and qualifications of personnel in selecting a nonconforming offer for award and without notifying other offerors of the agency's actual requirements and providing offerors the opportunity to fairly compete.

DECISION

Meridian Management Corporation and Consolidated Engineering Services, Inc. protest the award of a contract to Tate Facilities Services, Inc. under request for proposals (RFP) No. DEA-95-R-0010, issued by the Drug Enforcement Administration (DEA), Department of Justice, for facility management of the DEA's Lincoln Place Buildings in Arlington, Virginia. Meridian and Consolidated argue that DEA waived the RFP's minimum personnel requirements in making award to Tate.

We sustain the protests.

The RFP provided for the award of a fixed-price contract for facility management, including operation, maintenance, repair, and janitorial services, for two DEA buildings, comprising more than 900,000 square feet of space, for a base year with 4 option years. The minimum level of work and services to be provided was set forth in the statement of work (SOW), which included the requirement that the

contractor "shall provide" personnel in nine "essential labor categories": facility manager, on-site supervisor(s), stationary engineer, general maintenance worker(s), general maintenance helper(s), heating/refrigeration and air conditioning mechanic(s), maintenance plumber(s), maintenance electrician(s), and energy management systems personnel. For each of these labor categories, the RFP stated specific qualification requirements; for example, the RFP provided that:

"[t]he facility manager position requires a minimum of three (3) years of continuous experience within the past five (5) years in the management, operation, maintenance, and repair of equipment and systems of a facility the approximate size of the Lincoln Place facility and support requirements stated herein."

While the RFP did not specifically identify the number of personnel required for each of the nine labor categories, the following question and response was published by the agency concerning mandatory personnel:

"QUESTION: Reference: RFP Section C, para. C.11.7-C.11.9. Please provide a list of mandatory staff positions, indicating which positions are to be on-site personnel.

"RESPONSE: The following personnel must be on-site personnel from the contractor's own staff or from a sub-contractor: facility manager, on-site supervisor(s), engineer, heating/refrigeration and air conditioning mechanic, maintenance plumber(s), maintenance electrician(s), and energy management systems personnel."

In response to another question, the DEA informed offerors that the same person could not be proposed for more than one of the following positions: facility manager, stationary engineer, general maintenance worker, heating/refrigeration and air conditioning mechanic, maintenance plumber, maintenance electrician, and energy management systems operator. Offerors were informed that the questions and answers were not a part of the solicitation and did not qualify terms and conditions of the solicitation.

As amended, the RFP required that contractors' proposed key personnel include the facility manager, on-site supervisors, and energy management system operator, and that offerors provide resumes for their proposed key personnel.

The RFP provided for award on a best value basis and identified the following technical evaluation factors: Management and Plan of Operation (65 points), Experience and Past Performance (20 points), and Key Personnel (15 points).¹ Offerors were informed that the technical evaluation factors were more important than price, for which no specific weighting was identified.

DEA received proposals from eight offerors, including Tate, Consolidated, and Meridian (the incumbent contractor). Four proposals, including Tate's, Consolidated's, and Meridian's, were included in the competitive range. Discussions were conducted, and best and final offers (BAFO) received and evaluated, as follows:

	<u>Technical</u>	<u>Price</u>
Tate	[DELETED]	\$(DELETED]
Offeror A	[DELETED]	\$(DELETED]
Meridian	[DELETED]	\$(DELETED]
Consolidated	[DELETED]	\$(DELETED]

The contracting officer determined that the four BAFOs were technically equal and selected Tate's BAFO for award based on Tate's lowest proposed price. Award was made to Tate, and these protests followed. Performance of Tate's contract has been suspended pending our decision in this matter.

Both protesters contend that the DEA waived mandatory minimum personnel requirements in making award to Tate.

DEA initially argues that neither protester is an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1996), because award was based on the lowest priced of the technically equal offers, and there is an intervening offer between the protesters' and the awardee's proposal. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1994), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., 67 Comp. Gen. 261 (1988), 88-1 CPD ¶ 151. A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7.

¹Subfactors were also identified for each of the technical evaluation factors.

Consolidated responds that none of the lower-priced offers met the mandatory personnel requirements and that it had not been apprised during discussions that the requirements had been relaxed. Meridian argues (and DEA does not rebut) that the intervening offer could not be accepted because the offeror lacked the required license to perform the contract.

As noted, the protests raise the question of whether the agency improperly waived RFP requirements without notifying the protesters and giving them an opportunity to offer on the allegedly relaxed requirements at a revised price. Inasmuch as the appropriate relief, if such an impropriety were found by our Office, would be for the protesters and other offerors to be given an opportunity to compete on the revised specifications, we consider the protesters raising this issue to have a sufficiently direct economic interest in the outcome to be deemed interested parties notwithstanding the existence of the intervening offeror. Eklund Infrared, 69 Comp. Gen. 354 (1990), 90-1 CPD ¶ 328; Tri-Tool Inc., B-229932, Mar. 25, 1988, 88-1 CPD ¶ 310; see Panhandle Venture V; Sterling Inv. Properties, Inc.--Recon., B-252982.3; B-252982.4, Sept. 1, 1993, 93-2 CPD ¶ 142.

Turning to the merits of the protests, Consolidated contends that the agency relaxed the RFP requirements, as clarified by its written responses to the potential offerors' questions in making award based on Tate's proposal. Specifically, while the responses required seven of the nine "essential" labor categories to be filled with on-site, full-time personnel and advised offerors that they could not propose the same person to perform more than one position for six of the categories, Tate's proposal only offered on-site, full-time personnel for [DELETED] labor categories.² Consolidated complains that its proposed price was much higher than all other offerors because it was the only offeror to propose on-site personnel for every mandatory labor category required by the RFP.

²Consolidated asserts in the affidavit of its vice president that, prior to the submission of initial proposals, the vice president inquired of the contracting officer whether the nine labor categories identified as "essential" in the SOW were required to be full-time, on-site positions, as indicated in the answers to the questions sent to the offerors; the vice president attests that the contracting officer informed him that all of the SOW "essential" labor categories were mandatory and that offerors were required to propose full-time, on-site personnel for each of the labor categories. The contracting officer denies having such a conversation with Consolidated's vice president and states that she consistently responded to such questions from offerors in any procurement by referring the questioner to the solicitation. We need not resolve this factual dispute because our decision is based upon the agency's stated requirements in the RFP and its responses to offerors' questions.

It is a fundamental principle of government procurement that competition must be conducted on an equal basis; that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. W.D.C. Realty Corp., 66 Comp. Gen. 302 (1987), 87-1 CPD ¶ 248; Cylink Corp., B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384. Thus, award must be based on the requirements stated in the solicitation, and offerors notified of the government's changed or relaxed requirements. Cylink Corp., *supra*. Moreover, where, as here, an agency disseminates written responses to offerors' questions during the course of a procurement, even where the questions and answers are not expressly incorporated into the RFP, the agency is bound by its responses, where they are not inconsistent with the RFP and one or more of the offerors would be prejudiced if the agency does not adhere to its statements. Colonial Storage Co.; Paxton Van Lines, Inc., B-253501.5 *et al.*, Oct. 19, 1993, 93-2 CPD ¶ 234.

We first note that the DEA's written responses, stating that the staff in seven of the nine labor categories were required to be on-site and from the offeror's or a subcontractor's own staff, and that one individual could not be proposed to fulfill the requirements of more than one of certain designated labor categories, are not inconsistent with the RFP; the RFP is silent as to how offerors were required to staff the identified nine "essential" labor categories, only stating that the contractor "shall provide" personnel in these labor categories.

The record also evidences that the agency waived the requirements established by the foregoing question responses in making the award to Tate and that there is a reasonable possibility that Consolidated was prejudiced by DEA's failure to adhere to its written answers.

Specifically, while Consolidated proposed full-time, on-site personnel in each of the identified mandatory labor categories consistent with DEA's written responses, the record shows that Tate's offered full-time, on-site personnel for only [DELETED] of the mandatory labor categories--Tate's proposal offered on-site personnel in the following labor categories: [DELETED]; Tate's staffing plan does not specifically identify on-site, full-time staff for the categories or staff for the [DELETED] category. Furthermore, Tate's offer of the same person for a number of labor categories (*e.g.*, Tate's offer of an [DELETED]) is not consistent with the agency's instructions that the same individual could not perform in more than one of six designated positions (facility manager, stationary engineer, general maintenance worker, heating/refrigeration and air conditioning mechanic, maintenance plumber, maintenance electrician, and energy management systems operator). Thus, Tate failed to propose full-time, on-site staff for each of the mandatory labor categories specified by the agency as clarified by DEA's written question responses supplied the offerors. While the DEA argues that Tate's "proposal included appropriate information for all mandatory positions within the RFP," it does not identify the

labor categories the agency believes to be mandatory under the solicitation or explain how Tate's proposal satisfied the stated personnel requirements.

Consolidated states that had it known of the agency's actual personnel requirements, its proposed technical approach and staffing, and consequent fixed price, would have been substantially lower. Specifically, [DELETED].³ Thus, on this record, we find a reasonable possibility that Consolidated was prejudiced by the agency's failure to identify its actual needs.

In sum, the DEA waived its stated requirements that the contractor provide full-time on-site staff for identified mandatory labor categories in making the award to Tate, without apprising the offerors of the government's changed requirements and providing them an opportunity to submit a revised proposal, and we sustain Consolidated's protest on this basis. W.D.C. Realty Corp., supra; Cylink Corp., supra.

Meridian asserts that the DEA waived RFP personnel requirements in finding that Tate's proposed facility manager satisfied the requirement that the proposed facility manager have at least 3 years of continuous experience within the past 5 years in the management, operation, maintenance, and repair of equipment and systems in a facility of the approximate size of the Lincoln Place facility. The resume of Tate's proposed facility manager shows that he served as a project manager of the [DELETED] building for the last 2 years and served as a chief engineer at two other sites for the previous 3 years. Meridian argues that the [DELETED] building (120,000 square feet) is substantially smaller than the DEA's buildings and thus does not satisfy the RFP requirements for a facility of the approximate size of the DEA's Lincoln Place facility. Meridian also complains, among other things, that Tate's facility manager's experience as a chief engineer does not satisfy the requirements for facility management experience.

DEA responds, without explanation, that the resume for Tate's proposed facility manager provided sufficient information for the agency to determine that the proposed candidate satisfied the RFP qualification requirements. However, there is no documentation in the record evidencing that the agency considered the qualifications of Tate's proposed facility manager prior to making award or found that the proposed facility manager's past experience satisfied the RFP's stated requirements.

We find no reasonable basis for the agency's conclusion that the resume for Tate's facility manager demonstrated compliance with the RFP requirements and conclude that on this record the agency essentially waived this requirement as well, without

³[DELETED].

so advising the other offerors. It is un rebutted that the [DELETED] building, at which the proposed facility manager served as a project manager, is not of the approximate size of the Lincoln Place facility, as required by the RFP; thus, the record provides no basis for this experience to be used to satisfy the mandatory qualification requirement. Regarding the facility manager's other stated experience as a chief engineer on two other projects, neither the resume, nor Tate's proposal, explains what duties were performed by this individual as chief engineer or why they are comparable to the experience/duties that would be required by the facility manager here. While the intervenor now claims that its proposed facility manager performed, as chief engineer, the duties of a facility manager, there is no evidence (such as an affidavit or declaration from the proposed facility manager detailing his duties and responsibilities as a chief engineer) that this is the case. Accordingly, we also sustain Meridian's protest.⁴

We recommend that the DEA amend the RFP to inform the competitive range offerors of the agency's actual minimum requirements, obtain revised proposals, and make a new source selection decision. If the DEA selects an offeror other than Tate for award, it should terminate Tate's contract and make award to that other offeror. We also recommend that Meridian and Consolidated be reimbursed their costs of filing and pursuing the protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protesters should submit their certified claims for costs to the contracting agency within 90 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

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⁴Meridian also protested that the award to Tate was improper because Tate did not possess required state business licenses and had been purchased by another firm before award. These protest allegations have no merit. Because the RFP did not state specific licensing requirements, the allegation concerning Tate's possession of necessary business licenses concerns the agency's affirmative determination of responsibility, which we will not review under the circumstances presented here. See Shel-Ken Properties, Inc.; McSwain and Assocs., Inc., B-261443; B-261443.2, Sept. 18, 1995, 95-2 CPD ¶ 139. Regarding the purchase of Tate prior to award, the record shows that while Tate's stock was purchased by another firm, Tate, as an entity, continues to exist for the performance of the contract; such circumstances, provide no basis to object to the award. See Sunrise Int'l Group, Inc., B-266357, Feb. 12, 1996, 96-1 CPD ¶ 64.