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## Decision

**Matter of:** OMNIPLEX World Services Corporation

**File:** B-291105

**Date:** November 6, 2002

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Joel Alvarey, Esq., Immigration and Naturalization Service, for the contracting agency.

Thedlus L. Thompson, Esq., for the General Services Administration.

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### DIGEST

Protest that contracting agency's award of a blanket purchase agreement to a firm pursuant to its federal supply schedule (FSS) contract was improper and contrary to the solicitation's terms is sustained where it is unclear from the record whether the services to be provided are within the scope of the offeror's FSS contract; the agency unreasonably determined that the offeror's proposal was technically acceptable; and the agency improperly failed to conduct the price realism evaluation required by the solicitation.

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### DECISION

OMNIPLEX World Services Corporation protests the award of a blanket purchase agreement (BPA) to B&W Technologies under request for proposals (RFP) No. OIS-2-00229, issued by the Immigration and Naturalization Service (INS) to obtain investigative services from three offerors holding a current federal supply schedule (FSS) contract with the General Services Administration (GSA) under schedule 738 X, Human Resources and Equal Employment Opportunity Services, special item number (SIN) 595 21. OMNIPLEX argues that the award to B&W was improper and contrary to the terms of the solicitation.<sup>1</sup>

We sustain the protest.

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<sup>1</sup>OMNIPLEX does not challenge the awards made to the two other offerors.

The INS is responsible for providing certification to institutions of learning that have demonstrated their ability to accept foreign students into their programs. Until recently, participating institutions gathered and submitted the required information manually. However, the INS is currently implementing a centralized, rapid-access electronic reporting system, the Student and Exchange Visitor Information Program, for tracking the more than one million foreigners who are in the United States to attend colleges, universities, and trade schools. As part of this initiative, INS will require that each school be investigated to determine whether it is capable of gathering and submitting information under the new requirements. The INS issued this solicitation to obtain the investigative services to conduct these site visits and assessments.

The solicitation stated that INS intended to acquire these services by awarding a “competitive BPA” to three offerors who have a current contract with GSA under Schedule 738 X, Human Resources and Equal Employment Opportunity Services, SIN 595 21. RFP ¶ 3.1. This SIN, “General Support Services,” includes such services as planning, recruitment and internal placement, pre-employment screening, position classification, personnel actions, training, employee assistance, employee relations, and outplacement. See [www.gsaelibrary.gsa.gov/elib/eLibrary.jsp](http://www.gsaelibrary.gsa.gov/elib/eLibrary.jsp), GSA E-Library Home Page. The RFP stated that all orders would be subject to the terms and conditions of each offeror’s FSS contract. RFP ¶ 2.1.

Award was to be made to the three offerors submitting technically acceptable proposals with the lowest prices, RFP ¶ 4.3, and offerors were required to ensure that their proposals fully complied with all RFP requirements. Id. ¶ 3.3.2.1. To demonstrate their technical capability, offerors were required to meet certain minimum requirements in order to earn a “pass” rating.<sup>2</sup> Among other things, offerors were required to demonstrate that they had immediate access to over 500 investigators and to demonstrate that these investigators were geographically dispersed throughout 40 or more states. RFP ¶¶ 3.3.2.1(1), 4.6.2. As discussed further below, paragraph 7 of the RFP’s statement of work (SOW) included a detailed description of the contractor personnel to be provided.

Price proposals were required to contain all information necessary to allow for a comprehensive evaluation of the prices proposed by the offeror. RFP ¶ 3.3.2.1(3). This information was to include pricing discounts with the proposed labor categories and hours, GSA schedules, a narrative describing all assumptions made by the offeror, and base rates for proposed employees. Id. and RFP ¶¶ 4.6.3, 4.6.4. Each offeror was required to identify a fixed price for an individual assessment per fiscal year, as well as extended pricing. Id.

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<sup>2</sup> Offerors were also required to submit past performance information; the past performance evaluation is not at issue here.

The INS planned to evaluate price proposals for price realism and reasonableness, as well as total evaluated price. The RFP stated that the price analysis would consider that the GSA schedule price had been deemed fair and reasonable; however, the discounted price might be considered unrealistic if the base rate (the salary the employee receives) was insufficient to retain quality personnel and keep turnover to a reasonable level. The government would conduct its price analysis using one or more of the techniques specified in Federal Acquisition Regulation (FAR) § 15.404-1(b). RFP ¶ 4.6.3. Proposals that were unrealistic in terms of technical commitment or unrealistically low in costs (e.g., had unrealistic base rates for one or more labor categories) and/or price would be deemed to show an inherent lack of technical competence or failure to comprehend the complexity and risk of the BPA requirements, which might be grounds for rejection of the proposal. Id. ¶ 4.6.4.

INS evaluated the proposals it received from five vendors, conducted discussions, and received and evaluated revised proposals. All offerors were rated “pass” under the technical capability and past performance factors, with the following total prices:

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|-----------|--------------|
| USIS      | \$23,250,000 |
| ManTech   | \$23,749,950 |
| B&W       | \$31,516,500 |
| OMNIPLEX  | \$(DELETED)  |
| Offeror E | \$(DELETED)  |

Award was made to USIS, ManTech, and B&W, the three offerors with the lowest prices, and this protest followed. The INS subsequently determined that urgent and compelling circumstances existed that would not permit the agency to wait for our decision to proceed with performance. 31 U.S.C. § 3553(d)(3)(C)(i) (2000).

OMNIPLEX asserts that the BPA awarded to B&W improperly exceeds the scope of the firm’s FSS contract. OMNIPLEX also argues that the agency improperly evaluated B&W’s technical proposal as “passing” or technically acceptable. OMNIPLEX finally argues that B&W’s proposal failed to conform to the RFP’s requirements concerning the submission of pricing information and that, as a result, the INS failed to evaluate B&W’s price proposal in accordance with the RFP’s terms.

As a preliminary matter, we address the issue of BPAs and our standard of review. The RFP stated that INS intended to issue a BPA against the offeror’s GSA FSS contract. See FAR § 8.404(b)(4). A BPA is meant to serve as “a simplified method of filling anticipated repetitive needs for supplies or services by establishing ‘charge accounts’ with qualified sources of supply . . . .” FAR § 13.303-1(a). Here, it appears that INS and the private parties view the issuance of BPAs as the form of “down-select” that will effectively determine which vendors INS will consider to meet its requirements. Presumably because the process of issuing BPAs is serving as a key step in the selection process, the agency, instead of simply choosing among FSS vendors (with or without a BPA “charge account”), elected to conduct what was

treated as a Part 15 negotiated procurement, beginning with the issuance of the RFP and continuing through the evaluation and selection process. Where an agency handles the selection of vendors for an FSS order, or for an FSS BPA, like a competition in a negotiated procurement, and a protest is filed challenging the outcome of the competition, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. See COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5. Here, the agency issued a request for proposals, and the RFP specifically stated that the source selection was to be conducted and selection made in accordance with the guidelines set forth in the FAR, and set forth specific procedures for the evaluation of proposals. RFP ¶ 4. Accordingly, while the provisions of FAR Part 15, which govern contracting by negotiation, do not directly apply, Computer Prods., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 at 4, we analyze OMNIPLEX's contentions by the standards applied to negotiated procurements. Labat-Anderson, Inc., B-287081 et al., Apr. 16, 2001, 2001 CPD ¶ 79 at 6.

#### Scope of B&W's FSS Contract

B&W holds a current FSS contract under Schedule 738 X, SIN 595 21. B&W's FSS contract lists various services, including forecasting the future demand for and supply of employees; recruitment and internal placement; pre-employment screening; position classification; training; employee relations services; and outplacement services. The contract also lists various labor categories, including personnel clerks and assistants, staffing specialists, classification specialists, employee relations specialists, employee development specialist, and subject matter expert. B&W Schedule Price List at 7-11. B&W proposed to meet the solicitation's requirements with its own personnel and a team of subcontractors. Under this approach, B&W was to perform oversight and management services; [DELETED] was to perform document analysis, data entry, quality control, and tracking; and [DELETED] was to perform field investigation work. B&W Technical Proposal at 1.

OMNIPLEX argues that the BPA awarded to B&W exceeds the scope of its FSS contract and is not based upon or related to that contract, citing the fact that B&W failed to link any of the services it proposed to perform to any of the services, labor categories, or prices listed in its FSS contract.

As a general rule, contracting agencies are required to obtain full and open competition in the procurement of supplies and services. 41 U.S.C. § 253(a)(1)(A) (2000); FAR § 6.101. The FSS program, directed and managed by GSA, gives federal agencies a simplified process for obtaining commonly used commercial supplies and services. FAR § 8.401(a). The procedures established for the FSS program satisfy the requirement for full and open competition. 41 U.S.C. § 259(b)(3); FAR § 6.102(d)(3); Sales Res. Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 3. However, non-FSS products and services may not be purchased using FSS procedures; instead, their purchase requires compliance with the

applicable procurement laws and regulations, including those requiring the use of competitive procedures. See T-L-C Sys., B-285687.2, Sept. 29, 2000, 2000 CPD ¶ 166 at 4; SMS Sys. Maint. Servs., Inc., B-284550.2, Aug. 4, 2000, 2000 CPD ¶ 127 at 2; Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18 at 3-4.

Consistent with this legal framework, GSA requires that, when teaming arrangements are being made, all team members hold FSS contracts, GSA's Oct. 30, 2002 Comments at 1, and the RFP here required that services provided by team members must be within the scope of their contracts. RFP ¶ 3.1. While a schedule contractor may be permitted to use subcontractors to provide the services already included in its FSS contract, in our view, it may not properly use subcontractors to offer services not included in either its own or those companies' FSS contracts, since this would mean that it was improperly including non-FSS goods or services in an FSS sale. See Pyxis Corp., *supra*.

In this procurement, we have concern that the INS may be improperly taking advantage of the convenience of the FSS ordering system to enter into a BPA with a vendor for services that are not included in the scope of that vendor's FSS contract or to order services from vendors (whether as "team" members or subcontractors) who do not hold FSS contracts for those services.<sup>3</sup> In particular, it appears that the INS has awarded a BPA to B&W that exceeds the scope of the services covered by that firm's FSS contract. B&W's proposal did not link any of the services it and its subcontractors proposed to provide to any of the services, labor categories, or prices listed in its FSS contract. OMNIPLEX appears to accept that two positions in B&W's FSS contract might cover the investigative services B&W proposed to provide through its subcontractor [DELETED], but it is not clear to us that this is the case. It is also not clear from B&W's FSS contract that any of its services or labor categories encompass the oversight and management functions B&W proposed to provide itself, or the data management functions B&W proposed to provide through its

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<sup>3</sup> The agency's position on whether B&W's "team" is comprised of subcontractors or teaming partners, see FAR Part 9.6, has changed during the pendency of the protest. While B&W's proposal is not entirely clear on this issue, for the sake of this decision, we assume that the agency's most recent position—that they are subcontractors—is correct. As GSA's guidance on the multiple award schedules program makes clear, however, there are material differences between the two teaming structures. GSA's Multiple Award Schedules Program Owner's Manual at 27-30. As noted above, if B&W's proposal were viewed as a teaming arrangement, both [DELETED] and [DELETED] would have to be proposing services included in their FSS contracts (which are, we note, under schedules other than the one from which the agency intended to order). The INS does not appear to have considered whether the services those two firms propose to provide here are within the scope of their FSS contracts. In implementing our recommendation, the INS may need to clarify B&W's intentions and the scope of the other firms' FSS contracts.

subcontractor [DELETED].<sup>4</sup> Notwithstanding the apparent disconnect between the services offered in B&W's proposal and the services covered by its FSS contract, there is no evidence that the INS ever considered whether the services B&W and its subcontractors offered to provide were covered by B&W's FSS contract. The INS appears to erroneously believe that it was not required to make this inquiry as long as B&W held a current FSS contract under schedule 738 X, SIN 595 21, see Agency Oct. 29, 2002 Response to GAO Questions at 4, and it has failed to address this question despite several requests from our Office to do so.

In view of the fact that the BPA awarded to B&W appears to have exceeded the scope of that firm's FSS contract, we sustain the protest on this basis. See T-L-C Sys., supra; American Mgmt. Sys., Inc., B-216998, July 1, 1985, 85-2 CPD ¶ 3 at 7.

### Evaluation of Technical Proposals

OMNIPLEX argues that B&W's proposal did not meet all of the RFP's technical requirements and that the INS improperly found the proposal technically acceptable.

In considering a protest challenging an agency's evaluation of proposals, we will examine the record to determine whether the agency's judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. ENMAX Corp., B-281965, May 12, 1999, 99-1 CPD ¶ 102 at 2. We have reviewed the solicitation, B&W's proposal, and the evaluation materials and, based on the record before us, are unable to conclude that the evaluation was reasonable.

Offerors were required to ensure that their proposals fully complied with all RFP requirements and to clearly demonstrate their technical capability. RFP ¶ 3.3.2.1. To earn a passing rating, offerors were required to demonstrate that they had immediate access to over 500 investigators and that these investigators were geographically dispersed throughout 40 or more states. Id. at ¶ 4.6.2.; see also id. at ¶¶ 3.3.2.1(1); 4.6.2. These requirements are drawn from the SOW paragraph outlining the requirements for contractor personnel. That paragraph reads, in its entirety:

The Contractor shall have immediate access to over 500 investigators. The Contractor shall provide trained investigators nationwide who have the required knowledge and expertise in performing time-sensitive investigations, test and evaluation, certification and accreditation and compliance audits and inspections. Investigators should be knowledgeable in the laws, regulations and procedures applicable to this program. Individuals should be proficient in fact-

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<sup>4</sup> In contrast, the record shows that the FSS contracts held by OMNIPLEX and at least one of the awardees encompass all of the services they propose to provide.

finding, threat and risk assessment skills, and be able to provide thorough, accurate and unbiased investigative support. Personnel shall be geographically dispersed in order to respond within the established timeframe while providing the highest quality product.

RFP SOW ¶ 7.

When read as a whole, the RFP clearly requires offerors to show immediate access to more than 500 investigators, over a wide geographical area, who meet the requirements of SOW ¶ 7. The INS agrees with OMNIPLEX that the RFP “requested 500 trained investigators.” Agency’s Sept. 30, 2002 Response to GAO Questions at 7.

B&W proposed [DELETED] as its field investigation subcontractor and stated that the firm currently performs residential and commercial inspections. B&W Technical Proposal Cover Letter at 2. B&W’s proposal states that “[b]y leveraging its existing workforce and its expertise in hiring and training new field investigators, [DELETED] can provide adequate resources to complete school certifications for the INS. The company currently maintains a full-time workforce of more than [DELETED] field representatives who can support the required school visits.” B&W Technical Proposal at 1.

In responding to the specific requirements of SOW ¶ 7, B&W states:

[DELETED] maintains a full-time, geographically dispersed workforce of more than [DELETED] field representatives to support site visit inspection requirements for a wide range of customers. . . . [DELETED] will train its existing field representatives to ensure they are qualified investigators for the INS school certification program. Through this training, the investigators will acquire the requisite knowledge and expertise in performing time-sensitive investigations; comprehensive testing and evaluations; and certification, accreditation, and compliance audits and inspections. They will also become knowledgeable in the laws, regulations, and procedures applicable to this program. With experience on other Federal contracts, [DELETED]’s field representatives are already proficient in fact-finding and threat and risk assessment skills, and they have expertise in providing thorough, accurate, and unbiased investigative support.

Id. at 8.

OMNIPLEX argues that B&W’s proposal does not meet the requirement to show immediate access to “trained investigators,” but simply shows that it has access to more than 500 “field representatives” who will receive training in the future in order to meet the requirements of SOW ¶ 7. We agree.

The INS is incorrect when it argues that B&W's references to the provision of training apply to newly hired employees. B&W's proposal clearly states that it "will train its **existing** field representatives to ensure they are qualified investigators for the INS school certification program."<sup>5</sup> B&W Technical Proposal at 8 (emphasis added). The INS is also incorrect when it argues that B&W's references to the provision of training simply mean that the investigators will be trained to ensure they understand what the INS desires from them as concerns the INS school certification program. In response to the SOW ¶ 7 requirement to "provide trained investigators nationwide who have the required knowledge and expertise in performing time-sensitive investigations, test and evaluation, certification and accreditation and compliance audits and inspections," B&W's proposal clearly states that, "[t]hrough this training, the investigators **will acquire** the requisite knowledge and expertise in performing time-sensitive investigations; comprehensive testing and evaluations; and certification, accreditation, and compliance audits and inspections." Id. (emphasis added).

The record shows that the evaluators took no notice of B&W's failure to propose trained investigators but only considered the number of personnel proposed and their geographic dispersion. While the RFP does not explicitly provide that offerors must demonstrate immediate access to more than 500 "trained" investigators, the solicitation, when read as a whole, requires that the investigators to be provided be "trained investigators." Even if we could not conclude that B&W's failure in this regard must result in a finding of technical unacceptability, it clearly could have affected the evaluators' conclusion that B&W's proposal was technically acceptable. Accordingly, we conclude that the evaluators had to consider whether B&W's failure to propose personnel meeting the requirements of the solicitation made its proposal technically unacceptable, and we sustain the challenge to the evaluation in this area. ENMAX Corp., supra, at 4.

#### Evaluation of Price Proposals

The solicitation required offerors to provide "all information necessary to allow for a comprehensive evaluation of the prices proposed by the [o]fferor." RFP ¶ 3.3.2.1.(3). Such information included pricing discounts with the proposed labor categories, hours, and base rates, applicable GSA schedule contracts, and a narrative fully describing all assumptions. RFP ¶¶ 3.3.2.1.(3), 4.6.3, 4.6.4. Price was to be evaluated "for price realism and reasonableness," and discounted prices might be found unrealistic if the base rate (the salary an employee receives) is "insufficient to retain quality personnel and keep turnover to a reasonable level." RFP ¶¶ 4.6.3, 4.6.4. Proposals that were unrealistic in terms of technical commitment or unrealistically

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<sup>5</sup> It is also unclear from the record whether [DELETED]'s "field representatives" are, in fact, "investigators" as required by the RFP.

low in costs (“e.g., unrealistic base rates for one or more labor categories”) and/or price would be deemed to show an inherent lack of technical competence or failure to comprehend the complexity and risk of the BPA requirements. RFP ¶ 4.6.4. The government planned to conduct its analysis of prices using one or more of the techniques specified in FAR § 15.504-1(b).

OMNIPLEX argues that B&W’s proposal failed to conform to these requirements because it failed to include labor categories, hours, and base rates for all of the services promised in its technical proposal and, while it mentioned several [DELETED], it failed to provide any of the [DELETED]. In the absence of this information, OMNIPLEX argues, the agency did not and could not evaluate B&W’s price proposal in accordance with the RFP’s terms.

The agency’s evaluation of price proposals consisted solely of a comparison of each offeror’s proposed per-assessment price with those of the other offerors and the independent government cost estimate. The agency argues that, although the RFP requested labor categories, hours, and base rates, this data did not play a role since it was not material in evaluating the proposals. The INS asserts that since this is a fixed-price contract, what was “truly relevant” was the fixed-price per-assessment rate the offeror was charging for a given fiscal year. Agency’s Oct. 29, 2002 Response to GAO Questions at 5. Since B&W’s rate fell into the mid-range of all rates proposed, the agency determined that its price was reasonable.

The analysis performed by the INS was for price reasonableness, an analysis involving the evaluation of a proposed price without evaluating its separate cost elements and proposed profit, using such techniques as comparison of proposed prices received in response to the solicitation. FAR § 15.404-1(b) (defining “price analysis”). Even if the INS had sufficient information to determine price reasonableness notwithstanding B&W’s failure to comply with the RFP’s requirements for the submission of pricing information, the RFP also explicitly required the agency to conduct a price realism evaluation.

Where, as here, a BPA contemplating fixed-price task orders is to be awarded, the “realism” of offerors’ proposed prices is not ordinarily considered, since a fixed-price contracting vehicle places the risk and responsibility for contract costs and ensuing profit or loss on the contractor. Labat-Anderson, Inc., supra, at 8. However, because there is a risk of poor performance in certain circumstances, such as where a contractor fails to obtain and keep qualified personnel, see Research Mgmt. Corp., B-237865, Apr. 3, 1990, 90-1 CPD ¶ 352 at 8, an agency may, in its discretion, provide for a price realism analysis in the solicitation of fixed-price proposals. See Hydraulics Int’l, Inc., B-284684, B-284684.2, May 24, 2000, 2000 CPD ¶ 149 at 14. The nature and extent of an agency’s price realism analysis are matters within the agency’s discretion. Cardinal Scientific, Inc., B-270309, Feb. 12, 1996, 96-1 CPD ¶ 70 at 4.

The INS did not conduct a price realism evaluation; the contracting officer states that she conducted a “price analysis in lieu of a price realism evaluation.” Contracting Officer’s Statement, Oct. 29, 2002, at 1. However, the solicitation required the INS to evaluate price proposals for both price reasonableness and price realism. The two types of analysis have two very different purposes and are not interchangeable. The argument raised by counsel for the INS, that the agency used the “wrong wording” in the RFP and should have called for a “price analysis” and not a “price realism” evaluation, Agency’s Oct. 29, 2002 Response to GAO Questions at 5, is both unsupported by any such explanation from the contracting officer and wholly unpersuasive. The solicitation did not merely use the term “price realism” but explained, in detail, what the agency planned to evaluate—the salaries the employees were to receive (the “base rates”)—and why it planned to evaluate them. The agency’s failure to conduct a price realism evaluation of any proposal was clearly contrary to the solicitation’s requirements. See M&S Farms, Inc., B-290599, Sept. 5, 2002, 2002 CPD ¶ \_\_ at 12. Moreover, we believe the record demonstrates that OMNIPLEX was prejudiced by the agency’s failure to evaluate proposals for price realism. As OMNIPLEX explains, its proposal [DELETED] its FSS contract, and if it had known that the INS did not intend to evaluate price realism to ascertain whether discounted rates were too low to reflect adequate technical commitment and/or to ensure the retention of qualified personnel, it might have [DELETED]. OMNIPLEX Supplemental Comments, Oct. 30, 2002, at 4.

We recommend that the INS reevaluate technical and price proposals in a manner consistent with the solicitation’s stated evaluation criteria, and make a new source selection decision based upon that reevaluation. If the INS did not actually intend to evaluate proposals for price realism, the INS should amend the solicitation accordingly and permit the submission of revised proposals for evaluation. We also recommend that the INS review B&W’s proposal to ascertain whether the services it proposes to provide are within the scope of its FSS contract and take appropriate action based upon its findings. As explained above, if the INS finds that B&W has proposed to provide services not covered by its FSS contract, it may not properly awarded the firm a BPA under its FSS contract to provide those services. If the new source selection decision determines that offerors other than the current awardees are in line for award, the INS should terminate the appropriate contracts and make award to the successful offerors. We also recommend that OMNIPLEX be reimbursed its costs of filing and pursuing the protests, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1) (2002). OMNIPLEX should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa  
General Counsel