

United States Court of Appeals for the Federal Circuit

INSERSO CORPORATION,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

FEDITC, LLC, RIVERSIDE ENGINEERING, LLC,
Defendants

2019-1933

Appeal from the United States Court of Federal Claims
in No. 1:18-cv-01655-LAS, Senior Judge Loren A. Smith.

Decided: June 15, 2020

RICHARD P. RECTOR, DLA Piper LLP (US), Washington, DC, for plaintiff-appellant. Also represented by DAWN STERN; CARL BRADFORD JORGENSEN, Austin, TX.

ANTHONY F. SCHIAVETTI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by JOSEPH H. HUNT, ROBERT EDWARD KIRSCHMAN, JR., DOUGLAS K. MICKLE.

Before REYNA, MAYER, and TARANTO, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TARANTO.

Dissenting opinion filed by *Circuit Judge* REYNA.

TARANTO, *Circuit Judge*.

The United States Defense Information Systems Agency (DISA), which is part of the U.S. Department of Defense, awarded contracts to multiple firms that bid for the opportunity to sell information technology services to various federal government agencies. Inersso Corporation unsuccessfully competed to be one of the firms awarded a contract. In an action filed against the United States in the Court of Federal Claims, Inersso alleged that DISA disclosed information to certain other bidders but not Inersso, giving the rival bidders an unfair competitive advantage. The Court of Federal Claims held that DISA's disclosure did not prejudice Inersso in the competition and on that basis entered judgment in favor of the government. *Inersso Corp. v. United States*, 142 Fed. Cl. 678 (2019).

We agree that judgment in favor of the government is appropriate, but on a different ground. We conclude that, because Inersso did not object to the solicitation when it was unreasonable to disregard the high likelihood of the disclosure at issue, Inersso forfeited its ability to challenge the solicitation in the Court of Federal Claims. We do not reach the prejudice portion of the court's decision. We therefore vacate that decision and remand for the court to enter judgment consistent with this opinion.

I

On March 2, 2016, DISA publicly posted Solicitation No. HC1028-15-R-0030 (Encore III). The solicitation invited firms to bid for the opportunity to enter into indefinite-delivery/indefinite-quantity contracts under which the awardees would provide information-technology services to

the Department of Defense and other federal agencies. The solicitation states that the contracts would involve fixed-price and cost-reimbursement task orders and that awards of contracts would be made to offerors whose proposals provided the best value to the government and satisfied the evaluation criteria.

The solicitation lists three criteria for evaluating proposals: (1) the bidder's technical/management approach, (2) the bidder's past performance, and (3) cost/price information. For the evaluation of price, the solicitation states, DISA would calculate a "total proposed price" and a "total evaluated price." J.A. 101918. The total proposed price would be calculated by applying government-estimated labor hours for each year of contract performance to each offeror's proposed fixed-price and cost-reimbursement labor rates; in turn, the total evaluated price would be calculated by adjusting any cost-reimbursement rates that DISA determined were unrealistic. The proposals with the lowest total evaluated price would then be evaluated for compliance with the other terms of the solicitation.

DISA divided the Encore III competition into two competitions. One competition would award a "suite" of contracts in a "full and open" competition; the other would award a suite of contracts to small businesses. J.A. 101891. DISA anticipated awarding up to twenty contracts in each competition.

Importantly, the solicitation expressly states that small businesses could compete in both competitions but could receive only one award. J.A. 101892. The solicitation also provides that firms could compete through joint ventures or partnerships. J.A. 101907. Under those provisions, several firms that bid in the small-business competition in fact also competed in the full-and-open competition as part of joint ventures. Inerso competed only in the small-business competition.

Bidders in both competitions submitted their proposals by October 21, 2016. But the timing of the two competitions quickly diverged. On November 2, 2017, DISA notified successful and unsuccessful bidders in the full-and-open competition of their award status. By November 8, 2017, *i.e.*, less than a week later, DISA completed the debriefing process by which it discloses certain details of the agency's selection decision to winners and losers. *See* 48 C.F.R. § 15.506.

DISA had not yet completed evaluating the proposals submitted in the separate small-business competition and was still communicating with bidders in that competition. By October 18, 2017, DISA had received responses to the first round of evaluation notices it had sent to small-business bidders. Even after November 2, 2017, DISA sent several more rounds of evaluation notices to small-business bidders. DISA did not request final proposal revisions from the small-business bidders until April 2018. *See* 48 C.F.R. § 15.307. Ultimately, such bidders had until June 20, 2018, to submit their final revised proposals for the small-business competition.

DISA notified successful and unsuccessful bidders of its award decisions for the small-business suite on September 7, 2018. Inserso did not receive an award because its total evaluated price was the 23rd lowest in a competition for twenty slots. DISA attached a debriefing document to its notice to Inserso. The debriefing included—among other things—the total evaluated price for the twenty awardees and some previously undisclosed information on how DISA had evaluated the cost element of the proposals.

In response to its debriefing, Inserso sent follow-up communications to DISA. Inserso noted that several awardees in the small-business competition had also competed in the full-and-open competition as part of joint ventures or partnerships, and it asked whether those entities had received similarly detailed debriefings at the

conclusion of the full-and-open competition (in fall 2017). Inersso expressed concern that, if so, the earlier debriefing would have provided unequal information giving a competitive advantage to some of the bidders in the pending small-business competition. In response, DISA stated that all unsuccessful bidders in both competitions were given similarly detailed information in their debriefings.

On September 12, 2018, Inersso filed a protest in the United States Government Accountability Office (GAO). *See* 4 C.F.R. §§ 21.1–21.2. On October 17, 2018, GAO dismissed Inersso’s protest because another party was challenging the same solicitation at the Court of Federal Claims. *See id.*, § 21.11(b).

On October 25, 2018, Inersso filed its own complaint in the Court of Federal Claims, alleging that the full-and-open debriefing gave certain offerors in the small-business competition a competitive advantage by providing them, but not other bidders, the total evaluated price for all full-and-open awardees and previously undisclosed information regarding DISA’s evaluation methodology. Inersso alleged that this unequal provision of information created an organizational conflict of interest in violation of 48 C.F.R. §§ 9.504, 9.505 and, in addition, violated at least one regulation specifically addressed to disparate treatment of bidders, 48 C.F.R. § 1.602-2(b). Inersso moved for judgment on the administrative record, and the government opposed Inersso’s motion and cross-moved for judgment on the administrative record.

The Court of Federal Claims ruled in favor of the government. Without definitively finding a violation, the court recognized that the challenged disclosure of information might have violated the identified regulatory standards, stating in particular that the total evaluated prices of the winners of the full-and-open competition “provided a useful comparison tool that [small-business-competition] offerors could utilize as a benchmark in revising their price

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