



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Techno-Sciences, Inc.

File: B-277260

Date: September 22, 1997

Minh N. Vu, Esq., Latham & Watkins, for the protester.
R. P. Sharma, Ph.D., Research and Professional Services, an intervenor.
Alden F. Abbott, Esq., and Amy Freeman, Esq., Department of Commerce, and
Audrey H. Liebross, Small Business Administration, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency did not properly determine that the price for a contract for nonproprietary software development and maintenance services noncompetitively awarded under the Small Business Administration's section 8(a) program did not result in a cost to the agency that exceeded a fair market price where the agency's estimate of fair market price did not consider the protester's price for already developed nonproprietary commercial software that may satisfy the agency's requirements.

DECISION

Techno-Sciences, Inc. protests the award of a contract to Research and Professional Services, Inc. (RPS) negotiated through the Small Business Administration's (SBA) section 8(a) set-aside program,¹ under request for proposals (RFP) No. 50-DDNE-7-90034, issued by the National Oceanic and Atmospheric Administration (NOAA) for software development, testing, and maintenance. Techno-Sciences contends that the price at which the contract was awarded to RPS exceeds the fair market price.

We sustain the protest.

NOAA initiated this procurement to obtain nonproprietary software to replace Techno-Sciences's proprietary software that currently operates the United States Mission Control Center (USMCC). The USMCC is the United States' component of

¹Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to contract with government agencies and arrange for performance of those contracts by awarding subcontracts to small socially and economically disadvantaged businesses.

the International Cospas-Sarsat satellite-based search and rescue system that uses satellites to detect and locate emergency beacons carried by ships, aircraft, or individuals.² The system was the product of an international agreement between the United States, France, Canada, and the former Soviet Union, and today encompasses 23 additional nations; it is comprised of a network of satellites, ground stations, mission control centers (MCC), and rescue coordination centers. When an emergency beacon is activated the signal is received by a satellite and relayed to a ground station (local user terminal (LUT)), which processes the signal and calculates the position of the signal. The position is then transmitted to an MCC which transmits an alert message to the appropriate rescue coordination center based on the geographic location of the signal. The USMCC must also perform certain unique national requirements beyond the International Cospas-Sarsat requirements.³

NOAA originally developed an IBM mainframe-based USMCC in 1986. In 1990, NOAA contracted with Techno-Sciences for the LUT and MCC maintenance services. In 1992, NOAA modified that contract to have Techno-Sciences create software to operate the USMCC from a PC (personal computer)-based system; under that contract Techno-Sciences had ownership of the software. In May 1994, NOAA let a sole-source contract priced at \$1,978,044 to Techno-Sciences for a base year with four option periods for corrective and adaptive maintenance of the software, including continuously upgrading Techno-Sciences's software to comply with the dynamic USMCC requirements, including those of Cospas-Sarsat; this contract contained guaranteed minimum prices of \$200,000 for each option period.

²Cospas is the acronym for *cosmicheskaya sistyema poiska avariynich sudov*, which means space system for the search of vessels in distress in Russian.

³These unique requirements include the following: (1) message production for applications involving the Department of Defense for pilots in distress, NASA for astronauts in distress, the Department of Energy, the Drug Enforcement Agency, and several state governments; (2) interface with the NOAA Central Environment Meteorological Satellite Computer System; (3) processing of instrument telemetry data for the instruments on board the NOAA satellites; (4) handling for instrument commands and command verifications; (5) data interfaces to the unique data bases of the USMCC; and (6) message production for the Rescue Coordination Centers of the United States Coast Guard and Air Force.

To eliminate the government's reliance upon proprietary software to operate the USMCC, NOAA began ongoing negotiations with Techno-Sciences in February 1995 to obtain proprietary rights in its software; these negotiations were unsuccessful.⁴ Between February and April 1996, the agency and Techno-Sciences again undertook negotiations regarding data rights in the software, during which Techno-Sciences proposed to provide NOAA with a licensed copy of its proprietary source code for "unrestricted use by NOAA in the development and administration of the USMCC" at no additional charge under its contract.⁵ In exchange for the source code and other promises, Techno-Sciences requested that NOAA exercise all the remaining options under its current contract (priced at \$600,000). The record reflects that it was anticipated that these discussions were to continue. In the interim, NOAA attempted to negotiate a reduction to the guaranteed minimum price contained in Techno-Sciences's contract because the government believed the price to be higher than the value of the potential services to be rendered. No agreement was reached between the parties and NOAA determined that exercising the option for the period May 10, 1996, to May 9, 1997, was not in the government's best interest.

On November 11, 1996, NOAA issued a requisition to purchase development of nonproprietary software to replace Techno-Sciences's proprietary software. On November 18, NOAA offered the requirement to the SBA to be performed under the section 8(a) program and identified RPS as the recommended contractor for this requirement. The contract was to have a 12-month base period and three 12-month options at a total estimated value of \$500,000.⁶ On November 26, 1996, the SBA

⁴NOAA has produced typed notes documenting an oral conference call held with Techno-Sciences which reflect that Techno-Sciences would not agree to a contract to sell ownership of its software and would only part with the source code for \$2 million.

⁵During the negotiations, Techno-Sciences offered, among other things, to grant NOAA rights to access maintenance, development, and modification of the software for use at USMCC, and the right to disclose the software to its contractors for this purpose, provided that the contractors agreed to nondisclosure. As discussed below, NOAA argues that these proposals were unacceptable because of NOAA's need to possess ownership of the software.

⁶There is no contemporaneous documentation reflecting the agency's methodology for arriving at this original fair market price estimate; however, in an affidavit in response to the protest NOAA explains that this estimate was inadequate and understated because it was based upon faulty assumptions. NOAA asserts that it used an old "rule of thumb" that it cost \$50,000 per programmer year, which resulted in an estimate of \$200,000 for system development and \$100,000 annually for out-year system maintenance. It now argues that this estimate was

(continued...)

nominated RPS as the 8(a) contractor. On March 14, 1997, following negotiations with RPS, and after determining its costs to be reasonable, NOAA awarded a cost-plus-fixed-fee 8(a) contract to RPS at a total estimated cost of \$829,256, reflecting a base estimated cost of \$323,650 and estimated costs for the option years of \$160,518, \$168,472, and \$172,617, respectively.

Meanwhile, at the International Cospas-Sarsat manufacturers' meeting on October 24, 1996, Techno-Sciences introduced its fourth generation MCC software purportedly satisfying all of the current Cospas-Sarsat requirements at an advertised price of \$100,000. Several NOAA officials were in attendance and had general conversations with Techno-Sciences about the software. In November 1996, Techno-Sciences informed NOAA of its interest in participating in a competition for its USMCC software development and maintenance requirement. On April 8, 1997, Techno-Sciences presented NOAA with an unsolicited offer to provide its fourth generation software at a price of \$100,000. On May 9, NOAA informed Techno-Sciences of the award to RPS and subsequently disclosed the award price in response to Techno-Sciences's Freedom of Information Act request. This protest within 10 calendar days of being apprised of RPS' award price followed.

Techno-Sciences contends that RPS' award price exceeded a fair market price for the software and the agency did not conduct a proper market survey as required by applicable regulations, given that the agency did not consider Techno-Sciences's offered \$100,000 fixed price for its fourth generation MCC software, which assertedly meets the agency's requirements.

"An 8(a) contract, sole source or competitive, may not be awarded if the price of the contract results in a cost to the contracting agency which exceeds the fair market price." Federal Acquisition Regulation (FAR) § 19.806(b). A "fair market price" is defined as a "price based on reasonable costs under normal competitive conditions and not on [the] lowest possible cost." FAR § 19.001. FAR § 19.202-6(b) provides that "[f]or 8(a) contracts, both with respect to meeting the requirement at [FAR §] 19.806(b) and in order to accurately estimate the current fair market price, contracting officers [are required to] follow the procedures at [FAR §] 19.807." The FAR § 19.807 procedures state that "[t]he contracting officer shall estimate the fair market price of the work to be performed by the 8(a) contractor" and that:

[i]n estimating the fair market price . . . the contracting officer shall use cost or price analysis and consider commercial prices for similar products and services, available in-house cost estimates, data (including cost or pricing data) submitted by the SBA or the

⁶(...continued)
unreasonable in light of RPS' proposal and the agency's revised fair market price estimate.

8(a) contractor, and data obtained from any other Government agency.

FAR §§ 19.807(a) - (b) (emphasis added). Given this direction, agencies are expected to gather reliable, accurate, and current information upon which they may reasonably base an estimate of the prices at which the required items or services could be obtained from commercial sources. See Government Contracting Resources, B-243915, Aug. 15, 1991, 91-2 CPD ¶ 153 at 4.

Our Office will not question an agency's fair market price determination unless it is not reasonably based or there is a showing of fraud or bad faith. Id. Here, we find that the agency's determination that RPS' contract price did not exceed a fair market price was not reasonably based, inasmuch as the agency did not reasonably follow the FAR § 19.807(b) procedures for determining fair market price.

The record shows that rather than estimating a fair market price, NOAA determined RPS's price to be reasonable by comparing RPS' hourly unloaded direct labor rates for programmer/analysts to other unloaded labor rates of assertedly similar skilled employees under other NOAA contracts, including a current RPS contract with the agency.⁷ RPS proposed a labor rate of \$[DELETED] and the comparison rates were \$[DELETED].⁸ Thus, the agency found RPS' cost to be reasonable, after considering the other cost factors in RPS' proposal, and the contract's estimated level of effort. NOAA did not consider the prices that may be offered by commercial sources of MCC software, or through any other means.

NOAA argues that it was justified in not exploring commercial sources for prices because it was familiar with the manufacturers of MCC software and knew that none produced nonproprietary software, including Techno-Sciences.⁹ NOAA argues that given the lack of nonproprietary MCC software in the marketplace, the agency's fair market price analysis was reasonable, inasmuch as the 8(a) contract price did not exceed that for software development, testing, and maintenance. Techno-Sciences responds that NOAA incorrectly assumed that its fourth generation software was proprietary when in fact this software is nonproprietary and that for a fixed price of \$100,000 NOAA would have received complete ownership rights in the

⁷None of these contracts pertained to the USMCC software or maintenance contract but involved some form of software development or support.

⁸The protester notes that none of these rates actually appear in these comparison contracts and the agency admits that these rates that were used for comparison purposes did contain minor errors.

⁹At least three other companies develop and sell MCC software. They are CAL Corporation, CEIS TM and Morsviazsputnik.

software, including source code, object code, executable code, documentation and related data.

Notwithstanding NOAA's asserted familiarity with the marketplace regarding MCC software, we believe that FAR § 19.807(b) obligated the agency to undertake a current investigation of the marketplace in order to determine whether a nonproprietary solution to its software needs existed before it proceeded to award of the 8(a) contract. See Logics, Inc., B-237412, Feb. 13, 1990, 90-1 CPD ¶ 189 at 5. In this regard, FAR § 19.807(b) requires contracting officers to "consider commercial prices for similar products [or] services" in determining fair market price.

Here, the record is devoid of any evidence that NOAA investigated the current marketplace in any way for purposes of determining a commercial price for the requirement, such as through a survey of the manufacturers of the similar nonproprietary software, by contacting nations that operate MCC's, or by considering other similar commercial software developers outside of NOAA.¹⁰ Given the rapid pace change takes place in the marketplace, we find that the agency's simple reliance upon its asserted familiarity with the marketplace to avoid making a current market survey as to the availability of nonproprietary software was unreasonable. See generally McSwain & Assocs., Inc., et al., B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 3-4; ACCU-Lab Medical Testing, B-270259, Feb. 20, 1996, 96-1 CPD ¶ 106 at 4 (agency is required to consider current market conditions when making a small business set-aside decision).

NOAA nevertheless argues that Techno-Sciences's position in the protest that its fourth generation software is nonproprietary is inconsistent with its prior dealings with the agency, such that NOAA still doubts whether this software is, in fact, nonproprietary. However, as indicated above, Techno-Sciences previously offered to the agency various concessions regarding rights in the software, including providing its source code (albeit at a cost that was not then acceptable to the agency). Moreover, time had passed since the prior unsuccessful negotiations with Techno-Sciences¹¹ up to when the agency executed the RPS contract, during

¹⁰The agency now argues that its actions are reasonable because it contacted one manufacturer following the protest who confirmed that it has not and would not produce nonproprietary MCC software and that a survey involving some of the other nations has shown its award price to be reasonable. However, we think this information only highlights that the agency failed to undertake the action at the time it was estimating the fair market price which could have been instrumental in estimating an appropriate fair market price.

¹¹The record shows that these discussions were interrelated with other issues, for example, whether Techno-Sciences's contract options would be exercised.

which time market conditions and the relationship of the parties had changed and Techno-Sciences began marketing its fourth generation MCC software for \$100,000. Under the circumstances, we are not persuaded that the agency's prior dealings with Techno-Sciences reasonably leads to the conclusion that the agency could not obtain complete ownership in Techno-Sciences fourth generation MCC software, and think that FAR § 19.807 required the NOAA to at least explore whether Techno-Sciences's offer of its fourth generation MCC software could or would offer a nonproprietary solution to the agency before NOAA discounted that possibility. See Logics, Inc., supra, at 5. On this record, there is no evidence to dispute Techno-Sciences's assertions that its fourth generation MCC software is nonproprietary and that the agency only incorrectly assumed otherwise by not inquiring¹²--this is exactly the scenario that could have been avoided had NOAA surveyed the current market in determining fair market price as required by the FAR § 19.807.

NOAA also asserts that the price for Techno-Sciences's software should not be the measure for determining fair market price because the software allegedly cannot meet the minimum needs of NOAA because of the unique requirements associated with operating the USMCC and that \$100,000 is not a reasonable price for these services in any case. The record simply does not support the agency's assertions in this regard. Well prior to this protest, Techno-Sciences, the developer of the software currently operating the USMCC, publicly represented its price for the MCC software to be \$100,000 under ordinary competitive circumstances. Moreover, Techno-Sciences asserts that it has examined the RPS contract specifications, which only call for the replacement of Techno-Sciences's software and that its software will meet the requirements listed therein, and that in any event it could have modified its software to meet the unique enhancements not in the current USMCC software noted by the agency in this report (but not specifically apparent from specifications included in RPS' contract) for an additional \$40,000. Other than its general disagreement, the agency has not offered evidence demonstrating the unacceptability of Techno-Sciences's software or that Techno-Sciences would not be able to supply nonproprietary software upgraded to meet the USMCC's unique requirements for approximately \$140,000. In any case, at the very least, Techno-Sciences's fourth generation MCC software reasonably should be considered to be a sufficiently similar product to look at in determining a fair market price.

In sum, we find that NOAA failed to properly estimate the fair market price in accordance with FAR § 19.807(b) and as a consequence did not properly determine that the contract price of RPS' 8(a) award did not result in a cost to the agency that exceeded a fair market price, as required by FAR § 19.806(b). In this regard, Techno-Sciences's offer of apparently acceptable nonproprietary software for a

¹²For example, Techno-Sciences states that it previously has provided nonproprietary software to India.

fixed price of approximately \$140,000 is much less than the \$323,650 estimated cost for developing this software in RPS' 8(a) contract. While NOAA argues that the award price represents a reasonable price for software development and maintenance services, it has offered no persuasive explanation for why it may ignore the price of already developed software products that arguably can satisfy the agency's needs. Therefore, we sustain the protest.

We recommend that the agency review its fair market price estimate, specifically considering Techno-Sciences's MCC software, including enhancements and annual upgrade prices. If it is determined that the RPS' contract cost exceeds a fair market price for a similar product and services meeting the agency's needs, then NOAA should terminate RPS' contract, withdraw the 8(a) set aside,¹³ and fulfill this requirement under an unrestricted procurement. In addition, we recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). The protester should submit its certified claim for costs to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States

¹³There is no evidence that any other qualified 8(a) firm could provide the requested software development services or the nonproprietary software itself at a cost less than RPS'.