



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Omni Corporation

File: B-281082

Date: December 22, 1998

Paul Shnitzer, Esq., Kenneth M. Bruntel, Esq., and Jeffrey E. Greene, Esq., Crowell & Moring, for the protester.

Lynda Troutman O'Sullivan, Esq., and Benjamin D.M. Wood, Esq., Miller & Chevalier, for Ferguson-Williams, Inc., an intervenor.

Matthew Keiser, Esq., and Charles A. Briggs, Esq., U.S. Army Corps of Engineers, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency conducted misleading discussions and improperly evaluated proposals during a competition to select the private-sector proposal upon which to base a cost comparison pursuant to Office of Management and Budget Circular No. A-76 is dismissed as premature where the protester files its challenge prior to the post-award debriefing offered by the agency at the conclusion of the administrative appeal process resolving the successful private-sector offeror's challenge to the agency's in-house cost estimate.

2. Agencies are required to provide offerors who participate in the private-sector competition portion of the A-76 cost comparison process--but are not selected for comparison with the in-house offer--a debriefing on the results of the competition.

DECISION

Omni Corporation protests that the U.S. Army Corps of Engineers treated Omni unfairly during the competition held pursuant to request for proposals (RFP) No. DACW66-98-R-0003 for the operation and maintenance of locks and dams on the Red River Waterway in Louisiana. The RFP was used to select a private-sector offer for comparison to the government's in-house cost estimate under Office of Management and Budget (OMB) Circular No. A-76. Omni argues that, among other things, the Corps misled it to increase its staffing (and thus its price) for these services, while the government's in-house estimate used a lower staffing level than Omni.

We dismiss the protest.

BACKGROUND

The RFP, issued December 29, 1997, contemplates award of a contract for the operation and maintenance of five lock and dam facilities located along a 236-mile stretch of the Red River from Shreveport, Louisiana to the Red River's junction with the Old River. Three of these lock and dam facilities are currently operated by the government, while two have been operated by Omni since 1992. To streamline operations along the river system, the Corps concluded that either the government or a contractor should operate all five of the locks and dams along this stretch of waterway.

The procedures for determining whether the government should perform an activity in-house, or allow the activity to be performed by a contractor, are set forth in OMB Circular No. A-76, and the Circular No. A-76 Revised Supplemental Handbook (March 1996) (the "Supplemental Handbook"). When an activity is considered appropriate for an in-house versus private-sector cost comparison, the Supplemental Handbook outlines the process. Supplemental Handbook, Chap. 3, § A.3. Where a negotiated procurement approach is used, the cost comparison process can be viewed as consisting of three basic steps: (1) a competition among private-sector offerors, conducted much as any federal procurement is conducted; (2) a comparison of the winning private-sector offer with the in-house estimate to ensure that both are based upon the same scope of work and performance levels--and if they are not, to adjust the in-house estimate; and (3) a straightforward cost comparison of the offers to determine which offer will be most economical for the government. Id. §§ H, J; see NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ ____ at 4-5. In addition, the Supplemental Handbook establishes an A-76 administrative appeals process for parties seeking to challenge the results of the cost comparison. Id. § K.

The RFP used here to conduct the competition among private-sector offerors--the first step of the three-step process described above--anticipates selection of the proposal which presents the best value to the government. RFP § M.3. The RFP also contains the clause found at Federal Acquisition Regulation (FAR) § 52.207-2, "Notice of Cost Comparison (Negotiated)," which advises that the "solicitation is part of a Government cost comparison to determine whether accomplishing the specified work under contract or by Government performance is more economical." RFP § L.3.

In response to the RFP, the agency received initial proposals from four offerors, including Omni and Ferguson-Williams, Inc., the offeror whose proposal ultimately was selected for comparison with the in-house estimate. In the Corps's view, none of the initial proposals was acceptable, and no proposal became acceptable until submission of the third round of revised proposals. Before each call for revised

proposals, the Corps held discussions with the four offerors and pointed out the perceived weaknesses and deficiencies in their proposals. At the conclusion of the evaluation of the third round of revised proposals, the source selection authority excluded Omni and another offeror from further consideration, and selected Ferguson-Williams as the best value offeror for the cost comparison with the in-house estimate. Source Selection Decision, Aug. 19, 1998, at 4-5.

By letter dated August 31, the Corps advised Omni that Ferguson-Williams's proposal had been selected for comparison with the in-house estimate, and that the Corps anticipated performing the cost comparison that day. This letter also advised that Omni would be notified of the final decision and given an opportunity to request a debriefing in accordance with FAR § 15.506 (post-award debriefings) at the end of the A-76 administrative appeals process.

By letter dated September 1, the Corps advised Omni that the cost comparison had been completed, and that the initial decision was that performance by in-house government personnel was more economical than performance by Ferguson-Williams. In response, by letter dated September 2, Omni stated that it considered the Corps's September 1 letter to be an award notice, and requested a post-award debriefing in accordance with FAR § 15.506.

By letter dated September 3, the Corps answered that the September 1 decision was an initial decision, as opposed to a final decision; that the letter advising of the decision was not an award notice; and that Omni would be given an opportunity to request a debriefing in accordance with FAR § 15.506 after completion of the A-76 administrative appeals process.

On September 8, Omni received information regarding the staffing levels used by the Corps to prepare the in-house cost estimate, and concluded that the Corps had conducted misleading discussions, without which Omni's proposal might have been considered to have offered the best value of the private-sector proposals. In response, Omni filed a protest with our Office 10 days later, arguing that the competition was flawed, and claiming, in essence, that Omni's proposal, not Ferguson-Williams's, should have been selected for comparison with the in-house estimate. On September 30, Ferguson-Williams filed a challenge to the cost comparison under the A-76 administrative appeals process.

DISCUSSION

Omni's protest raises two challenges to the conduct of discussions, and two challenges to the evaluation of its proposal. With respect to discussions, Omni protests that the Corps acted improperly by repeatedly advising Omni that its proposal lacked sufficient personnel to perform the services required here, when the Corps based its estimate on [deleted]. Specifically, Omni complains that its initial proposal offered to perform these services using [deleted] full-time personnel,

but in response to repeated agency admonitions during discussions that Omni had not proposed sufficient staffing, Omni increased its staffing to [deleted] full-time personnel--while the Corps's proposal to perform this work was based on 33 full-time personnel [deleted]. Omni also claims that during discussions the Corps improperly induced Omni to add additional costs for tools to its proposal, although Omni's initial proposed tool list was [deleted]. With respect to the evaluation, Omni argues that the Corps miscalculated the qualifications of its proposed personnel, and wrongly assigned a cost deficiency over a relatively trivial deviance in Omni's proposed general and administrative rate in the fourth year of performance.

In response to this protest, Ferguson-Williams requested that Omni's challenge be dismissed for failure to exhaust its administrative remedies. In this regard, Ferguson-Williams contends that Omni is, in essence, challenging the agency's cost estimate, and was first required to raise its challenge under the A-76 administrative appeals process.

As an initial matter, we disagree with Ferguson-Williams's contention that Omni's protest is a challenge to the agency's cost estimate. With respect to the two evaluation challenges, Ferguson-Williams's contention is wrong on its face. With respect to the two discussions challenges, Omni is not arguing that the staffing levels (or the tool list) used to prepare the cost estimate are incorrect. Rather, Omni is accepting those levels, and claiming that the conduct of discussions was improper given the Corps's own apparent belief that the Corps could operate and maintain these five locks and dams in accordance with the requirements of the solicitation with 33 full-time personnel (and with a less extensive tool list). Thus, Omni is contending that its proposal should have been evaluated as meeting the requirements of the RFP, and that the Corps wrongly induced Omni to increase its price by adding additional personnel and additional costs for tools.

In addition, Ferguson-Williams is mistaken in its apparent belief that Omni is required to pursue evaluation challenges like these under the A-76 administrative appeals process. The Supplemental Handbook expressly explains that the A-76 administrative appeal procedures do not apply to questions concerning the selection of a contractor for comparison with the government's cost estimate. Supplemental Handbook, Chap. 3, § K.6.a. Rather, the administrative appeals process is reserved for questions regarding the agency's compliance with the rules of the A-76 process, decisions to waive a cost comparison, or costs used to perform the comparison. *Id.* § K.1.c. See also FAR § 7.307 ("the appeals procedure shall be used only to resolve questions concerning the calculation of the cost comparison and shall not apply to questions concerning selection of one contractor in preference to another, which shall be treated as prescribed in Subpart 33.1, Protests").

Thus, we conclude that our Office is the appropriate place for Omni to pursue its challenge to the private-sector competition portion of the A-76 process; however, we also conclude that the protest is premature at this juncture.

The Supplemental Handbook describes the initial comparison of a selected offeror's price with the in-house estimate--the third step in the three-step process described above--as a tentative decision. Supplemental Handbook, supra, §§ J.1, K.1, K.1.b, K.2.b, K.5. The Handbook explains that the decision rendered by the appeal authority is the final decision. Id. § K.8. Consistent with this scheme, when Omni asked on September 2 for a post-award debriefing pursuant to FAR § 15.506, the Corps advised Omni that the September 1 cost comparison decision was an initial decision, and that Omni would be given an opportunity to receive a post-award debriefing after completion of the A-76 administrative appeals process. Letter from Memphis District, Army Corps of Engineers, to Omni (Sept. 3, 1998).

We agree with the Corps's view that offerors who participate in the private-sector competition portion of the A-76 process, but are not selected for comparison with the in-house offer, should be given a debriefing on the results of the competition, and the reasons the unsuccessful offeror was not selected. Such offerors, who are competing for a contract conducted pursuant to the FAR, see Supplemental Handbook, supra, §§ G(3), H(1), have been "excluded from the competition before award" and therefore "may request a debriefing before award." FAR § 15.505. See 10 U.S.C. § 2305(b)(6)(A) (Supp. II 1996). The contracting officer may delay the debriefing, but not later than the time for post-award debriefings. FAR § 15.505(b).

While there is no award at the conclusion of the private-sector competition (and, if the government's in-house offer is selected, there will technically be no award in the procurement at all), we find reasonable the Corps's interpretation of the Supplemental Handbook equating the final decision--after the completion of any challenge to the cost comparison by the appeal authority--with an "award" decision, and the Corps's view that this decision is the appropriate trigger for a post-award debriefing.¹ On the other hand, we recognize that, in some sense, both the selection

¹Omni's protest illustrates the unique uncertainties surrounding an A-76 challenge that could cause an agency to reasonably decline to provide a debriefing until the administrative appeals process is completed. For Omni to prevail in its challenge, it must demonstrate not only that the agency failed to follow established procedures, but also that it was prejudiced in that the failure could have materially affected the outcome of the cost comparison. Tecom, Inc., B-253740.3, July 7, 1994, 94-2 CPD ¶ 11 at 3. Here, Omni could not establish prejudice at the time it filed its protest because even if its challenge were upheld--and its proposal considered without the changes Omni made in response to the allegedly misleading discussions--Omni's initial proposed price was higher than the in-house estimate, as calculated at that time.

However, during the course of this protest, the administrative appeals decision upheld portions of Ferguson-Williams's challenge, and increased the amount of the
(continued...)

of the winner in the private-sector competition and the initial selection in favor of the in-house offer could be viewed as "award" decisions. For that reason, we believe that, if the Corps had decided to provide the debriefing at any point after completion of the private-sector competition, Omni's debriefing could have been treated, in terms of content, as a post-award debriefing, see FAR § 15.506(d), rather than as a pre-award one. See FAR § 15.505(f) (prohibiting disclosure at a pre-award debriefing of, for example, the number of offerors).

In terms of our process, where, as here, an offeror has been eliminated from consideration in an A-76 competition and a debriefing has been properly requested (i.e., timely and in writing), a protest filed before the debriefing (even if the protest basis was known before the debriefing) will be dismissed as premature, and should be filed not later than 10 days after the date on which the debriefing is held. See 4 C.F.R. § 21.2(a)(2) (1998); cf. The Real Estate Ctr., B-274081, Aug. 20, 1996, 96-2 CPD ¶ 74 at 2 (same, in context of protest filed after award, but before required debriefing).

The protest is dismissed.

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¹(...continued)

in-house estimate. The appeal decision is currently under review by the Corps, and is also the subject of a protest to our Office by Ferguson-Williams, which argues that other elements of the in-house estimate should be increased as well. Thus, even at this juncture, the final amount of the in-house estimate--and the extent of Omni's prejudice--is subject to change. Further, the administrative appeals decision suggested, as an alternative to increasing the in-house estimate in certain areas, that the Corps consider whether the RFP should be amended to delete certain requirements, a step which would have great impact on Omni as it would require reopening the competition among the private-sector offerors.