

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE:

B-215775

DATE: March 4, 1985

MATTER OF:

ORI, Inc.

DIGEST:

1. Protest filed with GAO on the tenth working day after the bases of the protest are known is timely.
2. In reviewing protests against allegedly improper evaluations, GAO will not substitute its judgment for that of the agency's evaluators, but rather will examine the record to determine whether the evaluators' judgments were reasonable and in accord with listed criteria, and whether there were any violations of procurement statutes and regulations.
3. In camera review of source selection documents shows that evaluation was fair and reasonable and consistent with evaluation criteria in the solicitation.
4. The submission of a below-cost or a low profit offer is not illegal and provides no basis for challenging an award of a firm, fixed-rate contract to a responsible contractor, since such a contract is not subject to adjustment based on the contractor's cost experience during performance and places no obligation on the contracting agency to pay more than the contract rate.
5. A determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment by the contracting officer, which will not be questioned unless it is clearly unreasonable or there is a showing of bad faith or fraud.

6. Where agency does not find an actual conflict of interest is created by awarding the contract to a particular firm, protest alleging a possible or theoretical conflict of interest is denied.

ORI, Inc. (ORI), protests the award of a contract to Southern Engineering Company (Southern) under request for proposals (RFP) No. F08637-84-R-0018, issued by Tyndall Air Force Base, Florida (Air Force), to provide the government with utility rate expert services. ORI alleges that the Air Force misapplied the RFP's evaluation criteria in its evaluation of Southern's technical proposal, that Southern does not meet the minimum technical qualifications of the RFP, and that the Air Force failed to properly assess the reasonableness of Southern's price proposal. Finally, ORI argues that the award to Southern created an improper conflict of interest.

We deny the protest.

The Air Force argues that ORI's protest was untimely filed. Our Bid Protest Procedures required that protests be filed within 10 working days after the protester became aware of the bases of protest. 4 C.F.R. § 21.2(b)(2) (1984); Scan-Optics, Inc., B-211048, Apr. 24, 1984, 84-1 C.P.D. ¶ 464. ORI was first informed by the Air Force on June 26, 1984, that award was made to Southern. ORI's protest was filed 10 working days later on July 11. Therefore the protest is timely.

The RFP listed the following award factors in descending order of importance:

"(1) Technical Factors.

- (a) Experience with Utility Regulation
- (b) Samples or Examples of Work
- (c) Organizational Capabilities

(2) Cost Factors"

ORI contends that Southern lacks experience with utility regulation, the most important technical criterion, and therefore, the fact that Southern received a technical score just below ORI's score indicates that the evaluation criteria were not properly applied.

In reviewing protests against allegedly improper evaluations, this Office will not substitute its judgment

for that of the contracting agency's evaluators, who have wide discretion, but rather will examine the record to determine whether the evaluators' judgments were reasonable and in accord with listed criteria, and whether there were any violations of procurement statutes and regulations. Anchor Conveyors, Inc.; The Austin Company, B-215624, B-215624.2, Oct. 23, 1984, 84-2 C.P.D. ¶ 451.

ORI has attempted to obtain from the Air Force, under the Freedom of Information Act, information concerning Southern's technical proposal. The Air Force has denied ORI's access to Southern's proposal and most of the documents related to the evaluation process, but has provided all of these documents to our Office for review. Due to the proprietary nature of much of this material and because the Air Force had denied ORI's Freedom of Information Act claims, we have reviewed all of the material in camera in light of the protest issues raised, but our discussion is necessarily limited. See, for example, Robert E. Derektor of Rhode Island, Inc.; Boston Shipyard Corp., B-211922, B-211922.2, Feb. 2, 1984, 84-1 C.P.D. ¶ 140.

Our in camera review of Southern's proposal and the source selection documents shows that the Air Force evaluators rated Southern's proposal in a reasonable manner and, with one minor exception, which we find non-prejudicial to ORI, followed the stated evaluation criteria. The Air Force gave slightly more weight to "Organizational Capabilities" than it did to "Samples or Examples of Work" although the RFP indicated that the reverse would be the case. Since Southern was rated higher in both categories than ORI, we do not believe that ORI was prejudiced by the reversal of priority given to these two categories. In addition, the combined maximum points under these two criteria is less than the maximum possible points under the highest stated technical factor, "Experience." While the source selection materials show that ORI received a higher score than Southern under the "Experience" category (as ORI argues should be the case), neither ORI nor Southern came close to the maximum possible score under this factor. Southern's extremely strong scores under the other two technical criteria brought Southern's overall technical score only slightly below ORI's. We conclude that although ORI received a higher score than Southern under "Experience", the Air Force's conclusion, that Southern's overall technical proposal was essentially as strong as ORI's, and evidenced technical qualification, is reasonably based.

ORI also objects to the evaluation of Southern's price proposal. The solicitation requests prices for evaluation reports, for testimony and other services from individuals in certain categories, and for out-of-pocket expense items. Estimates of the number of evaluation reports and manhours required also were set forth.

ORI first contends that Southern could not possibly provide expert witnesses at the price which it offered, \$37 per hour, for Phases II and III of the procurement. ORI argues that Southern should have offered a higher price per hour.

We will not consider this allegation. The prices offered by Southern are fixed and are not subject to adjustment during the contract period. The submission of a below-cost or a low profit offer is not illegal and provides no basis for challenging an award of a firm, fixed-rate contract to a responsible contractor, since such a contract is not subject to adjustment based on the contractor's cost experience during performance and places no obligation on the contracting agency to pay more than the rate at which contract award is made. See Everhart Appraisal Service, Inc., B-213369, May 1, 1984, 84-1 C.P.D. ¶ 485; Ted L. Bidy and Associates, Inc., B-209297; B-209297.2, Apr. 22, 1983, 83-1 C.P.D. ¶ 441.

Whether the low offeror can perform the contract at the price offered is a matter of responsibility. Prior to award, the contracting officer must make an affirmative determination that the prospective awardee is a responsible contractor. Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.103(b) (1984). Our Office does not review protests against affirmative determinations of responsibility, unless either fraud or bad faith on the part of the procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. Zytron, B-213576, Dec. 28, 1983, 84-1 C.P.D. ¶ 34. Neither exception is alleged here.

ORI also contends that Southern's fixed price for Phase I of the procurement, \$4,800 per evaluation report, is too high. However, the contracting officer determined that the prices offered by Southern were fair and reasonable and based on adequate competition. We consistently have held that a determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment by the contracting officer. We will not question that determination unless it is clearly unreasonable or there is a showing of bad faith or fraud.

Alan Scott Industries; Grieshaber Manufacturing Company, Inc., B-212703, B-212703.2, Sept. 25, 1984, 84-2 C.P.D.

¶ 349. Southern's total offer was the lowest of nine in the competitive range. There clearly was adequate competition and the award price was determined to be reasonable. Also, the prices offered for evaluation reports by the nine firms in the competitive range were from \$3,330 to \$11,400. Nothing in the record would indicate to us that the solicitation estimates are faulty or that the acceptance of Southern's offer would otherwise not result in the lowest cost to the government. See Gyro Systems Co., B-216447, Sept. 27, 1984, 84-2 C.P.D. ¶ 364. ORI simply has not shown that the determination concerning the fairness of Southern's price proposal is unreasonable.

ORI's final argument is that award to Southern creates a conflict of interest because Southern has represented utility companies which provide utility services to the Air Force and these companies' interests were antithetical to those of the Air Force. The responsibility for determining whether a firm has a conflict of interest if a firm is awarded a particular contract and to what extent a firm should be excluded from competition rests with the procuring agency and we will not overturn such determination except when it is shown to be unreasonable. Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 C.P.D. ¶ 94. The record shows that the source selection committee considered this issue and found that no actual conflict existed. ORI has not shown the agency determination is unreasonable.

The protest is denied.

for Seymour Efron
Comptroller General
of the United States