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DECISION

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

FILE: B-220049.2 **DATE:** April 7, 1986

MATTER OF: Price Waterhouse--Reconsideration

DIGEST:

1. The General Accounting Office affirms its decision sustaining a protest that the agency did not conduct meaningful discussions with all offerors in the competitive range, where the only probative evidence filed with GAO, including an affidavit by the chairman of the evaluation panel, supports the protester's contention.

2. A decision sustaining a protest and recommending additional discussions with the offerors and possible contract termination will not be reconsidered based upon the estimated costs of termination where, although the protest was filed within 10 days of award, the agency proceeded with performance of the contract upon a finding that to do so would be in the best interest of the government, since the General Accounting Office is required by the Competition in Contracting Act to disregard such costs in recommending a protest remedy.

3. Previous disclosure of an offeror's ceiling price for a fixed-price, incentive contract does not constitute grounds for changing GAO's recommendation that discussions be reopened where the offeror's target price and incentive formula were not disclosed, prejudice to the parties would be minimal, and the agency failed in its obligation to conduct meaningful discussions in the first instance.

The Department of the Treasury requests reconsideration of our decision in Price Waterhouse, B-220049, Jan. 16, 1986, 65 Comp. Gen. ___, 86-1 CPD ¶ 54. In sustaining the protest, we concluded that the agency

failed to conduct meaningful discussions with the protester. Treasury raises a number of grounds for reconsideration, including a contention that we failed to consider evidence in the record establishing that meaningful discussions were conducted.

We affirm our prior decision.

Price Waterhouse protested the selection of Arthur Young & Company under solicitation No. A-85-9 to design, develop, and implement a department wide payroll system. Only Price Waterhouse and Arthur Young were in the competitive range for the fixed-price, incentive contract. In their initial proposals, both firms estimated levels of effort to perform the work greatly in excess of the government's estimates. After discussions, Arthur Young reduced its estimated level of effort by about 30 percent and its price by almost 50 percent. Price Waterhouse slightly raised its level of effort and price, so that, after best and finals, Arthur Young's price was less than one-half of Price Waterhouse's.

Upon learning of the award to Arthur Young and the contract ceiling price, Price Waterhouse protested on September 9, 1985, alleging that either the firms did not compete on the same basis or Treasury accepted a below-cost proposal, which Price Waterhouse believed would undermine the integrity of the procurement system because of unusual opportunities for change orders and follow-on contracts at artificially high prices.

Subsequently, the protester learned from the administrative report that Treasury considered it to have "grossly overestimated" much of the level of effort required, and that Treasury recognized this early in the procurement. As a result, during a conference at our Office on October 21, Price Waterhouse argued that Treasury failed to indicate during discussions that the firm had overestimated the level of effort required and had actually encouraged the firm to increase its effort in some areas.

In its comments on the agency report and conference, Price Waterhouse provided sworn affidavits by the four representatives that participated in discussions with Treasury. Each of them stated that, except for the agency's preference that fewer tasks be initiated in the first contract year to ease funding constraints in that year, Treasury mentioned no concern about the protester's proposed levels of effort or cost. The Price Waterhouse representatives stated that Treasury officials indicated

that Price Waterhouse had underestimated the scope of work for several project tasks. Price Waterhouse also provided a letter it received from Treasury following the discussions that stated concerns about the Price Waterhouse proposal and was intended to assist in preparing a best and final offer. The letter generally involved areas in which the agency apparently believed that the firm had underestimated the scope of the project.

Based upon the record before us, we concluded that Treasury had not conducted meaningful discussions with Price Waterhouse because it had not expressed its concern that Price Waterhouse substantially overestimated the effort necessary on key portions of the work. We sustained the protest on this basis. Since we had no evidence regarding the subject of discussions between Arthur Young and the agency, we noted that if Arthur Young had been told of Treasury's concern about its estimated levels of effort and price, this would raise an additional question regarding equal treatment of the offerors.

Information in the Record

Treasury contends that our Office engaged in speculation about Treasury's actions and failed to accept a statement contained in the record as establishing that the agency conducted meaningful discussions with Price Waterhouse. The statement was as follows:

> "PW [Price Waterhouse] was consistently above the estimated level of hours set by Treasury for each task on the basis of contractors with far less experience than PW. Moreover, PW allocated an excessive number of hours to top management officials and senior consultants for tasks that could primarily be completed by its project leaders and analysts. The government recognized this early on in the procurement, and it was its position during the fact-finding session that PW was encompassing too much, that its proposal was too heavy, and that costs should be scaled down."

This statement gave rise to emphatic denials by Price Waterhouse at the bid protest conference and in each of the supplementary affidavits by Price Waterhouse representatives. The protester pointed out that the statement was made in a legal analysis by a Treasury attorney who did not attend the discussion sessions, and that there is no support for the assertion in the contracting officer's

statement of facts or in other documents submitted with the administrative report. The Treasury attorney reported in response to a telephone request for confirming documents that the quoted statement only related to the agency's "position" and did not record what Price Waterhouse was actually told. Consequently, at the conference and on two subsequent occasions, our Office asked Treasury to supplement the record to establish what the agency actually did tell the offerors.1/ We requested the entire record concerning the discussions, including agendas, summaries or minutes, notes taken by participants and any other evidence of the contents of the meetings. We also agreed that, if the agency believed necessary, it could provide contemporary materials such as affidavits to ensure that the record accurately reflected the discussions, subject to our Office's final determination regarding whether the contemporary materials were appropriate to receive under our regulations.

On January 15, the day before we issued our decision on the protest, the agency provided an affidavit by the chairman of the evaluation panel and a letter to Treasury from Arthur Young summarizing the discussions. Pursuant to CICA, 31 U.S.C.A. § 3555(a) (West Supp. 1985), and our regulations, 4 C.F.R. § 21.3(g) (1985), we did not consider the late filing since it would have delayed issuance of our protest decision.

In sustaining Price Waterhouse's protest, we did not infer or presume that the withheld documents or the affidavit and letter filed on January 15 were favorable or

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1/ As we noted in the protest decision, the record of discussions should have been included in the original administrative report. The protester's contention that Treasury misled it during discussions is really a refinement of its original argument that the offerors did not compete on the same basis. In its protest letter, Price Waterhouse stated that the discussions with Treasury confirmed to the protester that it had not overestimated the required level of effort, and that the firm had increased its price and estimated levels of effort in response to Treasury advice. The Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. § 3553(b)(2) (West Supp. 1985), requires agencies to submit to our Office "a complete report (including all relevant documents) on a protested procurement." The record of discussions with both offerors is clearly relevant to Price Waterhouse's protest as initially filed.

unfavorable to Treasury. Nor did we fail to consider the statement in Treasury's legal analysis regarding its position about Price Waterhouse's cost. On the record before us at that time, the only probative evidence was that submitted by the protester, and we reached our decision based upon that evidence.

Treasury also argues that the affidavit by the evaluation committee chairman and the Arthur Young letter filed with our Office on January 15 establish that meaningful discussions were conducted and that our decision was wrong. We disagree.

The chairman of the evaluation committee claims the offerors were apprised of Treasury's serious concerns about the estimated levels of effort and prices through two statements made by Treasury at the discussion sessions. First, he states that he began each session by stating that the costs proposed for several large deliverables to be initiated in 1985 were more than the agency had projected. Arthur Young's summary of these discussions reports that Treasury asked the following question:

> "Treasury anticipates that TUPS [the project] involves several large deliverables which need to be funded in FY 1986. To facilitate Treasury's funding process, please indicate how the deliverables might be divided into smaller but nevertheless logical contract deliverables."

Price Waterhouse confirms that Treasury conveyed its desire that the offerors "restructure the project so that performance of fewer tasks would begin during the first fiscal year." Thus, while concerned about fiscal year 1986 costs, the agency apparently requested the offerors to postpone some work rather than having indicated that some reduction in total cost would be appropriate.

Second, the affidavit states that by questioning the staffing and cost of a review panel that each firm proposed, Treasury adequately conveyed its concerns. Each offeror proposed a review panel consisting of four individuals, which was primarily to be available for consultation. We do not believe that discussion of efficient staffing and proposed use of a small group providing auxiliary support to the contract effort met Treasury's obligation to apprise Arthur Young and Price Waterhouse of significant concerns that the work had been largely overestimated and overpriced.

The Arthur Young letter submitted to us by Treasury is dated August 2, 1985, and states that it provides technical clarification to the firm's proposal. It restates and answers the questions asked by Treasury during discussions. None of the questions recounted by Arthur Young indicate that Treasury raised its concerns about the firm's estimated levels of effort and price other than the inquiry about the work of Arthur Young's review panel.

Treasury has neither confirmed nor denied that additional documents relating to discussions exist. We again conclude that Treasury failed to conduct meaningful discussions with all offerors in the competitive range, and affirm our prior decision.

Remedy

Treasury asks that we reconsider our recommendation that the agency conduct another round of discussions, request revised proposals, and terminate Arthur Young's contract if Price Waterhouse is the successful offeror. Treasury claims that because Arthur Young's price has been disclosed, allowing further proposals in effect would constitute an auction. On the other hand, Treasury suggests that Arthur Young might raise its price and the government could ultimately pay more for the payroll system.

Conducting meaningful discussions with all offerors in the competitive range is a statutory obligation whenever it cannot be clearly demonstrated that acceptance of an initial proposal will result in the lowest overall cost to the government. 41 U.S.C.A. § 253b(d) (West Supp. 1985). Under this standard, Treasury was clearly obligated to apprise both offerors of its concern over estimated levels of effort and resulting price. While the agency has not provided us with the complete record of discussions, the evidence before us supports our finding that meaningful discussions were not conducted with the protester and may not have been conducted with Arthur Young. Only Arthur Young's ceiling price has been revealed by Treasury; its target price, incentive fee formula, and staffing levels have not been disclosed. Under these circumstances, we believe that any prejudice to the parties from reopening discussions would be clearly outweighed by the harmful effect on the integrity of the competitive procurement system if the agency's action is not remedied. See Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD ¶ 256.

The agency also argues that it will incur considerable cost if it must terminate the current contract, and that we should have considered these costs in making our recommendation.

When the head of a procuring activity decides, under 31 U.S.C.A. § 3553(d)(2)(A)(i), to continue performance of a protested contract based on a finding that to do so would be in the best interest of the government, we are required to make recommendations without regard to any cost or disruption from terminating, recompeting, or reawarding the contract. 31 U.S.C.A. § 3554(b)(2). The purpose for this requirement was explained in the Conference Report accompanying the bill enacted as the Deficit Reduction Act of 1984, which contained CICA, as follows:

> "Before notifying the Comptroller General that continued performance of a disputed contract is in the government's best interest . . . the head of the procuring activity should consider potential costs to the government from carrying out relief measures as may be recommended by the Comptroller General if the protest is subsequently sustained. This is to insure that if the Comptroller General sustains a protest, such forms of relief as termination, recompetition, or re-award of the contract will be fully considered for recommendation. Agencies in the past have resisted such recommendations on the grounds that the government's best interest would not be served by relief measures of this sort because of the added expenses involved. This provision is designed to preclude that argument in the future, and thus to avoid prejudicing those relief measures in the Comptroller General's review."

H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436 (1984). Prior decisions of our Office cited by Treasury, American Sterilizer Co., B-219021, Sept. 20, 1985, 85-2 CPD ¶ 313, and Arthur Young & Co., B-216643, May 24, 1985, 85-1 CPD ¶ 598, in which we considered termination costs in recommending a remedy, did not involve an agency finding under 31 U.S.C.A. § 3553(d)(2)(A)(i). They are not relevant to this proceeding.

We affirm our decision.

Milton J. Socolar

Acting Comptroller General
of the United States