The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rosser, White, Hobbs, Davidson, McClellan, Kelley, Inc.
File: B-224199

Date: December 24, 1986

DIGEST

1. Under request for proposals which provides for award to lowest priced technically acceptable offeror, contracting agency properly excluded protester's technically acceptable offer from competitive range where protester's proposed price was so substantially higher than other technically acceptable offer that protester did not have a reasonable chance of receiving award.

2. Protester fails to show that procurement was improperly influenced in favor of awardee due to alleged conflict of interest on part of contracting agency officials where protester does not show what role officials played in the procurement; alleged conflict of interest is limited to membership in awardee, a professional organization; and there is no evidence that evaluation was influenced in any way by favoritism toward awardee.

DECISION

Rosser, White, Hobbs, Davidson, McClellan, Kelley, Inc. (Rosser White) protests the award of a contract to the American Corrections Association (ACA) under request for proposals (RFP) No. N00600-86-R-4465, issued by the Navy for a Brig Program Study. Rosser White contends that the Navy improperly excluded it from the competitive range and that award to ACA was improper due to a conflict of interest on the part of the Navy technical evaluators. We deny the protest.

The RFP, issued on June 13, 1986, called for award of a fixed-price contract for development of plans to implement management and operational recommendations made in a prior study by Rosser White of the Navy's corrections, or brig, system. Section M of the RFP provided that award would be made to the lowest priced technically acceptable offeror.

Initial proposals were submitted by three offerors, including Rosser White and ACA, a nonprofit professional organization for those in the corrections field. The technical proposals were evaluated by the activity for which the contract was to be performed, the Bureau of Naval Personnel. By memo dated July 21, the Bureau advised the contracting activity that all three proposals were unacceptable as submitted, but reasonably susceptible of being made acceptable through discussions. The memo included a list of questions for each offeror covering areas of its proposal requiring clarification, which subsequently were sent to each offeror. Rosser White states that it responded to the questions concerning its proposal by letter dated August 14. By memo dated August 19, the Bureau revised its initial conclusion and found each of the three proposals technically acceptable.

In a subsequent memo, the Bureau provided a brief comparison of the offerors' price proposals. ACA's proposed price was $299,416; Rosser White's, $456,572; and the third offeror's, $493,818. ACA's lower price reflected its lower personnel and administrative costs and the omission of profit from its price proposal. The Bureau concluded that, while it would be easier for the agency to work with Rosser White due to its experience with the prior brig study, ACA also would deliver a quality product.

By memo dated August 26, the contracting officer narrowed the competitive range to one offeror, ACA; Rosser White and the third offeror were excluded because of the price difference between their proposals and ACA's proposal. According to the Navy, the contracting officer's determination was approved by the contract review board at a meeting on August 28; formal approval was based on a September 2 memo prepared by the contracting officer. On August 28, the Navy asked for a best and final offer from ACA, which later orally advised the Navy that its proposal would remain unchanged.

On September 9, Rosser White received notice from the Navy that it had been excluded from the competitive range. Award to ACA was made on September 11. Rosser White then filed its protest on September 23.

Rosser White first contends that it was improper for the Navy to exclude it from the competitive range based only on the price difference between its proposal and ACA's proposal. We find this argument to be without merit.

Determining the competitive range is a matter primarily within the discretion of the procuring agency. While, as Rosser White states, we will closely scrutinize a determination which results in only one offeror being included in the

competitive range, we will not disturb such a determination unless it is shown to lack a reasonable basis. Forecasting International Ltd., B-220622.3, Apr. 1, 1986, 86-1 CPD ¶ 306. More specifically, a technically acceptable proposal may be excluded from the competitive range where the offeror's proposed price is so substantially higher than the other technically acceptable offers that the firm does not have a reasonable chance of receiving the award. Tracor Marine, Inc., B-222484, Aug. 5, 1986, 86-2 CPD ¶ 150.

Here, Rosser White's price was $157,156 higher than ACA's. The principal differences between the two price proposals were in indirect expenses, where Rosser White's expenses ($169,305.68) were approximately $89,000 higher than ACA's ($80,854); and miscellaneous direct costs, where Rosser White's costs ($54,446.32) were approximately $28,000 higher than ACA's ($26,000). ACA, a nonprofit corporation, also included no profit in its price, while Rosser White's proposal provided for $37,292 in profit. In addition, while ACA's and Rosser White's proposed direct labor costs were close ($148,800 v. $149,168), ACA proposed almost double the number of work hours (11,312 v. 6,146), reflecting the significantly lower wage rates proposed by ACA.

Rosser White argues that the Navy should have included it in the competitive range, in order to give Rosser White an opportunity to revise its proposal and reduce its price. We disagree. Since the RFP provided that award would be made to the lowest priced, technically acceptable offeror, Rosser White would have had to lower its price to below ACA's to be in line for award. Rosser White thus would have had to reduce its initial price of $456,572 by more than $157,000, or almost one-third, to be below ACA's $299,416 price.1/ In view of the significant price reduction required, we agree with the Navy that Rosser White could not reasonably be expected to lower its price sufficiently to have a reasonable chance at award; accordingly, the Navy properly excluded Rosser White from the competitive range. See Informatics General Corp., B-210709, June 30, 1983, 83-2 CPD ¶ 47, aff'd on reconsideration, Nov. 18, 1983, 83-2 CPD ¶ 580.

1/ Rosser White also argues that it was improper to exclude it from the competitive range based solely on the price discrepancy since its proposal was technically superior to ACA's. There is no support in the record for Rosser White's contention, and, in any event, its asserted technical superiority is irrelevant under the evaluation scheme in the RFP, which, as noted above, provided for award to the lowest priced, technically acceptable offeror.

Rosser White next argues that three Navy officials who were involved in the technical evaluation of the ACA proposal are members of ACA, and, as a result, their participation in the evaluation constituted a conflict of interest. As support for its assertion, Rosser White relies principally on Department of Defense (DOD) Directive 5500.7, para. VII(D), which provides in relevant part that:

> ". . . all DOD personnel who have affiliations or financial interests which create conflicts or appearances of conflicts of interests with their official duties must disqualify themselves from any official activities that are related to those affiliations or interests or the entities involved."

Rosser White in essence argues that the Navy officials' membership in ACA, which the Navy does not dispute, is an "affiliation" giving rise to a conflict of interest which, standing alone, makes award to ACA improper.

In considering conflict of interest allegations in the context of a bid protest, our role is not to determine whether a violation of the applicable conflict of interest statutes or regulations occurred; rather, our review focuses on whether the individuals involved in the alleged conflict of interest exerted improper influence in the procurement on behalf of the awardee. See Sterling Medical Associates, B-213650, Jan. 9, 1984, 84-1 CPD ¶ 60. Thus, even assuming that the Navy officials' ACA membership constitutes a conflict of interest within the meaning of DOD Directive 5500.7, as Rosser White maintains, the award to ACA will not be disturbed unless there is a showing that the officials improperly influenced the procurement in favor of ACA.

Rosser White maintains that it has presented the "hard facts" called for under CACI, Inc.-Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983), to establish an actual conflict of interest which justifies overturning the award to ACA. We disagree. The court in CACI made clear that inferences of wrongdoing based on "suspicion or innuendo" are not a sufficient basis to overturn a contract award. Id. at 1582. In fact, the court found no basis to disturb the award at issue in CACI since careful scrutiny of the record showed no evidence of actual bias or favoritism or any other impropriety in the contract award due to the participation of the agency evaluators with the alleged conflict of interest. Similarly here, we find that Rosser White has failed to make the showing required to disturb the award to ACA.

Rosser White does not discuss in detail what part the three Navy officials with the alleged conflict of interest played in the procurement. Rosser White states only that one official was a member of the source selection board and the other two were in the chain of command in the using activity, the Bureau of Naval Personnel, with an unspecified role in the procurement. The Navy report on the protest indicates only that two of the three officials named by Rosser White participated in some capacity in the evaluation of the ACA proposal.2/ Further, even assuming that the officials had an actual role in the evaluation, their affiliation with ACA is as members only; there is no indication that they serve as officers or have any other more active involvement.

Most important, there is no evidence that the determination that ACA was technically acceptable, and thus eligible for award, was in any way influenced by favoritism toward ACA on the part of the officials Rosser White identifies. In this regard, Rosser White itself does not contend that ACA would have been found technically unacceptable but for the participation in the evaluation by the officials who were ACA members. In addition, there is no evidence of bias against Rosser White in order to favor ACA, since Rosser White's proposal, like ACA's, was found technically acceptable. Finally, the individual who made the determination that Rosser White be excluded from the competitive range because of the price differential was not one of the individuals mentioned by the protester as having a conflict of interest.

In sum, it is not clear what role the three Navy officials played in the procurement; the affiliation allegedly giving rise to the conflict of interest is limited to ACA membership; and the record lacks any indication that the evaluation of the ACA proposal was improperly influenced. Thus, even assuming that the Navy officials' ACA membership constituted a conflict of interest, there is no basis in the record for finding any impropriety in the contract award due to their participation in the evaluation.

2/ Specifically, the Bureau's August 19 memo concluding that all three offerors were found technically acceptable was signed by one of the officials identified by Rosser White; the subsequent memo discussing the offerors' price proposals refers to a meeting between one of the officials and a representative from the contracting activity; and the September 2 business clearance memo identifies one of the officials as a technical contact point.

Rosser White requests that it be allowed to recover its proposal preparation costs and the costs of filing and pursuing the protest. Since we find the protest to be without merit, we deny the request for costs. Bid Protest Regulations, 4 C.F.R. § 21.6(d), (e) (1986).

for Seymour Efros
Harry R. Van Cleve
General Counsel