



The Comptroller General
of the United States

Washington, D.C. 20548

Ashen - BL

Decision

Matter of: Environmental Technology Corp.
File: B-225479.3
Date: June 18, 1987

DIGEST

1. Protest that agency should have offered the opportunity for a live test demonstration only to the highest-ranked offeror, rather than to all offerors in the competitive range, is untimely where filed more than 10 working days after protester knew that all offerors would have such an opportunity.
2. Protest that contracting agency improperly considered the results of a live test demonstration in calculating final technical scores is without merit where the demonstration relates to specific solicitation requirements and the solicitation specifically stated that the test would assist the government in making final technical evaluations.
3. Agency's acceptance of a below-cost, fixed price proposal from a responsible offeror is not legally objectionable. When a contracting officer makes an affirmative determination of responsibility, the General Accounting Office will not review it absent a showing that the determination may have been made fraudulently or in bad faith, or that definitive responsibility criteria were not met.
4. The Small Business Administration is empowered conclusively to determine matters of size status for federal procurement purposes, and the General Accounting Office will neither make nor review such determinations. Allegation that small business offeror is in collusion with large business is therefore dismissed.

DECISION

Environmental Technology Corporation (ETC) protests the award of a contract for microprocessor-controlled audio-meters to PCA Microsystems, Inc. under request for proposals (RFP) No. DADA15-86-R-0058, issued by Walter Reed Army Medical Center. ETC challenges the Army's decision to extend the opportunity for a live test demonstration (LTD) of offered equipment to all offerors in the competitive range, and argues that as the highest-rated offeror, once it

039256

had successfully completed the LTD, it should have received the award.

We dismiss the protest in part and deny it in part.

BACKGROUND

The solicitation, issued April 25, 1986, requested offers to provide up to 540 microprocessor-controlled audiometers, related peripherals and software on a fixed-price basis. The equipment will be used to evaluate the hearing of military personnel and government employees at installations in the United States and overseas. Award was to be made to the offeror whose proposal met the mandatory specifications and offered the greatest value to the government, as reflected by the highest weighted point score derived from a mathematical formula giving technical and cost factors equal importance.

Six offerors submitted initial proposals by the June 11 closing date. Since the procurement was set aside for small business, the proposal submitted by Tracor Instruments, a large business, could not be considered for award. The Army considered the other five proposals to be technically unacceptable without further negotiations. Accordingly, it conducted discussions with the offerors and requested that they submit revised proposals by July 24.

Although the Army found only two of the revised proposals to be technically acceptable, it concluded that the other three were susceptible of being made acceptable, and it therefore retained all five offerors in the competitive range. The agency amended the solicitation and requested best and final offers by September 10. Based upon its evaluation of these, the Army eliminated the two highest-priced proposals from the competitive range. It scored the remaining ones as follows:

	Technical	Price	Total
ETC	46.80	42.55	89.42
PCA	35.35	50.00	85.35
Besserman Corporation	35.69	41.97	77.66

LIVE TEST DEMONSTRATIONS

The Army then requested ETC, as the highest-ranked offeror, to provide equipment for an LTD. This was in accord with

solicitation provisions that informed offerors that the government might require such demonstrations.

Specifically, Section C of the solicitation, which included specifications and the statement of work, provided:

"C.9.1 Live Test Demonstration (LTD). After receipt and preliminary technical evaluation of proposals, and prior to final determination of technical responsiveness, offerors may be required to successfully perform a LTD in the presence of Government representatives.

"C.9.2 Purpose. The purpose of the LTD is to demonstrate to the Government that the proposed integrated systems (equipment and software) can perform all requirements of the specification as well as comply with all representations made in the proposal."

In addition, Section M, which listed evaluation and award factors, provided:

"M.7 Operational Demonstration Before Award. In addition to the technical review of technical proposals . . . and to assist Government personnel in making a final technical evaluation, the Government may, at its option, require any offeror to demonstrate in an operational environment that the equipment proposed can perform as claimed in the offeror's technical proposal. The Government may require, as well, that any or all of the requirements set forth in Section C of this document be demonstrated. Failure to demonstrate that offered equipment can meet Section C requirements may result in rejection of the proposal as technically unacceptable."

In an LTD begun on September 30 and completed on October 6, the protester successfully demonstrated that its equipment complied with all major requirements of the solicitation; it demonstrated compliance with the remaining, minor requirements during a retest conducted on November 5. At this point, ETC states, it believed it had been determined to be the best-qualified vendor, and it was merely waiting for formal announcement of the award. On November 12, however, Besserman Corporation, the third-ranked offeror, protested to our Office, alleging that the Army's failure to provide other offerors in the competitive range an LTD was inconsistent with the terms of the solicitation. Although, as ETC correctly states, the Army had initially intended to

have only the highest-ranked offeror perform an LTD, and to go on to the next-ranked offeror only if the first failed to demonstrate its capability, the agency reconsidered and ultimately offered both Besserman and PCA the opportunity for an LTD. Besserman withdrew its protest, but failed the subsequent demonstration; the Army therefore rejected its proposal as technically unacceptable. PCA, on the other hand, successfully demonstrated its equipment, and the Army found its proposal to be technically acceptable.

By letter dated January 14, the Army requested another round of best and final offers to be submitted by January 21. PCA changed both its technical and price proposals; ETC, however, did not revise either, but merely confirmed its previous offer. Based upon the LTDs and the revised offers, the Army rescored proposals as follows:

	Technical	Price	Total
PCA	41.84	50.00	91.84
ETC	48.00	43.25	91.25

Given the slight difference in point scores and the substantial difference in price (\$2,620,310 for PCA and \$3,029,693 for ETC), the Army determined that award to PCA would be in the best interest of the government. Award was made on January 28, and ETC thereupon filed this protest with our Office.

ETC challenges the Army's decisions (1) to offer PCA the opportunity to demonstrate, during an LTD, that its proposed equipment complied with the solicitation requirements and (2) to consider the results in calculating the final technical scores. ETC contends that the solicitation required the Army to offer an LTD only to the highest-ranked offeror. Since ETC was initially the highest-ranked offeror and passed its LTD, the firm argues that it was entitled to award. In any case, ETC argues, the solicitation contemplated that the LTD would be evaluated only upon a pass/fail basis, and should not have affected technical scores. This interpretation, the protester argues, is consistent with the Army's response to a question from Besserman as to whether it would be offered an opportunity for an LTD. By letter of October 29, the contracting officer advised Besserman that this portion of the evaluation process would not be scored, but was intended only to confirm the capability of the apparent winning offeror.

The Army defends its subsequent decision to provide all offerors in the competitive range with an opportunity for an LTD as a reasonable interpretation of the RFP. Moreover, the agency maintains, offering additional offerors such an opportunity enhanced competition. The Army further contends that it was proper to consider the results of the LTD in scoring technical proposals because the demonstration was part of the negotiation process.

ANALYSIS

ETC's challenge to the Army's decision to extend the opportunity for an LTD to the other offerors in the competitive range and then to request another round of best and finals is untimely. Our Bid Protest Regulations require protests, other than those based upon apparent improprieties in a solicitation, to be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1986). The Army has provided our Office with a contemporaneous memorandum documenting a November 18, 1986 telephone call in which the contracting officer informed ETC that the opportunity for an LTD would be provided to all offerors in the competitive range. In addition, the last round of best and finals was due January 21. ETC, however, failed to protest these actions until February 20. We therefore will not consider them.

As for rescoring of technical proposals, the protester does not allege, nor does the record indicate, that the rescoring was related to capabilities other than those specifically required by the specifications/statement of work; rather, ETC merely argues that the demonstrations should not have affected scoring at all.

We disagree. Nothing in the solicitation states that performance in a LTD will not affect an offeror's technical score. On the contrary, the solicitation required submission of a detailed technical description of the proposed system and provided that all offerors in the competitive range might be required to perform an LTD for the purpose of demonstrating compliance with all representations made in the proposal (as well as with the requirements of the solicitation). The statement that the government could require an LTD "in addition" to the review of technical proposals certainly does not indicate that the results of the LTD could not or would not be reflected in proposal scoring. In this respect, we have recognized that a contracting agency may consider information outside an offeror's technical proposal in rating that proposal and in rescoring it. Cf. Hayes International Corp.--Reconsideration, B-224567.2, Mar. 6, 1987, 87-1 CPD ¶ 256.

In any case, we question whether ETC has suffered competitive prejudice here. All offerors in the competitive range were treated equally and given an equal opportunity to demonstrate that their proposed equipment would best satisfy the agency's minimum needs. ETC does not allege that it could have performed better during the LTD or otherwise increased its technical score had it known that the agency would rescore, based in part on the results of the demonstration. Further, it appears that the \$409,383 difference in cost between the two proposals ultimately determined which provided the greater value to the government. We therefore deny this basis of protest.

OTHER BASES OF PROTEST

ETC also alleges that the awardee's price represents a buy-in, or below cost offer, and that the firm is in collusion with a large business.

An agency's acceptance of a below-cost, fixed-price offer does not provide a basis upon which an award to a responsible offeror may be challenged. Parker Shane Mfg., B-220273, Sept. 30, 1985, 85-2 CPD ¶ 367; see Ball Technical Products Group, B-224394, Oct. 17, 1986, 86-2 CPD ¶ 465. Here, regardless of whether PCA was attempting a buy-in, the contracting officer has made an affirmative determination of PCA's responsibility, which our Office will not review absent a showing that the determination may have been made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(f)(5). Neither has been shown here.

As for ETC's allegation that PCA does not qualify as a small business because the firm is in a joint venture or otherwise associated with Tracor, a large business, the contracting officer referred this matter to the Small Business Administration (SBA). By decision dated March 18, SBA's Dallas Regional Office determined PCA to be a small business. (ETC's appeal of that decision to SBA's Office of Hearings and Appeals is pending.) Under 15 U.S.C. § 637(b)(6) (1982), the SBA is empowered conclusively to determine matters of size status for federal procurement purposes. Therefore, this Office will neither make nor review size status determinations. 4 C.F.R. § 21.3(f)(2); see Qualimetics, Inc., B-222726, June 3, 1986, 86-1 CPD ¶ 519; see also Junger Utility and Paving Co., B-223557, July 15, 1986, 86-2 CPD ¶ 71.

The protest is dismissed in part and denied in part.

for Seymour Stone
Harry R. Van Cleve
General Counsel