



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: State Technical Institute at Memphis

File: B-229695; B-229695.2

Date: February 10, 1988

DIGEST

1. Where agency did not consider protester's proposed costs unreasonable and those costs did not exceed the government's estimate, it was not necessary for the agency to notify protester during discussions that its proposed costs were too high.
2. Protester, the fourth ranked offeror, is not an interested party to protest the award to the highest ranked offeror where the second and third ranked offerors are in line for award if the protest is sustained.
3. Agency need not perform a cost realism analysis where solicitation is competitive and results in the award of a fixed-price contract.

DECISION

State Technical Institute at Memphis (STIM) protests the award of a contract to San Diego Community College District (San Diego) under request for proposals (RFP) No. N00612-87-R-9012, issued by the Department of the Navy to procure contractor instructor services for the Navy Air Technical Training Center at Millington, Tennessee.

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

The RFP provided that award would be based on price and other factors. Offerors were required to submit a price proposal and an "other factors" proposal, and were advised that in the proposal evaluation "other factors" would be worth 60 percent and price would be worth 40 percent. The RFP provided for the award of a fixed-price contract for a 9-month base period and four 1-year option periods to the responsive offeror whose total offer on all line items was most advantageous to the government.

The Navy received five proposals, evaluated them, and requested each offeror to submit a best and final offer (BAFO). San Diego's BAFO was ranked first with 94.12 points: 40 points for its \$31,549,637 low price proposal and 54.12 points for its "other factors" proposal. STIM was ranked fourth with 80.96 points: 20.96 points for its \$60,251,200 price proposal and 60 points for its "other factors" proposal. The second and third ranked offerors received total scores of 93.24 and 85.88 points, respectively, and each offered to perform the contract at a price lower than STIM's. The Navy determined that the offer presented by San Diego would be most advantageous to the government and awarded a contract to that firm.

On November 25, 1987, STIM protested to our Office that the Navy failed to hold meaningful discussions with the offerors; that San Diego's offer violated the solicitation's anti-wage busting provisions; and that San Diego had submitted an unbalanced bid.^{1/} Following a December 1 debriefing with the Navy, STIM supplemented its initial protest grounds by asserting that the Navy had failed to consider whether the prices proposed by San Diego were reasonable and realistic.

STIM first protests that the Navy violated its obligation to hold meaningful discussions with all offerors in the competitive range by failing to notify STIM that its proposed costs were significantly higher than the costs proposed by the other offerors. STIM also asserts that the agency was required to hold discussions because none of the other offerors complied with all the requirements of the RFP and the Navy thus needed additional information to evaluate the proposals submitted by these offerors. The only specific matter on which STIM focuses is the firm's belief that none of the other offerors submitted resumes of all necessary contract personnel as required by the RFP.

The Navy argues that it was not required to notify STIM that its costs were high because the agency did not consider the

^{1/} The Navy responded to this issue in a report to our Office and specifically argued that San Diego did not submit an unbalanced bid. In its comments on the Navy's report, STIM did not rebut the Navy's answer. We therefore consider this issue abandoned. See Action Industrial Supply, B-224819, Jan. 6, 1987, 87-1 CPD ¶ 11.

high costs a deficiency. The Navy further notes that Federal Acquisition Regulation (FAR) § 15.610(d)(3)(ii) (FAC 84-16) prohibits advising an offeror of its price standing relative to other offerors.

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(b)(4)(B) (Supp. III 1985), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful, which means that an agency must point out deficiencies, weaknesses and excesses in the proposal unless doing so would result in disclosure of one offeror's approach to another or technical leveling. Once discussions are opened with an offeror--and a request for BAFO's constitutes discussions--the agency must point out all deficiencies in the offeror's proposal. Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54.

Here, while the price proposed by STIM is higher than the prices proposed by other offerors, the Navy did not consider the price unreasonable. In fact, according to the Navy, it actually considered the price reasonable because STIM's proposal was based on a higher number of instructors than the other offerors' proposals. Also, the price proposed by STIM did not exceed the government estimate. In this regard, although the Navy did not prepare a formal cost estimate, the record shows the agency expected to pay approximately 50 million dollars for the services over the 5-year period, an amount closer to STIM's proposed price than to the prices proposed by the other offerors. In any event, an agency generally is not required to point out that a price below the government estimate is too high and, as noted by the Navy, an agency may not tell an offeror how its price stands compared to its competitors' offers. Price Waterhouse, 65 Comp. Gen. 205, supra; University Research Corp., B-196246, Jan. 28, 1981, 81-1 CPD ¶ 50. Consequently, we cannot conclude that the Navy was required to notify STIM during negotiations that its proposed price was high.

STIM also asserts that the Navy was required to hold discussions with the other offerors because they did not submit the resumes of all necessary contract employees. The RFP, however, did not require offerors to submit the resumes of all contract employees. Rather, it required that offerors submit resumes of 10 percent of all instructional personnel and 100 percent of all managerial and supervisory personnel. The Navy has informed us that San Diego and the second and third offerors complied with this requirement.

STIM next alleges that San Diego intends to hire STIM employees that currently are performing the instructor

services contract and pay them less in salary and fringe benefits than they are receiving from STIM. STIM asserts that this practice, known as wage busting, is prohibited with respect to professional employees^{2/} by Office of Federal Procurement Policy (OFPP) Letter No. 78-2 (March 29, 1978) as well as by the solicitation. STIM protests that in evaluating San Diego's proposal the Navy failed to apply the anti-wage busting provisions and, thus, improperly awarded the contract to San Diego.

The Navy responds that neither the provisions of the solicitation concerned with wage busting, nor the applicable regulations, require a successor contractor that might hire professional employees who had been working for the incumbent contractor to pay those employees the same wages they were receiving from the incumbent. Rather, the provisions require that the offeror submit a total compensation plan setting forth salaries and fringe benefits proposed for professional employees. If the proposal shows that the offeror proposes to pay lower compensation levels than the incumbent paid for the same work, the contracting officer is required to evaluate the proposal on the basis of maintaining program continuity, uninterrupted high quality work, and availability of required competent professional service employees. The Navy reports that San Diego did submit the compensation plan and this plan was reviewed, as required by the solicitation. The Navy states:

"The Contracting Officer's finding that [San Diego] was a responsible offeror whose salaries were comparable to average salaries paid on other Navy education contracts and to salaries paid in Tennessee, is based on previous contracting for similar services and documents reviewed in proposals provided under this solicitation."

Under our Bid Protest Regulations, we only will consider a protest by an interested party, i.e., an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. §§ 21.0(a), 21.1(a) (1987). A party is not interested to maintain a protest if it would not be in line for award if the protest were sustained.

^{2/} Section 4(c) of the Service Contract Act of 1965, as amended, 41 U.S.C. § 353(c) (1982), was enacted to prevent wage busting with respect to blue collar and some white collar service contract employees. See Aleman Food Service, Inc., B-216143, Nov. 15, 1984, 84-2 CPD ¶ 537.

Here, the protest record establishes that if San Diego were not selected the Navy, based on the proposal evaluations, would choose the second or third ranked offeror for award. STIM therefore is not interested to raise this protest issue. See First Continental Bank Building Partnership, B-224423, Sept. 3, 1986, 86-2 CPD ¶ 255.

STIM argues that we should consider the firm an interested party on this issue for two reasons. First, STIM contends, in its supplemental protest letter it argued that both the second and third evaluated offerors also engaged in wage busting^{3/} and, further, that it orally raised this issue at the conference held at the General Accounting Office. Second, STIM argues that it is interested because as alternative relief to acceptance of its offer it is requesting cancellation of the RFP and resolicitation of the requirement.

There is no merit to STIM's position. In STIM's supplemental protest, the firm generally asserts that it was the only offeror that met all the requirements of the RFP and, thus, was the only offeror eligible to receive the contract award. STIM also specifically argues that none of the other offerors complied with the RFP requirement to submit with the offers the resumes of all necessary contract personnel. We do not find STIM's general allegation, especially in view of the more specific allegation, sufficiently definite for us to consider it a protest that the second and third evaluated offerors violated anti-wage busting prohibitions. See 4 C.F.R. § 21.1(c)(4); Dayton T. Brown, Inc.--Reconsideration, B-223774.4, Jan. 21, 1987, 87-1 CPD ¶ 75. Further, to the extent STIM raised this issue at the conference or in its post conference comments, to be timely a protest must be submitted within 10 working days after the protester knows or should know its protest basis. 4 C.F.R. § 21.2(a)(2). STIM acknowledges that it learned this protest basis on December 1, so that to be timely it would have to be filed here by December 15. The conference was held on December 22, however, and STIM's comments were submitted on December 31.

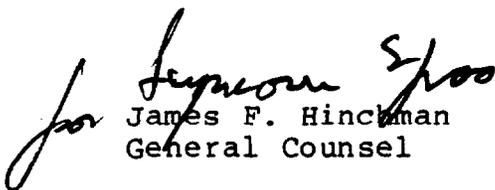
As to STIM's second point, while in some cases our Office will consider a timely protest by a party that is not next in line for award, those cases generally involve defects in

^{3/} The only objection STIM raised concerning the second and third ranked offers is that they did not contain the required resumes. As noted above, however, both offerors did submit the required resumes.

the solicitation itself so that if the protest were sustained the solicitation might be canceled and reissued. See H.V. Allen Co., Inc., B-225326, et al., Mar. 6, 1987, 87-1 CPD ¶ 260. Here, the protest does not involve a solicitation defect and, if we sustained the protest, we would recommend consideration of the intervening offers for award, not that the solicitation be canceled and reissued. Consequently, we will not consider STIM an interested party under this theory.

Finally, STIM protests that the Navy failed to conduct a cost realism analysis of San Diego's proposed price. It is unclear what STIM's specific concern is in raising this issue, but it appears that it basically involves both the wage busting matter and a general concern that the Navy did not assess whether the price proposed by San Diego is realistic for the contract effort. As discussed above, however, STIM is not an interested party to protest that San Diego engaged in wage busting. Also, since this is a competitive solicitation which resulted in a fixed-price contract, the Navy was not required to conduct a cost realism analysis. See Supreme Automation Corp., et al., B-224158, et al., Jan. 23, 1987, 87-1 CPD ¶ 83. To the extent STIM is contending that San Diego cannot perform at its offered price, there is no legal basis to object even to a below-cost award if the offeror is otherwise responsible. Id. Here, the contracting officer found San Diego to be a responsible offeror, a determination we generally do not review. See 4 C.F.R. § 21.3(f)(5).

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel