Arsenoff

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ultra Technology Corp.--Reconsideration

File: B-230309.4

Date: November 2, 1988

DIGEST

Request for reconsideration is denied where protester did not show that prior decision contained errors of fact or law or present information not previously considered that would warrant its reversal or modification.

DECISION

Ultra Technology Corporation seeks reconsideration of our decision, Ultra Technology Corp., B-230309.2, Aug. 2, 1988, 88-2 CPD ¶ 107. We denied the protest in part because we concluded that the contracting agency, the Department of the Navy, had acted reasonably in determining that the proposed awardee, Applied Retrieval Technology, Inc.,1/ was technically acceptable with regard to a solicitation evaluation factor involving minimum experience for certain on-site technicians required during contract performance. We also dismissed Ultra Tech's protest in part because, to the extent that its arguments could be construed as challenging the Navy's affirmative determination of the awardee's responsibility, there was no allegation of fraud or bad faith on the agency's part and the solicitation contained no definitive responsibility criteria. The protester alleges that it was not provided with agency documents that it requested, that the solicitation did in

1/ Applied Retrieval was awarded the contract on August 18, 1988. Ultra Tech's supplement to this request for reconsideration, which was filed on September 6, is being considered separately as a postaward protest under B-230309.6. Cybernated Controls Corp. has also filed a request for reconsideration which is being considered as a new protest under B-230309.5.

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fact contain definitive responsibility criteria, and that we erred in stating the degree to which its proposed price was higher than the proposed awardee's.

We deny the request for reconsideration.

First, the protester asserts that it should have been provided a copy of Applied Retrieval's entire proposal and that we failed to address its request for a fact-finding conference pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.5(b) (1988). As we noted in the decision, the release of the proposed awardee's proposal during the preaward protest could have caused that firm substantial competitive harm; accordingly, we properly denied Ultra Tech's request, notwithstanding its unsupported assertion that this Office was incapable of adequately reviewing the proposal in camera without benefit of the protester's informed analysis. 4 C.F.R. § 21.3(d)(2).2/

Further, we disagree with Ultra Tech concerning the issue of a fact-finding conference. Its original protest letter of April 15 stated:

> "After review of the requested documents, the Comptroller General should permit the filing of additional statements by the parties and, if requested by Ultra Tech, conduct a fact-finding conference to determine the technical acceptability of [Applied Retrieval's] proposal . . . ." (Emphasis supplied.)

On May 26, the attorney asigned to this case contacted the protester and informed Ultra Tech that we did not regard its conditional statement as a request for a fact-finding conference. The record indicates that, although the protester made reference to our authority to hold such a conference in its comments on the agency report, it did not

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2/ Ultra Tech has offered to review the proposal under a "protective order;" such a procedure is not a part of our Bid Protest Regulations. See 52 Fed. Reg. 46,446 (1987). Moreover, we are unpersuaded by the argument that we should release the proposal because the Small Business Administration, Office of Hearings and Appeals has ordered its release during the course of a size appeal proceeding because, as the protester is aware, that order was not fully complied with by Applied Retrieval and is being challenged in the United States District Court for the District of Columbia. See Applied Retrieval Technology, Inc. v. Abdnor, Civ. No. 88-2829 (D.D.C., filed Sept. 30, 1988).

in our view make a specific request that a fact-finding conference be held which required our response. In any event, the protester has not identified a specific factual dispute which would be appropriate for resolution in a fact-finding conference.

Next, Ultra Tech disagrees with our conclusion that the solicitation provision requiring offerors to submit resumes for on-site technicians with specified levels of experience was not a definitive responsibility criterion. In this regard, the protester also argues that the solicitation requirement that a maintenance management plan be submitted constitutes a definitive responsibility criterion concerning corporate experience. In each case, as stated in our original decision, the requirements were listed as factors upon which technical acceptability would be evaluated. Notwithstanding the protester's assertions to the contrary, when such requirements are included as evaluation factors in a negotiated procurement, as they may properly be, we do not regard them as definitive responsibility criteria. Consulting and Program Management, B-225369, Feb. 27, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 229. In any event, we fail to understand the point of the protester's argument since, if we were to conclude that the solicitation factor concerning the qualifications of proposed personnel was a definitive responsibility criterion, we would have evaluated the agency's conclusion that the proposed awardee met that criterion using essentially the same standard as we used to review the agency's technical evaluation. See Yardney Electric Corp., 54 Comp. Gen. 509 (1974), 74-2 CPD ¶ 376. As we stated in our original decision, we simply do not agree that the solicitation contains a factor, be it a technical evaluation factor or a definitive responsibility criterion, which pertains to the offeror's overall experience.

Finally, the protester states that our decision overstated the difference between Applied Retrieval's price and its own. Ultra Tech does not allege that its price was lower than Applied Retrieval's, it only suggests that our "mistaken belief" with regard to the actual difference between the two prices "may have understandably influenced [our] review of the Navy's technical acceptability determination, including [our] decision regarding the appropriateness of discovery." The price difference reported in our decision was that contained in the agency report which has remained unchallenged by the protester until this time. Moreover, Ultra Tech is simply incorrect in suggesting that the size of any price difference between the two proposals influenced our conclusions.

Since the protester in its request for reconsideration has not shown that our decision contained errors of fact or law or present information not previously considered that would warrant its reversal or modification, it is denied. Systems & Processes Engineering Corp.--Second Request for Reconsideration, B-231420.3, June 30, 1988, 88-1 CPD ¶ 620.

James F. Hinchman
General Counsel