

Arsemoff



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ultra Technology Corp.; Applied Retrieval
Technology, Inc.--Requests for
Reconsideration

File: B-230309.7; B-230309.8

Date: June 6, 1989

DIGEST

Pursuant to a General Accounting Office recommendation for corrective action, agency reasonably determined that awardee had acted improperly in proposing a lead technician who had given its subcontractor permission to use his name. Where the solicitation did not require submission of employment commitments or place restrictions on subcontracting, whether proposed personnel are to work for the prime contractor or the subcontractor is of no consequence.

DECISION

Ultra Technology Corporation and Applied Retrieval Technology, Inc. request reconsideration of our decision, Ultra Technology Corp., B-230309.6, Jan. 18, 1989, 89-1 CPD ¶ 42, in which we sustained in part and denied in part Ultra Tech's protest of an award to Applied Retrieval under request for proposals (RFP) No. N00600-88-R-1135, issued by the Navy as a small business set-aside for the repair and maintenance of automated storage and retrieval equipment at sites in Norfolk, Oakland and San Diego. Ultra Tech also objects to the agency's response to our request for corrective action contained in the decision.

We affirm our prior decision and find that the agency responded appropriately to our recommendation.

Ultra Tech's protest was sustained solely with respect to an issue involving the possibility that Applied Retrieval had offered the services of a lead technician for the Norfolk site who had not authorized the firm to use his name. We reached this conclusion because, in response to an affidavit submitted by Ultra Tech from the individual stating that he had not authorized the awardee to include his name in its proposal, we received no rebuttal from Applied Retrieval and

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only a brief reply from the Navy which indicated that the awardee believed it had the individual's permission. Thus, in view of the inadequate explanation, we recommended that the agency terminate Applied Retrieval's contract unless it determined that the awardee had a satisfactory explanation regarding the use of the proposed key individual's name. We denied the remainder of Ultra Tech's protest--including the contention involving lead technicians proposed by Applied Retrieval for the two other sites and the argument that the Navy should have terminated the contract following receipt of a post-award decision of the Small Business Administration (SBA) Office of Hearings and Appeals reversing an earlier SBA determination that Applied Retrieval was a small business.

By letter dated March 23, 1989, in response to our decision, the Navy informed us that it had obtained an explanation from Applied Retrieval concerning the lead technician proposed for the Norfolk site and had concluded that the facts did not warrant a finding that the awardee had improperly submitted the individual's name. Accordingly, the agency states that it does not intend to terminate Applied Retrieval's contract.

In its request for reconsideration, Ultra Tech objects to our decision to the extent that it permitted the Navy to determine whether Applied Retrieval's explanation was satisfactory; in this regard, Ultra Tech contends that the agency lacks objectivity and suggests, among other things, that we review the matter independently in order to provide an effective remedy. Ultra Tech also requests that we reconsider our decision with respect to the other two lead technicians so as to draw adverse inferences from the alleged failure by the agency and the awardee to rebut evidence offered by Ultra Tech to the effect that these individuals were also unavailable to perform as proposed. Finally, Ultra Tech requests that we reconsider whether the Navy should be required to terminate Applied Retrieval's contract in view of the SBA appellate decision holding that the awardee was not a small business.

Applied Retrieval initially objected to our decision because, as an interested party, it allegedly was not provided with a copy of the affidavit from the key individual submitted by Ultra Tech and, thus, in its view, was improperly denied an opportunity to provide a timely rebuttal during our consideration of the protest; subsequently, Applied Retrieval modified its position to indicate that its request for reconsideration would be moot if, upon

our review of the matter, we took no exception to the Navy's decision not to terminate its contract.^{1/}

We have reviewed the explanation provided by Applied Retrieval to the Navy concerning its proposal of the individual in question as lead technician for the Norfolk site and, for the reasons discussed below, find no basis upon which to object to the agency's decision to proceed with the contract as awarded.

According to the affidavits submitted by Applied Retrieval and the individual it proposed for the Norfolk site, in July 1987, that individual was contacted by the Science Management Corporation (SMC) to find out if he was interested in the job under a contract which was then being competed under solicitation number N00600-87-R-3562. He confirmed his interest, negotiated an approximate salary with SMC, and provided resume information which was later used in the firm's proposal. Ultra Tech was awarded a contract under the solicitation but it was later terminated and the requirements were re-competed under the subject RFP. SMC then contacted the individual to reconfirm his availability. Following an amendment to the RFP which converted it to a total small business set-aside, SMC, a large business, was precluded from submitting an offer in its own right. Subsequently, Applied Retrieval and SMC signed a teaming agreement which provided that Applied Retrieval would submit an offer using SMC as a subcontractor. The resume of the individual was included in Applied Retrieval's proposal. The proposal did not indicate for which firm the individual was to work.

Following the award to Applied Retrieval, in September 1988, SMC again contacted the individual proposed as lead technician for the Norfolk site. According to the individual's own affidavit as submitted by Ultra Tech, when he was informed that he would have to work for Applied Retrieval at a lower salary than previously proposed, he told SMC's representative that he "would think about it." When he was contacted several days later and offered the

^{1/} Applied Retrieval also suggests that, if we agree with the Navy's decision to continue with contract performance, Ultra Tech may not be entitled to the protest costs awarded for the issue we sustained. The Navy, which is the proper party to raise such a question, has not objected to the award of costs. We do not consider matters raised on behalf of other parties who may properly raise the issues themselves before the Office. Unidynamics/St. Louis, Inc., B-232295, Dec. 21, 1988, 88-2 CPD ¶ 609.

same position in SMC's direct employ, he told SMC's representative that he was not interested in the position. According to the affidavit submitted by SMC's representative who dealt with the individual in question, the refusal to work in Norfolk was the result of a salary dispute.

It is the Navy's position that, since SMC had the individual's express permission to use his name in connection with the lead technician position at Norfolk, and since the RFP did not require either letters of commitment or a designation as to whether lead technicians would be working for a prime contractor or a subcontractor, Applied Retrieval did not act improperly in using the individual's name as it did.

Where, as here, an RFP does not require the submission of employment commitments or place restrictions on subcontracting, whether an offeror submits the names of key personnel in good faith depends upon whether the individuals proposed were contacted with respect to their willingness to work and whether they agreed to have their names submitted; whether the proposed personnel are to work for the prime contractor or a subcontractor is of no consequence. See Kirschner Assocs., Inc., B-187625, June 15, 1977, 77-1 CPD ¶ 426. Moreover, the fact that, after award, key personnel are changed does not necessarily lead to the conclusion that submittal of resumes was the result of a misrepresentation. Id.

Based on our review of the information supplied by the Navy in response to our decision, we see no basis upon which to object to agency's conclusion that the awardee's explanation was satisfactory. In our view, Applied Retrieval did not act improperly in proposing the individual for the Norfolk job because its subcontractor, SMC, had contacted that individual and had twice obtained his express permission to use his name. Indeed, the reasonableness of Applied Retrieval's reliance on the permission given directly to its subcontractor in this situation appears to be borne out by the individual's own affidavit which indicates that, even after award, he was willing to consider employment directly with Applied Retrieval. The fact that he was unable to finalize an agreement with either the offeror or the subcontractor does not establish that Applied Retrieval included the individual's name in its proposal improperly. Kirschner Assocs., Inc., B-187625, supra.

Ultra Tech also suggests that Applied Retrieval's most recent explanation is inconsistent with its previous representations to the SBA that all three of its lead technicians would work directly for the awardee. While the

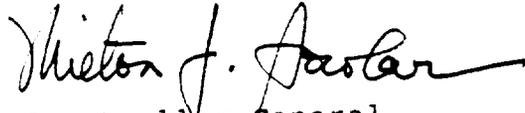
initial SBA size determination decision reflects some confusion over terminology with regard to the firm's proposed project director and its three lead technicians, it is clear that, in reaching its decision, SA reviewed Applied Retrieval's proposal (which did not designate which firm would employ the lead technicians) and the teaming agreement (which was silent as to lead technicians). Thus, based on the record before us, we are unable to conclude that Applied Retrieval has made any materially inconsistent statements regarding its proposed lead technicians. In any event, this Office is simply not the appropriate forum to pursue Ultra Tech's continuing objections to SBA's original size determination. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(2) (1988).

Ultra Tech has also objected to our decision denying its protest with respect to the other two lead technicians proposed by Applied Retrieval, asserting that the agency's responses to its allegations were insufficient and contending that we should, therefore, draw inferences adverse to the agency's position. We considered the adequacy of the agency's position regarding these individuals in reaching our earlier decision and Ultra Tech has presented us with no new information warranting a modification of that decision. Bid Protest Regulations, 4 C.F.R. § 21.12(a).

Finally, Ultra Tech argues that our recent decision in Maximus, Inc., B-231885, Nov. 10, 1988, 68 Comp. Gen. _____, 88-2 CPD ¶ 467, compels a recommendation that Applied Retrieval's contract be terminated in light of the post-award SBA appellate decision which found the firm to be a large business. In Maximus, we sustained the protest because the contracting agency awarded a set-aside contract to a firm which was found, upon SBA's first review of the matter, to be a large business, without ever giving notice of the proposed award to other offerors as required by law, without having adequate justification to waive the preaward notice requirements, and, in effect, without waiting the required 10 days from SBA's receipt of a timely size protest before making an award. None of these circumstances was present in the instant matter and, accordingly, Ultra Tech's arguments present no valid basis for granting its request for reconsideration on this issue.

In view of our decision upholding the Navy's determination to proceed with the contract, Applied Retrieval's request for reconsideration is academic.

Our prior decision is affirmed.

A handwritten signature in cursive script, reading "Milton J. Foster". The signature is written in dark ink and extends across the width of the text block.

Acting Comptroller General
of the United States