



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ACR Industries, Inc.

File: B-235465

Date: August 31, 1989

DIGEST

1. General Accounting Office will not second guess agency's failure to consider termination costs as determinative in deciding whether to take corrective action on an erroneously awarded contract.
2. Protest that the conduct of a second round of best and final offers (BAFOs), which eventually lead to the termination of a contract, created an improper auction is timely when filed within 10 days of the date the protester becomes aware of the content of such BAFOs.
3. General Accounting Office will not grant remedy to a protester, who contends improper auction techniques were employed in that its initial best and final offer (BAFOs) price was disclosed to its competitor prior to receipt of a second round of BAFOs, where the protester was admittedly aware of its competitor's prices yet made no contemporaneous complaint about potential auction techniques.
4. Where no technical discussions were conducted, an agency could not engage in the prohibited practice of technical leveling or technical transfusion.

DECISION

ACR Industries protests the termination of its contract under request for quotation (RFQ) No. DAAJ09-87-Q-4396, issued by the Department of the Army, Army Aviation Systems Command (AVSCOM), and purposed award of a contract to Eastern Gear Corporation, for gearshafts for use on the OH-6A helicopter. ACR contends that the Army's termination action was erroneous because it did not consider all costs to the government and because the Army improperly disclosed to ACR's earlier submitted price to Eastern Gear.

We deny the protest.

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The RFQ was issued on October 8, 1987, as a sole-source procurement to McDonnell Douglas Helicopter Company for the acquisition of a quantity of 232 gearshafts for use on the OH-6A helicopter. In response to a request from the Small Business Administration, the RFQ was sent to ACR Industries and to Eastern Gear Corporation. Quotations were received from all three firms. Amendment 1, increasing the quantity from 232 to 510 each, was issued on June 28 and revised quotations were received. On August 17, ACR and Eastern Gear were accepted as approved sources subject to being incorporated into the Technical Data Package (TDP). BAFOs were requested by phone on September 13 and all three firms submitted quotations; ACR's quote of \$1,128 per unit was low with Eastern Gear next low at \$1,285 per unit.

On October 18, the contracting officer verbally informed ACR that it was the low offeror and that it would prepare the award, subject to the TDP adding of ACR as an approved source. At this time, the contracting officer also told ACR the dollar amounts quoted by the other offerors, and informed Eastern Gear that ACR was the low offeror. The contracting officer and Eastern Gear deny that Eastern Gear was similarly told the prices of the other competitors.

With the receipt of the approved TDP, the Army decided that it needed to incorporate first article testing into the RFQ and issued Amendment 2 to the RFQ on February 28, 1989, with another BAFO request. Eastern's quote of \$1,127 per unit was low with ACR second low at \$1,128 per unit. After evaluation of transportation costs, the government found ACR was the low offeror and awarded it the contract.

Eastern Gear protested this award to the agency on April 17 and the agency, in preparing its response to that protest, discovered a calculation error in evaluating transportation costs, and concluded that Eastern Gear's quote represented the lowest cost to the government, even including the transportation cost. Consequently, the Army determined that Eastern Gear should be awarded the contract and issued a notice of termination to ACR on April 21. After the Army sent a detailed explanation of the termination to ACR on April 28, ACR protested to our Office on May 8.

ACR does not contest that a calculation error was made in computing transportation costs that erroneously indicated ACR was entitled to the award. However, ACR contends that the costs of terminating its contract should have been considered in determining the propriety of the termination. However, we will not second-guess an agency's failure to consider these costs as determinative in deciding whether to

take corrective action on an erroneously awarded contract. Unisys Corp., 67 Comp. Gen. 512 (1988), 88-2 CPD ¶ 35; Amarillo Aircraft Sales & Servs., Inc., 63 Comp. Gen. 568 (1984), 84-2 CPD ¶ 269.

The primary focus of ACR's protest is that it believes its initial BAFO price was disclosed to Eastern Gear, which permitted Eastern Gear to underbid it in the second round of BAFOs. ACR explains that, because ACR was admittedly provided pricing information on the other competitors, the contracting officer probably gave such information to Eastern Gear because Eastern Gear reduced its unit price to within \$1 per unit of ACR's offer. ACR maintains that this "drastic reduction" is most suspect because, when the second BAFO was requested, the only change was the addition of a first- article-test report, which ACR argues is usually provided free of charge or, at most, provided at a fee equal to one unit. ACR contends that these actions constituted technical leveling, technical transfusion, and the use of auction techniques, all of which are prohibited by Federal Acquisition Regulation (FAR) § 15.610(d) (FAC 84-16).

The Army argues that ACR's protest on this point is untimely filed under our Bid Protest Regulations, since it was filed more than 10 working days after its basis was known or should have been known. The Army asserts that this basis of protest arose either on October 18, 1988, when ACR received competitor pricing, or no later than February 28, 1989, when ACR was informed of the request for a second round of BAFOs.

We believe the Army misconstrues the nature of ACR's protest. ACR does not protest the fact that a second round of BAFOs was requested; rather, ACR is protesting that the price reduction in Eastern Gear's proposal could only have been caused by a prohibited price disclosure. Since ACR only learned of Eastern Gear's price reduction after its contract was terminated, ACR could reasonably wait until that time before it protested this agency conduct. See Eagan, McAllister Assocs., Inc., B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405; Raytheon Ocean Sys. Co., B-218620.2, Feb. 6, 1986, 86-1 CPD ¶ 134. Inasmuch as ACR's protest was filed within 10 days of when it was apprised of Eastern Gear's price, its protest is timely.

ACR's contention that improper auction techniques were likely employed by the Army is based upon the fact that it

was apprised of its competitor's prices on the first BAFO.^{1/} ACR contends that given the fact that Eastern Gear's second BAFO was slightly less than ACR's price, Eastern Gear must have been similarly apprised of ACR's price. Both the Army and Eastern Gear deny any such disclosure was made.

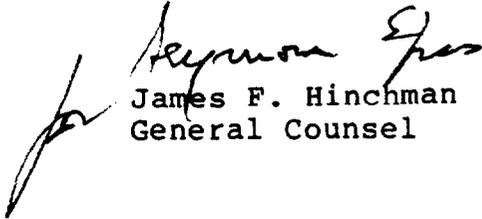
We believe it would be anomalous to grant ACR any remedy based on its allegation that its first BAFO price was disclosed to Eastern Gear, inasmuch as ACR was admittedly aware of its competitors' first BAFO prices, yet made no contemporaneous complaint about potential auction techniques when new BAFOs were requested. In any case, it would not be appropriate to reinstate ACR's award, as requested by ACR, since it was not otherwise entitled to the award as the low evaluated offeror.

Finally, ACR's arguments that the agency engaged in technical leveling and technical transfusion are misplaced. Technical leveling arises when, as the result of successive rounds of discussions, the agency helps to bring one proposal up to the level of the other proposals by pointing out inherent weaknesses that remain in an offeror's proposal because of the offeror's own lack of diligence, competence or inventiveness after having been given the opportunity to correct those deficiencies. FAR § 15.610(d)(1) (FAC 84-16); Unidyne Corp., B-232124, Oct. 20, 1988, 88-2 CPD ¶ 378. Technical transfusion occurs when the government discloses one offeror's approach to another offeror. FAR § 15.610(d)(2) (FAC 84-16); Raytheon Ocean Sys. Co., B-218620.2, supra. Here, while the offerors were given an opportunity to revise their proposals, there is no indication that the contracting officer helped Eastern Gear or that the contracting officer conveyed, either directly or indirectly, during discussions a better technical approach or ACR's technical approach. Indeed, the record indicates

^{1/} ACR did not and does not contest the agency's need to reopen discussions and request new BAFOs to add the material requirement that first article tests be required under the contract. Indeed, such a complaint would be untimely under our Bid Protest Regulations.

there were no technical discussions. Under these circumstances, we see no basis to conclude that the Army engaged in technical leveling or technical transfusion. Unidyne Corp., B-232124, supra; Applied Mathematics, Inc., 67 Comp. Gen. 32 (1987), 87-2 CPD ¶ 395.

Accordingly, the protest is denied.


James F. Hinchman
General Counsel