



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: General Marine Industries of New York, Inc.;
Todd Pacific Shipyards Corporation

File: B-240059; B-240059.2

Date: October 18, 1990

Lisa B. Horowitz, Esq., Washington, Perito & Dubuc, for General Marine Industries of New York, Inc., and H.K. Schaefer, for Todd Pacific Shipyards Corp., the protesters.

Douglas P. Larsen, Jr., Esq., Department of the Navy, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest asserting that agency improperly failed to impose a cap on general and administrative overhead rates proposed by offerors, and failed to include other similar terms in the request for proposals, is dismissed as untimely since under the General Accounting Office Bid Protest Regulations such challenges must be filed prior to receipt of initial proposals.
2. Challenge to agency's review of awardee's cost realism is denied where record shows that the cost realism review was reasonable based on consideration of the offerors' cost and pricing data, a Defense Contract Audit Agency audit, and the Source Selection Board's technical evaluation.
3. Assertion that agency acted improperly in deleting from awardee's contract certain clauses included in the solicitation is denied where the clauses were later properly found to be inapplicable or not required.

DECISION

General Marine Industries of New York, Inc. (GMI) and Todd Pacific Shipyards Corporation protest the award of a cost-plus-fixed-fee contract to Research Management Corporation (RMC) under request for proposals (RFP) No. N00406-89-R-0674,

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issued by the Department of the Navy, Naval Supply Center, Puget Sound, Washington. GMI contends that the Navy did not properly evaluate the realism of RMC's cost proposal. Todd challenges the failure of the solicitation to impose a ceiling on indirect costs, and to require offerors to establish that they currently possess the facilities, employees, quality assurance procedures, and requisite security clearances to perform the contract. Todd also argues that the Navy improperly deleted from the contract awarded to RMC certain provisions found in the solicitation.

The protests are denied in part and dismissed in part.

The Navy issued the RFP on July 26, 1989, seeking to award a cost reimbursement contract for renovation and repair services for selected spaces on Navy ships--i.e., galleys, messes, sculleries, laundries, dry cleaning and fast food facilities, and certain other areas. The RFP required offers to be based on a level of effort estimated at a total of 283,751 hours of direct labor for the base year and 2 option periods. Section M of the RFP advised offerors that cost would be more important than any other single evaluation factor; it further advised that if two or more offers were found to be technically equivalent, award would be made to the lowest evaluated offer.

Four offers were received by the closing date for initial proposals; RMC proposed the lowest cost and fee and achieved the highest technical evaluation. However, since the technical ratings given all four offers were very close, the contracting officer determined that the offers were technically equivalent. The contracting officer next reviewed each offeror's cost proposal for cost realism.

Upon completion of the evaluations, on May 21, 1990, the Navy requested best and final offers (BAFO) from all four offerors, indicating that award would be based on the lowest realistic evaluated costs since technical equivalence had been achieved. Each offeror responded with a slightly revised cost proposal; however, RMC remained the offeror with the lowest realistic evaluated cost--RMC's proposed costs in its BAFO were \$7,952,430; GMI's proposed costs were \$10,212,313; and Todd's proposed costs were \$13,787,110.

On June 5, the Navy made award to RMC, and on June 15, GMI protested to our Office. Four days later, on June 19, Todd filed its protest.

GMI PROTEST

GMI charges generally that the Navy's cost realism review of RMC's proposal was flawed in its assessment of the realism of RMC's overhead rates. Specifically, GMI argues that the general and administrative (G&A) expense rate and labor and material overhead rates proposed by RMC are unrealistic because RMC relied on a subcontractor for up to 50 percent of the work in the solicitation, and because the Navy failed to impose a cap on offerors' G&A expenses.^{1/} GMI also argues that RMC's proposed overhead rates are unrealistically low because of two other factors: (1) RMC's alleged failure to understand and account for the solicitation's requirement that offerors implement quality assurance procedures consistent with MIL-Q-9858A; and (2) RMC's alleged failure to understand and account for the warehousing requirements under the solicitation.

The Navy responds that its contracting officer performed an independent cost realism analysis on each of the four offers and adjusted and scored the proposed costs of each offeror for realism. The Navy argues that its cost realism review was reasonable since it was based on Defense Contract Audit Agency (DCAA) audits of all offerors and major subcontractors, the cost or pricing data provided with each offer, and the Source Selection Board evaluations of the technical proposals.

When an agency evaluates proposals for the award of a cost reimbursement contract, an offeror's proposed estimated costs of contract performance are not dispositive, since the offeror's estimates may not provide valid indications of the actual costs which the government is, within certain limits, required to pay. See Federal Acquisition Regulation (FAR) § 15.605(d). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. Arthur D. Little, Inc., B-229698, Mar. 3, 1988, 88-1 CPD ¶ 225. Our review of an agency's exercise of judgment in this area focuses on whether the agency's cost evaluation was reasonably based. Science Applications Int'l Corp., B-238136.2, June 1, 1990, 90-1 CPD ¶ 517; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

^{1/} GMI's existing contract to perform these services included a cap on G&A, and in its proposal to the Navy under the current solicitation, GMI offered a similar cap.

According to GMI, RMC's G&A rate and its other overhead rates are unrealistically low because RMC is planning to subcontract up to 50 percent of the work, and because the Navy failed to impose a cap on the amount of G&A expenses that will be reimbursed by the government.

As a preliminary matter, to the extent that GMI argues that a cap should have been imposed on offerors' G&A expenses, the protest concerns an alleged impropriety in the solicitation which had to be raised prior to the closing date for receipt of initial offers. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990). Since this issue was not raised until after award, it is now untimely.

With respect to GMI's challenge that RMC's overhead rates are not realistic because the firm's reliance on a subcontractor might cause those rates to exceed the levels estimated in its proposal, the protester does not explain why this is why so. DCAA's audit used by the contracting officer for his cost realism review indicates that RMC has a history of stable overhead rates. DCAA closely reviewed RMC's and the subcontractor's proposed overhead rates, considering the elements in each pool and the future direction of such rates due to changes in RMC's and the subcontractor's business base. Application of RMC's own overhead rates to its subcontract costs was specifically examined. The information furnished in these audits provides a reasonable basis for both the decision that the overhead rates estimated are realistic, and that the agency could refrain from imposing a cap on G&A rates.

In its challenge to the method used by the Navy to review RMC's overhead rates, GMI argues that DCAA's audits were flawed and could not properly form the basis for a cost realism review because the audits did not measure cost realism. GMI's challenge to the validity of DCAA's audit of RMC mischaracterizes the role of such an audit in the contracting officer's review. The DCAA audits prepared here were but one of the tools used by the contracting officer for the cost analysis set forth in the record as part of the Navy's Business Clearance Memorandum; the audits were not the cost realism review itself. DCAA reviewed each offeror's proposed direct charges and overhead rates and suggested to the contracting officer areas where those rates were supported or unsupported by the findings of the audit. In addition to the DCAA audit, the contracting officer used the cost and pricing data submitted by each offeror, and the Source Selection Board's technical evaluation in preparing the

independent cost realism analysis set forth in the Business Clearance Memorandum. Further, our review indicates that the contracting officer's review was both reasonable and thorough. Thus, the analysis properly formed the basis of the Navy's conclusion that RMC's estimated overhead rates were reasonable. See Systems Research Corp., B-237008, Jan. 25, 1990, 90-1 CPD ¶ 106.

GMI challenges the realism of RMC's proposed overhead rates on other grounds. GMI argues that RMC did not understand and include in its overhead rates an appropriate charge for implementing quality assurance (QA) procedures consistent with MIL-Q-9858A, the military standard for QA procedures required by the solicitation. Both GMI and the Navy agree that DCAA's audit reviewed many of the costs associated with implementing RMC's QA plan; however, GMI asserts that certain requirements of a QA plan consistent with the applicable military standard were not reflected in the cost realism review. GMI argues that MIL-Q-9858A was incorporated in the solicitation by reference in its entirety, and that any valid cost realism analysis must consider all the costs associated with complying with the standard.

The Navy's Source Evaluation Board concluded that RMC presented a QA plan that was compliant with the requirements of MIL-Q-9858A. Based on the evaluation board's conclusion that RMC would comply with the requirements of MIL-Q-9858A--as well as with the other requirements of the solicitation--and DCAA's conclusion that the proposed costs were consistent with RMC's performance approach and could be accepted as submitted, the contracting officer reasonably concluded that RMC's cost was realistic. Our in camera review of the record reveals no basis to conclude that RMC's proposal failed to comply with the requirements of MIL-Q-9858A, nor that the cost realism analysis was unreasonable. See Burns & Roe Indus. Servs. Co., B-233561, Mar. 7, 1989, 89-1 CPD ¶ 250.

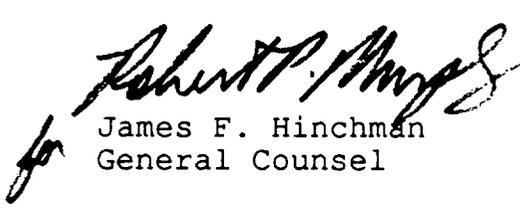
GMI's next assertion--that RMC failed to understand and account for the warehousing requirements under the solicitation--is simply in error. In its response to the protest, the Navy explained that RMC did not include charges for the solicitation's requirement to provide "adequate warehousing" in its overhead rates because it accounted for such costs as Other Direct Costs. GMI responded that the solicitation's warehousing requirements were broader than simply renting a warehouse, and that the Navy's response did not establish that the agency had considered all of the appropriate costs in its cost realism analysis. Our review of the record reveals that DCAA's audit provided to the contracting officer expressly establishes that the cost of the warehouses, as well as all associated costs, were reviewed by DCAA.

TODD'S PROTEST

In its protest, Todd first challenges the failure of the solicitation to impose a ceiling on indirect costs, and to require offerors to establish that they currently possess the facilities, employees, quality assurance procedures, and requisite security clearances to perform the contract. Todd's protest in these areas concerns an alleged impropriety in the solicitation which had to be raised prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); Englehard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. Since Todd's protest was not filed until after award was made, these issues are untimely.

Todd also argues that the Navy improperly deleted from the contract awarded to RMC certain clauses required by the solicitation. As a preliminary matter, Todd lacks the necessary direct economic interest to qualify as an interested party entitled to file a protest challenging award to RMC since it would not be in line for award of a contract even if its protest were sustained. See 31 U.S.C. §§ 3551(2), 3553(a) (1988); 4 C.F.R. §§ 21.0(a), 21.1(a). Nonetheless, we fail to see how Todd or any other offeror has been injured as a result of the agency's actions. The Navy deleted certain contract clauses included in the solicitation from the contract awarded to RMC. These clauses, although incorporated by reference into the solicitation, were later found to be inapplicable or not required by law or regulation. For example, four clauses in the solicitation were not required since the awardee is a small business (for example, small business awardees are not required to prepare small business and small disadvantaged business subcontracting plans as mandated by FAR § 52.219-9); two other clauses were mutually exclusive, one of which was deleted based on RMC's decision not to propose that it be reimbursed for Facilities Cost of Money pursuant to FAR § 52.215-30; and five clauses were deleted because they were no longer required by law or regulation. Accordingly, we find that the Navy acted properly in deleting these clauses from RMC's contract at the time of award.

The protests are denied in part and dismissed in part.


James F. Hinchman
General Counsel