

Shimamura



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Advanced Support Systems Management, Inc.

File: B-241528; B-241528.2

Date: February 14, 1991

Reginald Bell for the protester.
Pamela J. Mazza, Esq., Piliero, Tobin & Mazza, for CTA
Incorporated, an interested party.
Amy M. Shimamura, Esq., and James S. Spangenberg, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Protest that contracting agency improperly removed best and final offers (BAFO) from room designated for receipt of BAFOs prior to the BAFO receipt deadline and may have tampered with BAFO prices is denied, where the record shows that proposals were properly safeguarded and the protester fails to provide evidence in support of its allegation in response to affidavits of agency personnel denying there was tampering.
2. Agency reasonably accepted awardee's proposed use of a computer as meeting request for proposal response time requirements in the absence of credible evidence that the proposed system failed to meet these requirements.
3. Protest that contracting agency inequitably subjected the protester to an arduous pre-award survey, while ordering only a short-form survey for the awardee, is denied where the record shows that the contracting agency ordered short-form surveys for both the offerors, and the protester, who was second low priced on a request for proposals awarded to the low acceptable offeror, was not prejudiced as a result of the survey since the protester was not in line for award in any case.
4. Protest that awardee is not a small business and is therefore ineligible for contract award is dismissed because challenges of the size status of particular firms are for review solely by the Small Business Administration, not the General Accounting Office.

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5. Protest that contracting agency improperly failed to provide notice of contract award prior to award is denied where the agency properly waived the prior notice requirement of Federal Acquisition Regulations § 15.1001(b)(2) by determining, in writing, that the urgency of the requirement necessitated the award without delay.

DECISION

Advanced Support Systems Management, Inc., (ASSMI) protests the award of a contract to CTA Incorporated under request for proposals (RFP) No. N61339-90-R-0022, issued as a small business set-aside by the Department of the Navy, Naval Training Systems Center, Orlando, Florida, for the upgrade and modification of nine AH-1S Cobra Flight and Weapons Simulators (FWS), Device 2B33.1/ ASSMI contends that the contracting officer improperly collected best and final offers (BAFO) from the room designated for receipt of proposals prior to the 10 a.m. deadline for submission of BAFOs, inequitably subjected its firm to an arduous pre-award survey and failed to provide ASSMI with prior notice of contract award. ASSMI also contends that CTA's proposed computer will not meet the RFP's specifications, that CTA is not a small business, and that CTA will not be able to perform the contract at its offered price.

We dismiss the protests in part and deny them in part.

The RFP, issued on March 8, 1990, provided that contract award would be made to the lowest priced, technically acceptable offeror. Eight offers were received on April 23, and determined to be technically acceptable. BAFOs were requested and received by September 13. CTA submitted the lowest-priced BAFO and ASSMI was second low. The contracting officer requested pre-award surveys for both CTA and ASSMI. Based, in part, on CTA's pre-award survey, it was determined to be responsible. Thus, the contract was awarded to CTA on September 26. ASSMI protested the award on October 5.

ASSMI contends that the handling of BAFOs upon receipt was improper because the contracting officer removed the BAFOs from the room designated for receipt of BAFOs as BAFOs were

1/ The AH-1 FWS is a full fidelity mission simulator consisting of two independent training enclosures, motion systems, and visual systems supported by a single computer complex. The device is capable of providing the pilot and co-pilot/gunner with independent training at the same time on separate missions or integrated training on the same mission.

submitted. ASSMI suggests that BAFOs could have been compromised or tampered with. The protester contends that there should have been a public bid opening with all offerors and other interested parties present.

Federal Acquisition Regulations (FAR) § 14.402-1(a), which requires a bid opening officer to publicly open and, if practical, publicly read all timely received bids, is only applicable to sealed bidding procedures. In a negotiated procurement, as here, there is no provision for public opening. To the contrary, FAR § 15.411(b) specifically requires the contracting agency to safeguard proposals and quotations from unauthorized disclosure. The contracting officer therefore properly did not publicly open the proposals.

ASSMI describes the contracting officer's behavior as suspicious in monitoring the room for receipt of proposals, and in commenting that ASSMI's presence there to observe the submission of the other offers was inappropriate. However, we find nothing improper or suspicious in the contracting officer's actions to assure that all proposals were safeguarded. Moreover, the agency has submitted several affidavits indicating that the proposals were safeguarded as they were received, and then were opened in the presence of several government representatives.

ASSMI alleges that BAFO prices may have been tampered with because its original, as opposed to its BAFO, price was incorrectly recorded on the abstract of offers. ASSMI also speculates that CTA's BAFO price may have been lowered. The agency has provided affidavits from all agency personnel concerned, which state that all BAFOs were properly safeguarded and that none were tampered with. ASSMI contends that the agency's affidavits should not be given any weight because none were notarized. We do not agree that the failure to notarize these affidavits gives them less weight than the protester's wholly unsupported speculations. Agency procuring officials are presumed to act in good faith and, in order for our Office to conclude otherwise, the record must show that procuring officials had a specific and malicious intent to harm the protester. See NFI Mgmt. Co., 69 Comp. Gen. _____, B-238522 et al., June 12, 1990, 90-1 CPD ¶ 548. Nothing in the record suggests that there was any wrongdoing on the part of agency officials, or that ASSMI's or any other offerors' BAFO prices were changed.

ASSMI contends that CTA's proposed use of Harris Corporation Nighthawk 1200 computers as the host processors for the AH-1S cobra upgrade program will not meet the RFP response time requirements.^{2/} ASSMI alleges that Harris, for marketing purposes, generated the data found in CTA's proposal to make the Nighthawk 1200 appear faster and more powerful than it actually is. ASSMI claims that it and the other offerors considered and rejected this computer as incapable of meeting RFP requirements. ASSMI urges that the Army should have independently verified the computer's capabilities through a benchmark test.

In support of its contentions in this regard, ASSMI has attached alleged benchmark test results on the Nighthawk 1200 computer,^{3/} which ASSMI alleges it obtained from Harris. ASSMI claims this document shows that this computer's response time is rated at 1.632 million instructions per second (MIPS) when using Ada based software as required by the RFP,^{4/} instead of the 6 MIPS per computer rating claimed by Harris in CTA's proposal.^{5/} ASSMI contends that this Ada

^{2/} The Navy and CTA assert that this contention, first raised on October 24, is untimely under our Bid Protest Regulations, since it was made more than 10 working days after September 26, when ASSMI was apprised of the award. However, the record does not indicate that ASSMI was apprised on the award date that CTA offered a Harris computer based proposal. ASSMI did obtain information relating to the Harris computers on October 17. Since we resolve doubts regarding the timeliness of a protest in favor of the protester, we consider this protest allegation to be timely. See Industrial Enter. of Am., Inc., B-239898, Sept. 18, 1990, 90-2 CPD ¶ 228.

^{3/} This benchmark is labeled "PIWG Tape Acompile Results." The particular program referenced by ASSMI is called "Whetstone program, using standard internal Ada math calculations."

^{4/} Ada is the computer language specified for use in Department of Defense data processing applications. The RFP does require an Ada program support environment.

^{5/} ASSMI has also produced a number of other documents that it claims are benchmark results of the Nighthawk 1200 computer using Ada based software. CTA claims these benchmark test results were fabricated by ASSMI by altering data that ASSMI obtained from Harris under false pretenses. ASSMI denies this allegation and contends that it obtained these results from other sources. Since ASSMI has provided no further evidence that indicates that these documents are accurate benchmark

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based Whetstone benchmark test is a more accurate reflection of the RFP requirements than the FORTRAN based Whetstone program on which Harris and CTA base their claim that the Nighthawk 1200 can meet the RFP response time requirements using Ada based software.

The Navy asserts that the Ada benchmark data referenced by ASSMI does not in any way reflect on CTA's proposal, which demonstrates how it will meet the RFP response time requirements. The Navy asserts (and ASSMI does not respond) that it is unknown how the Whetstone program was modified for the PIWG test or how that benchmark was run. Since such benchmarks are often run to compare various computers, rather than to run efficiently, the relevance of this test is unknown.

On the other hand, Harris' manufacturing data clearly rates the Nighthawk 1200 at a maximum 6 MIPS and the CTA proposal accounts for any degradation in performance related to the use of Ada based software. ASSMI asserts that this degradation is much more drastic than claimed by Harris and CTA as evidenced by the PIWG benchmark results. The record, however, shows the Navy reasonably accepted CTA's detailed calculations and explanations that it needed only 7.667 MIPS to successfully operate its proposed system, taking into account, among other things, the use of Ada based software and worst case scenarios, and the two Harris computers were rated at a total of 12 MIPS. While it is true the CTA proposal offered to upgrade this system to an unvalidated Nighthawk 4000 model,^{6/} this does not mean the Nighthawk 1200 was incapable of meeting the RFP requirements. In the absence of credible evidence to the contrary, we find CTA's proposal was reasonably considered acceptable, and there was no requirement to run a benchmark test to confirm this capability.^{7/}

ASSMI maintains that the pre-award survey should only have been required for its firm if it had been the low offeror, and that the Navy improperly failed to cancel the survey prior to

^{5/}(...continued)
results of the Nighthawk 1200, we will not consider this data further.

^{6/} The Nighthawk 4000 has since been validated.

^{7/} The RFP contained no provision for a benchmark test, although it required detailed engineering calculations to show the system could meet RFP requirements.

contract award. ASSMI also contends that its firm was inequitably treated because the Navy requested only a short-form pre-award survey for CTA while requiring a full contractual/financial audit for ASSMI.

The record indicates that contrary to ASSMI's contention, the contracting officer requested short-form surveys for both CTA and ASSMI. The pre-award survey on CTA recommended award to that firm. We will not further review ASSMI's allegation that the pre-award surveys were improperly ordered or conducted because the survey had no bearing on ASSMI's not receiving the contract and, therefore, did not prejudice the protester. See Defense Indus. Inc., B-202094.3, Nov. 30, 1981, 81-2 CPD ¶ 429. In this regard, the record demonstrates that ASSMI was not awarded the contract because the protester was not the low offeror.

ASSMI contends that CTA is not a responsible contractor and will not be able to perform the contract at its offered price. CTA's price of \$3,855,286 is not significantly lower than ASSMI's price of \$3,933,333. Thus, this protest basis seems meritless. In any case, a determination that an offeror is capable of performing a contract is based, in large measure, on subjective judgments, which generally are not susceptible of reasoned review. Thus, an agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m) (1990); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. Where, as here, there is no showing of possible fraud or bad faith, or that the solicitation established definitive responsibility criteria, we have no basis to review the protest and it is dismissed.

ASSMI contends that the contract award was improper because CTA does not meet the 1,000 person small business size standard of the RFP. The Small Business Administration (SBA) determined on January 4, 1991, that CTA is a small business concern. ASSMI has appealed that determination within the SBA. The Small Business Act, 15 U.S.C. § 637(b)(6) (1988), gives the SBA, not our Office, the exclusive conclusive authority to determine matters of small business size status for federal procurement. 4 C.F.R. § 21.3(m)(2); Survive Eng'g Co., B-235958, July 20, 1989, 89-2 CPD ¶ 71. Thus, this protest basis is dismissed.

ASSMI further contends that the agency violated the FAR by failing to provide it with notice of contract award prior to award. In a small business set-aside, as here, upon completion of negotiations and determinations of

responsibility, but prior to award, the contracting officer is required to inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror. FAR § 15.1001(b)(2). Notice is not required, however, when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay. Id. In this case, the contracting officer made and documented the requisite determination. In any case, ASSMI was not prejudiced by the fact that it did not receive pre-award notice of the award, since it filed a size protest that was considered and denied by the SBA, and since the Navy suspended contract performance pending our decision on the protest. See Science Sys. and Applications, Inc., B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ 381.

The protests are dismissed in part and denied in part.

for Robert P. Murphy
James F. Hinchman
General Counsel