

R. Ayer



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: CapitolCare, Inc.

File: B-241976

Date: March 19, 1991

Marcia G. Madsen, Esq., and Scott G. Lindvall, Esq., Morgan, Lewis & Bockius, and Carthur Drake, CapitolCare, Inc., for the protester.

Steven P. Merrefield, for BI Monitoring Corporation, an interested party.

David E. Weiskopf, Esq., and Mary Ellen Hughes, Esq., Administrative Office of the United States Courts, for the agency.

Roger H. Ayer, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency decision to award two contracts instead of the three contracts mentioned in the solicitation, without first affording offerors an opportunity to submit revised proposals, is untimely under the Bid Protest Regulations when filed more than 10 working days after the protester received a letter naming the two awardees and providing their respective prices.

2. Protest of agency's nondisclosure of weights assigned to evaluation subfactors and agency rescoring of proposals using equal weighted subfactors is untimely under the Bid Protest Regulations when filed more than 10 working days after the protester received a response to its agency-level protest on other matters, which disclosed the agency's evaluation of the subfactors.

DECISION

CapitolCare, Inc. protests the award of two contracts, one to Guardian Technologies, Inc. and one to BI Monitoring Corporation (BIM), by the Administrative Office of the United States Courts under request for proposals (RFP) No. OXXDDFX-90-010 for electronic monitoring services for federal offenders.

We dismiss the protest.

The Administrative Office issued the RFP for a 1-year firm, fixed-price contract with 2 option years. The RFP advised offerors that the Administrative Office had paid \$6.00 per day

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per participant (i.e., offender) under the predecessor electronic monitoring contract. The RFP further stated:

"The Government intends to award three contracts to three different offerors to provide services. Each contract shall have an estimated volume of from 100 to 250 participants.

"The Government will rank offers according to the highest evaluated scores in accordance with the evaluation factors listed Contracts will be awarded to those three offerors ranked highest."

Offers were evaluated on a 100-point scale against three evaluation factors (two technical factors and cost). The first technical factor--quality of experience, business reputation, capacity and responsibility--carried a weight of 20 points with 6 listed subfactors, and the second technical factor--quality of services offered--was worth 60 points with 5 listed subfactors. The RFP did not disclose the number of points assigned to the 11 subfactors. The cost factor was valued at 20 points. The RFP reserved the right of the government to make award on the basis of initial proposals.

On the May 7, 1990, closing date, 16 proposals were received and evaluated using the announced 100-point scale. During the evaluation, the evaluators assigned differing previously unannounced weights to the 11 subfactors. Guardian and BIM received the two highest technical scores. CapitolCare had the fifth highest rated technical proposal, which was significantly lower than the two awardees. The evaluators determined cost scoring by assigning the maximum 20 points to the lowest priced offer and lesser scores to the more expensive offers. Guardian, BIM, and the protester received the same score for the cost factor because they offered the same price (the announced current contract price). The third and fourth rated offerors had significantly higher prices. No discussions were conducted.

The evaluators concluded that there was insufficient technical merit in the third and fourth rated proposals to justify an award at their higher prices. Since both Guardian and BIM were found to have the necessary capacity to service additional offenders, the evaluators recommended the award of two contracts. The agency recalculated the evaluators' subfactor scoring to give equal weight to the subfactors

within each factor.^{1/} The agency found that the recalculation did not change the relative ranking of the four highest ranked offerors; however, CapitolCare fell from fifth place to sixth place when the subfactors were scored with equal weight. On July 13, the Administrative Office accepted the evaluators' recommendation and made awards to Guardian and BIM, at which time CapitolCare was apprised of the awards.

CapitolCare was debriefed on August 7, and on August 21 filed an agency-level protest. CapitolCare challenged the awards on three basic grounds that: (1) the award of two contracts instead of the three contracts contemplated in the RFP was improper, absent an opportunity to revise proposed pricing, because it denied offerors an opportunity to factor the increased quantity of offenders into their pricing; (2) the evaluation of the awardees' proposals was improper because the awardees received more points than they should have; and (3) CapitolCare's proposal was scored too low, given its financial soundness and years of experience. The agency denied CapitolCare's protest on October 19. CapitolCare then filed essentially the identical protest at our Office on November 6.

After receipt of the agency report addressing the above arguments, and a bid protest conference at our Office, CapitolCare only maintained one of its three initial basic grounds, that the Administrative Office's award of two instead of three contracts was improper.^{2/} CapitolCare did present two additional contentions in the comments: (1) that the Administrative Office failed to evaluate the offers in accordance with the stated evaluation factors by not disclosing or evaluating in accordance with the weights assigned to the stated subfactors, and (2) that the

^{1/} The six subfactors associated with the 20-point technical evaluation factor were recalculated assigning a 3.3-point maximum score for each subfactor. The five subfactors under the 60-point technical evaluation factor were recalculated using a 12-point maximum score per subfactor.

^{2/} The agency report responded in depth to the protester's contentions regarding specific aspects of the evaluation of the awardees' and the protester's proposals. The protester did not dispute the agency's responses on these matters, but rather stated at the bid protest conference that it was only pursuing the protest bases that it addressed in its conference comments. Since the protester's conference comments did not address the issues concerning the relative evaluated qualities of the awardees' and protester's proposals, we consider them to be abandoned. See TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573.

Administrative Office should have requested best and final offers (BAFO) because of its failure to make three awards and its failure to disclose the proper evaluation weights.

CapitolCare's contention that the Administrative Office improperly awarded two contracts instead of the three contracts mentioned in the RFP, without affording offerors an opportunity to revise their cost proposals, is untimely under our Bid Protest Regulations. We will consider a protest that is initially filed with the agency, if both the initial agency-level protest and the subsequent protest to our Office are timely filed. 4 C.F.R. § 21.2(a)(3) (1990). To be timely filed with the agency, a protest of an issue, other than an alleged solicitation impropriety, must be filed with the agency not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). If an offeror is provided specific information concerning an award that reasonably apprises the protester of the facts on which it bases its protest, a protest of the award based on that information must be filed within 10 days thereafter. See Atlantic Marine, Inc., B-239119.2, Apr. 25, 1990, 90-1 CPD ¶ 427.

On July 13, 1990, the Administrative Office informed the protester that the agency made two instead of three awards and the prices at which the awards were made. No further information was needed (e.g., the debriefing) for the protester to realize that it had a fundamental disagreement with the agency over the number of awards that could properly be made under the solicitation without conducting discussions. Id. Since CapitolCare did not file its agency-level protest until August 21, more than 10 days after its receipt of the agency's letter advising of the two awards and their prices, its agency-level protest and subsequent protest to our Office are untimely. 4 C.F.R. § 21.2(a)(3). Although the agency addressed this matter in its answer to the protester's agency-level protest, the timeliness requirements of our Bid Protest Regulations may not be waived by the actions of the agency. Republic Maintenance of Kentucky, Inc., B-231123, June 2, 1988, 88-1 CPD ¶ 524; Air Cleaning Specialists, Inc.--Recon., B-236936.2, Nov. 3, 1989, 89-2 CPD ¶ 422.

CapitolCare's contention that the Administrative Office failed to evaluate the offers in accordance with the stated evaluation criteria, when it did not disclose the weights assigned to the subfactors during the evaluation, is also untimely. The Administrative Office's October 19, 1990, letter denying the agency-level protest stated in part:

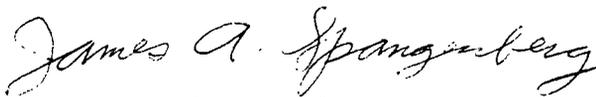
"The evaluation scores were tallied in two ways. They were first tallied using a weighted scale that assigned five points for financial status under the

20 point category called 'Quality of Experience, Business Reputation, Capacity, and Responsibility.' A second evaluation was conducted to see if the weighted score would change if each evaluation criterion was evaluated equally. Using an equal assignment of 3.3 points to each of the six criteria that were included, all evaluation criteria were evaluated equally in the second tally of scores."

Thus, CapitolCare learned on October 19 of the facts that form its basis of protest on this issue--that the agency had used two methods and different weights to calculate subfactor evaluation scores. However, CapitolCare's initial protest to our Office did not object to the agency's scoring methodology.^{3/} CapitolCare first raised the issue in a letter dated December 10, and reiterated it in its January 11 conference comments. This was more than 10 working days after October 19. Thus, the issue is untimely raised and is dismissed. See Science Sys. and Applications, Inc., B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ 381.

CapitolCare's contention that the Administrative Office should have conducted discussions and requested BAFOs because it rescored the proposals with equally weighted subfactors and decided to make less than three awards is also untimely filed. This issue is clearly intertwined with the above discussed untimely raised issues, and must therefore be considered untimely itself.^{4/}

The protest is dismissed.



James A. Spangenberg
Assistant General Counsel

^{3/} Although CapitolCare, in its later correspondence, states that this issue was raised in its initial protest, our review of that correspondence reveals that this was not the case.

^{4/} While the protester mentioned that the agency did not request BAFOs in its November 6 protest to our Office, this observation was not made in the context of remedying the remaining protest bases (that is, the agency's decision to award less than three contracts or the agency's use of unannounced subfactor weights during the evaluation); rather, the protester mentioned BAFOs in the context of providing offerors with an opportunity to give the agency further information concerning the offerors' financial status and ability to perform for the term of the contract, matters which CapitolCare no longer protests.