Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Miller, Davis, Marter & Opper, P.C.

File: B-242933.2

Date: August 8, 1991

Albert B. Krachman, Esq., Bracewell & Patterson, for the protester.
James Peterson, Esq., Department of Veterans Affairs, for the agency.
Scott H. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where record shows that agency may have terminated a contract and canceled the acquisition in an effort to avoid protest proceedings at the General Accounting Office, agency's actions will be examined to determine whether those actions were otherwise reasonable.

2. Agency actions in terminating a contract and canceling the acquisition were reasonable where contract award was improper because agency (1) failed to consider price in the source selection, and (2) improperly made award on the basis of initial offers to other than the lowest overall cost offeror.

DECISION

Miller, Davis, Marter & Opper, P.C., protests the termination of its contract No. V349P-1, and the cancellation of request for proposals (RFP) No. 349-6-91, issued by the Department of Veterans Affairs (VA) to acquire real estate closing and loan underwriting services for the state of Texas.1/ Miller Davis argues that the agency's actions lacked a reasonable basis because the award of the contract under the subject RFP was proper. Miller Davis asserts that the agency engaged in these actions merely to avoid decisions on various bid protests.

1/ VA acquires real estate on an ongoing basis through foreclosure proceedings where borrowers have defaulted on VA-underwritten loans.

We deny the protest.

The RFP specified that award would be made to the firm whose proposal offered the best overall value to the government, cost/price and other factors considered. The RFP further provided that technical considerations were more important than cost, but that, as proposals were determined to be more equal in technical merit, cost would become more important for award purposes. The RFP specified five technical evaluation criteria, some of which had a number of subcriteria, and also assigned a point value to each of the various criteria and subcriteria; the maximum number of technical points under the evaluation scheme was 195 points. In addition, the RFP expressly solicited unit prices for closing and underwriting services for the base year and 4 option years. These prices were stated to be "for evaluation purposes."2/

In response to the solicitation, the agency received five offers. After evaluating the offers for technical merit, the agency assigned the maximum 195 points to the offer of Miller Davis, and 119 points to the next-highest technically ranked offeror, Pope, Roberts & Warren, P.C. The remaining offerors received scores substantially below those assigned to the two highest-ranked offerors. Based on these technical scores, the agency made award to Miller Davis on the basis of initial offers without discussions. Miller Davis's total evaluated price for the 5 years was $12,456,390 while Pope Roberts's evaluated price was $4,320,000.3/

On February 13, 1991, subsequent to the award, Pope Roberts protested to our Office alleging, among other things, that the contract had been improperly awarded because the agency had not properly followed the RFP evaluation criteria in the source selection. On March 21, the agency responded to Pope Roberts's protest stating that the award had been made without consideration of price.4/ VA therefore proposed to terminate

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2/ These fees were apparently to be paid by buyers of the real estate, although other costs were reimbursed by VA under the contract.

3/ The other offerors' prices more closely approximated Pope Roberts's prices than Miller Davis's.

4/ The agency also stated that procurement-sensitive information had been improperly released during the course of an agency-level protest. Since the agency has otherwise provided a reasonable basis for the cancellation decision, we need not decide whether this disclosure, in itself, justified the cancellation.

for the convenience of the government the Miller Davis contract and to resolicit this requirement. On March 27, we dismissed Pope Roberts's protest as academic based upon the agency's proposed corrective action.

After VA terminated Miller Davis's contract, this protest was filed on April 15. During this same period of time, the agency concluded that it would be unable to timely meet its current requirements for the services through the proposed resolicitation for the long-term contract. Accordingly, VA issued invitation for bids (IFB) No. 349-15-91 to acquire the services for a 90-day interim period. The IFB, as amended, called for award to the low responsive, responsible bidder and did not provide for the rating of proposals based upon non-cost criteria. Miller Davis timely protested the terms of the IFB on April 29.

On June 4, VA responded to our request for an agency report on the protest of the IFB, stating that the IFB was canceled. VA claimed that it had determined to perform the services in-house and, consequently, no longer had a need for the requirement. On June 6, we dismissed Miller Davis's protest against the terms of the IFB as academic. It appears that VA no longer intends to issue a solicitation to acquire the service on a long-term basis either.5/

Miller Davis argues that the agency improperly canceled RFP No. 349-6-91 and improperly terminated the firm's contract that had been awarded under it. Specifically, the protester alleges that the reasons advanced by the agency for the cancellation are merely a pretext and that, in fact, the cancellation, as well as the determination to bring the requirement in-house, is merely an attempt on the part of the agency to avoid the various protests that have been filed in connection with the acquisition. Miller Davis argues that the record shows that price was, in fact, considered by the agency in connection with the source selection decision, and that this cannot serve as a basis for the agency's actions in canceling the requirement. Miller Davis also alleges that, in any event, this was a "no cost" contract and, therefore, even if the agency failed to consider cost, such a failure would not serve as a valid basis to disturb the source selection, especially since Miller Davis was clearly superior from a

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5/ VA explains that these services are performed in-house virtually everywhere else in the country.

technical standpoint.6/ Additionally, Miller Davis argues that VA lacks the capability to timely perform the services in-house, which it contends shows the reasons for cancellation advanced by VA are merely a pretext to avoid the protest.

VA asserts that we should dismiss the protest since it is performing the services in-house. As a general rule, we do not review agency decisions to cancel procurements so as to perform the work in-house, since such decisions are a matter of executive branch policy. RAI, Inc., B-231889, July 13, 1988, 88-2 CPD ¶ 48. Where, however, a protester has alleged that the agency's rationale for cancellation is but a pretext--that the agency's actual motivation is to avoid awarding a contract or is in response to the filing of a protest--we will examine the reasonableness of the agency's actions in canceling the requirement. Griffin Servs. Inc., B-237268.2 et al., June 14, 1990, 90-1 CPD ¶ 558, aff'd, General Servs. Admin.--Recon., B-237268.3 et al., Nov. 7, 1990, 90-2 CPD ¶ 369. In cases where we conclude that the agency's rationale for cancellation is merely a pretext, we will recommend appropriate corrective action. Id.

The record contains various documents prepared during the Pope Roberts protest, which show the agency's intention to leave the contract awarded to Miller Davis in place pending resolution of the initial protest; the contracting officer, in a memorandum dated February 19, stated "we are electing to leave the award in place, pending resolution of protest." Subsequently, when the agency decided to terminate Miller Davis's contract, it continued to express its intention to contract out for the services; the agency in a memorandum to our Office dated March 21, stated that "VA has decided to terminate the present award and resolicit its requirements." The agency expressed the same intention on April 9, stating that "following a reweighing of bid protest and investigations of complaints filed, the VA sales closing contract will be opened for solicitation of bids." The agency's continuing intention to contract out for the services is further evidenced by its issuance of the 90-day interim solicitation, which was designed to provide the services in question pending resolution of the Pope Roberts protest as well as the subsequent Miller Davis initial protest. It was only after Miller Davis filed its protest against the interim solicitation on April 29 that the agency, for the first time, decided to perform the services in-house. These circumstances, when considered in the aggregate, lead us to

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6/ Miller Davis argues in this respect that the buyers of the property, not the government, pay for the closing and underwriting services, thus rendering the contract a "no-cost to-the-government" contract.

conclude that the agency's decision to perform the services in-house may have been motivated by a desire to avoid the various protests that had been filed in our Office.

Nevertheless, the record indicates that the initial award to Miller Davis was clearly improper and was properly terminated. Thus, even if the decision to perform the services in-house was a pretext to avoid the current protests, Miller Davis was not prejudiced by this action since, as discussed below, it was not entitled to the award under the RFP.

The record confirms that price was not considered by the contracting officer when she made her source selection. Specifically, the contracting officer erroneously interpreted the RFP's evaluation criteria as requiring price to be considered only where two or more technical proposals were found to be equal. In this regard, the contracting officer, in her February 19 response to the Pope Roberts protest, stated "[t]he solicitation was clear that price would only be considered if proposals were technically equal." This erroneous assumption on the part of the contracting officer is corroborated by various statements made by her in a deposition taken in connection with this protest.7/ For example, the contracting officer stated in her deposition "I understood it that the technical and management qualities were the most important and unless they were equal the cost would not be considered."8/ Elsewhere in her deposition, the contracting officer, in discussing the overall amount of the award, stated "I was really quite surprised to see that we were dealing in that large a dollars."9/ Given this evidence and in light of the fact that Miller Davis's price was almost three times that offered in Pope Roberts's apparently acceptable offer, we conclude that price was not considered in awarding the contract to Miller Davis.10/ Moreover, given that there is no

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7/ This deposition was taken in connection with litigation currently pending in the District Court for the District of Columbia, Miller, Davis, Marter & Opper, P.C. v. Edward J. Derwinski, No. 91-0885 (D.D.C. filed April 23, 1991). The court requests our advisory opinion on this protest.

8/ Roscher deposition, page 97-98.

9/ Roscher deposition, page 168.

10/ We also find Miller Davis's argument that the agency was not required to consider cost because this was a "no-cost" contract to be without merit. It is a fundamental rule of federal procurement law that agencies are required to evaluate

(continued...)

indication that the lower-priced offers were technically unacceptable, the award on the basis of initial proposals without discussions to a firm offering other than the lowest overall cost to the government was improper.11/ FAR § 15.610(a)(3); AMP, Inc., B-239287, Aug. 16, 1990, 90-2 CPD ¶ 131.

The protest is denied.

James F. Hinchman
General Counsel

10/(...continued)
competing proposals strictly in accordance with the solicitation's evaluation criteria. Hydraudyne Sys. & Eng'g B.V., B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88. Here, the RFP specified that price would be an element in the agency's evaluation of proposals. Since the record shows that price was not considered, proposals were necessarily not evaluated in accordance with the RFP's criteria.

11/ It appears that VA was required to conduct the subject acquisition in accordance with the Federal Acquisition Regulation (FAR) since at least a portion of the funds involved in the contract were appropriated funds. FAR §§ 1.103; 2.101. Specifically, various elements of the closing transactions were paid for by VA using the agency's loan guarantee revolving fund. See 38 U.S.C. § 1824.