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

Decision

Matter of: Columbia Research Corporation

File: B-247073.4

Date: September 17, 1992

Paul Shnitzer, Esq., Crowell & Moring, for the protester, Vera Meza, Esq. and John J. Reynolds, Esq., Department of the Army, for the agency. Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Allegation that proposed awardee's price was unrealistic is dismissed as untimely where, pursuant to protective order issued under prior protest 3-1/2 months prior to filing current protest, protester's counsel received information which, together with information already in the record, was sufficient to put counsel on notice of protest basis; under these circumstances, timeliness is measured from time counsel knew or should have known protest basis, and fact that protester itself received arguably necessary information only later is irrelevant.

DECISION

Columbia Research Corporation (CRC) protests the proposed award of a contract to Technical Evaluation Research, Inc. (TERI), under request for proposals (RFP) No. DAAB07-90-R-B804, issued by the U.S. Army Materiel Command (AMC) as a total small business set-aside for engineering and technical services. CRC contends that AMC failed to conduct a proper cost realism analysis, which would have shown that TERI's price was unrealistically low.

We dismiss the protest as untimely.

BACKGROUND

This protest, which CRC filed with our Office on May 12, 1992, is the fourth in a series of protests filed by CRC concerning the proposed award to TERI. The solicitation in question, issued in September 1990, sought proposals for engineering and technical services. There were three major evaluation categories. The first two, technical and management, were of equal weight, and each was more

important than the third, price. The RFP stated that award would be made on the basis of the proposal that was most advantageous to the government overall. To be eligible for award a proposal had to be rated "acceptable" or "outstanding" under all evaluation factors and subfactors.

The proposals of CRC and TERI were included in the competitive range and, after discussions, those companies were requested to submit best and final offers (BAFO) limited to price. CRC, the incumbent, submitted a cover letter with its price BAFO, dated September 27, 1991, which stated in part that it "could not satisfactorily perform . . . under [this] contract at lower rates, and we sincerely doubt that any other firm could do so. . . . We urge you to look with suspicion at any proposal offering lower rates than ours."

CRC's proposed price was \$8,542,597; TERI's price, \$6,079,310, was 29 percent lower. AMC found both proposals technically acceptable, and concluded, on the basis of its significantly lower price, that TERI offered the most advantageous proposal overall. Upon being notified of the proposed award to TERI, CRC stated in a December 4 letter to AMC:

"Inasmuch as we are the incumbent contractor and we suspect that award [to TERI] was not made on best value but on low cost, we request a debriefing . . . to assure us that award was made in accordance with the stated evaluation criteria. . . ."

A debriefing was held on December 10, at which CRC was advised that its proposal had been rated acceptable under each evaluation factor and subfactor. The agency also stated that "your ratings were NOT higher than the proposed awardee's in the nonprice factors as you stated in your letter of December 4, 1991." (Emphasis in original.)

On December 21, CRC protested the proposed award to our Office, arguing that AMC had improperly evaluated TERI's and its own proposal under one subfactor under the management category. At the same time, CRC made an extensive document request, including AMC's source selection plan; materials relating to the evaluation of TERI's and CRC's proposals; TERI's technical, management, and price proposals; and the agency's price evaluation. Under a protective order issued by our Office, AMC provided these documents to counsel for CRC as part of the agency report on the protest, on January 29, 1992.

In Columbia Research Corp., B-247073; B-247073.2, Apr. 23, 1992, 92-1 CPD ¶ 385, we denied CRC's protest. We also dismissed as untimely a second protest--raised for the first time on February 10--that the agency had improperly evaluated TERI under one technical subfactor. We found that, based on information conveyed to the firm at the December 10 debriefing, CRC could have, but did not, raise this argument within 10 working days after December 10. As discussed below, we also dismiss this latest protest, which concerns the only evaluation category not already questioned, price.¹

UNTIMELINESS

Under our Regulations, protests of other than alleged solicitation improprieties must be filed no later than 10 working days after the basis for protest was known or should have been known. 4 C.F.R. § 21.2(a)(2) (1992). According to the protester, it first became aware of this basis for protest on April 28, when it received our decision, Columbia Research Corp., *supra*, which included a reference to TERI's total proposed price. Prior to that time, CRC argues, although its counsel was aware of TERI's significantly lower price, counsel was precluded from disclosing that information to CRC by the terms of the protective order under which that information had been made available to counsel; by the same token, without benefit of CRC's expertise, its counsel had no basis for suspecting that TERI's price was unrealistically low. Consequently, according to CRC, this basis for protest arose, not when its counsel learned of TERI's price under our protective order, but several months later, when CRC itself learned of the price outside of the protective order.

We disagree. As discussed, the protest record available to CRC's counsel gave counsel adequate information to raise the cost realism issue. First, CRC was informed at the debriefing that both it and TERI had been found acceptable in technical and management evaluation categories, leaving price as the apparent basis for the award. Second, CRC itself had admonished the agency "to look with suspicion at any proposal offering lower rates than ours," and had stated that "we suspect the award [decision] was not made on best value but on low cost." Third, CRC's BAFO letter stated that "we could not satisfactorily perform . . . under [this] contract at lower rates, and we sincerely doubt that any other firm could do so. . . ."

¹CRC's third protest in this series concerned size status issues and was dismissed in Columbia Research Corp., B-247073.3, June 4, 1992, 92-1 CPD ¶ 492.

These statements, all part of the protest record, should have put CRC's counsel on notice that, if the protected materials he received showed TERI offered a significantly lower price, there was a basis for challenging the realism of that lower price. Although CRC contends that its counsel was precluded by the protective order from even telling his client that TERI's price was significantly lower than CRC's, and thereby gaining CRC's expertise on the question of how realistic TERI's price was, such a communication in fact was not necessary. Since the record already included CRC's view that a lower price than its own could not be realistic, the only piece of information CRC's counsel was missing to raise this protest ground was TERI's price. When counsel received this price information, therefore, we consider him to have been on notice of the basis for protest, and measure timeliness from this point.

As part of its argument, CRC contends that TERI's proposed hourly rate, \$16.46, is "out of line with prevailing rates" and with the much higher hourly rate proposed by CRC, \$23.13. In light of the discussion above, CRC's counsel could have raised the same argument on the basis of one of the documents received under the protective order, the source selection decision document. In addition to indicating the large difference between TERI's and CRC's prices, this document showed even larger differences between TERI's prices and those of other offerors; it concluded that "the total proposal price submitted by TERI is lower than all other proposal prices received and is considered fair and reasonable." Based on this document and counsel's knowledge of CRC's proposed price, counsel could have raised the argument that TERI's rates were "out of line" without benefit of input from CRC.

CRC objects that its counsel was not aware from the agency report what TERI's proposed hourly rate was. The protester also states, however, that the solicitation required offerors to base their proposals on 369,326 hours, and explains that one calculates TERI's hourly rate by dividing TERI's total proposed price by that number of hours, for a total of \$16.46. Based on this simple calculation, involving only a figure specified in the solicitation and TERI's total price (obtained under the protective order), CRC's counsel should have been aware of TERI's hourly rate.

We therefore conclude that the protest is untimely because it was not filed until several months after protester's counsel should have been on notice of the protest basis. See generally Loral Infrared & Imaging Sys., Inc., B-247127.3, July 13, 1992, 92-2 CPD ¶ ____ (arguments timely where raised within 10 days of counsel's receipt of protective order material); Central Texas College, B-245233.5, Feb. 6, 1992, 92-1 CPD ¶ 151 (protester knew or

should have known of basis for protest within 10 days of receipt of awardee's proposal under protective order; proposal should at least have caused protester to diligently pursue additional information); see also C.M.P. Corp., GSBCA No. 10379-P, Jan. 12, 1990, 90-1 BCA ¶ 22,632, 1990 BPD ¶ 14 (counsel for protester knew or should have known basis for protest when counsel received technical scores and prices of offerors under protective order; at that point, "acting on behalf of" protester, counsel could determine whether price/technical tradeoff was proper).

The protest is dismissed.

A handwritten signature in cursive script that reads "Ronald Berger".

Ronald Berger
Associate General Counsel