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

Decision

Matter of: Downtown Copy Center

File: B-240488.8

Date: December 28, 1992

Jeffrey K. Kominers, Esq., Galland, Kharasch, Morse & Garfinkle, P.C., for the protester.
Brian J. Vella, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for International Transcription Services, Inc., an interested party.
E.J. McCarthy, Federal Communications Commission, for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee should be disqualified for possessing allegedly proprietary data is denied where internal agency investigation concluded that no improprieties occurred in the firm's obtaining the data and the data was not competitively useful by the time the protested procurement occurred.

2. Protest that agency misevaluated protester's proposal featuring an optical disk system is denied where protester does not rebut agency's finding that the proposal failed to adequately explain how the system would meet the agency's needs.

3. Protest that agency failed to conduct discussions is denied where record shows that the agency had a reasonable basis for its decision to award a no-cost contract on the basis of initial proposals.

DECISION

Downtown Copy Center (DCC) protests the award of a contract to International Transcription Services, Inc. (ITS) under request for proposals (RFP) No. 90-03, issued by the Federal Communications Commission (FCC) for services, plant, labor, equipment, materials and supplies necessary for the search, retrieval and duplication of agency documents in 13 public reading rooms and for distribution and sale to the public of those documents. DCC principally argues that: (1) ITS should have been disqualified from the procurement for

engaging in improper business practices which caused the firm to have access to the protester's proprietary information; (2) the FCC improperly evaluated the protester's technical proposal; and (3) the FCC failed to conduct the required discussions prior to selecting ITS for award.

We deny the protest.

HISTORY

RFP No. 90-03 was originally issued on February 1, 1990. It contemplated a contract for the installation and maintenance of duplicating equipment at various FCC locations, with the contractor to be compensated exclusively through copying fees to be paid by the public. DCC was awarded a contract on July 6, 1990, based upon the firm's offer proposing to supply Toshiba copiers.

On December 27, ITS filed suit in the United States District Court for the District of Columbia seeking an injunction against the award to DCC. ITS alleged that the award violated section 2443 of the Multilateral Export Control Enhancement Amendments Act,[1] which, as implemented, prohibited government agencies from contracting with and procuring, directly or indirectly, products and services from the Toshiba Machine Company and the Toshiba Corporation. By decision of January 23, the court found DCC's contract void ab initio. The court permitted DCC to continue performance, but instructed FCC to resume negotiations under the RFP with the offerors in the competitive range. International Transcription Servs., Inc. v. United States, Civ. No. 90-3129 (D.D.C. Jan. 23, 1991).

On March 5, FCC announced that it would return "the solicitation to the status it had on June 28, 1990, which was the day before the contracting officer invited vendors in the competitive range to submit best and final offers (BAFO)." On March 21, 1991, and at several intervals thereafter, the agency issued amendments to effectuate these plans with the next round of BAFOs scheduled to be submitted on May 23. DCC filed a protest concerning the solicitation of the new round of offers with this Office on May 21, challenging the terms of the amended solicitation and alleging that ITS should be disqualified from competition for improper possession of proprietary information. The FCC's Inspector General (IG) also commenced an investigation concerning ITS' possible possession of proprietary information. By agreement of the parties, the protest was closed pending the results of the IG investigation.

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[1]Pub. L. No. 100-418, § 2443, 102 Stat. 1107, 1365-66 (1988), 50 U.S.C. app. § 2410a (1988).

The IG completed his investigation on January 21, 1992, and, on the basis of the IG's report, the contracting officer concluded that the record did not support a finding that ITS should be disqualified from the competition. On May 19, the agency issued another amended version of RFP 90-03, and a second round of BAFOs were submitted on June 26.

The amended RFP, which is in issue in this protest, expanded the scope of the procurement from simply providing duplicating services to the public to more "complicated document search/retrieval services." Offerors were advised to submit entirely new proposals in order to meet the changed requirements. Offerors were also advised by the RFP that award might be made on the basis of initial proposals.

According to the RFP, award was to be made to the offeror receiving the highest score based on a technical assessment, which accounted for 70 percent of the total score, and price. "Price" did not represent the price to the government but rather the schedule of prices to be paid by the public users of the FCC reading rooms. Seven technical factors were to be graded on a 300-point scale as follows:

> "1. Establishment of operational procedures for establishment of all paperwork requirements (0-50 points).
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> "2. Establishment of operational procedures for processing public duplication requests (0-50 points).
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> "3. Installation of appropriate reproduction equipment in all applicable reference rooms per Work Statement (0-25 points).
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> "4. Establishment of equipment maintenance procedures for repair and/or replacement of malfunctioning equipment (0-50 points).
>
> "5. Establishment of equipment operation procedures for maintaining equipment in full operation (0-50 points).
>
> "6. Ability to expand capacity to handle annual tariff filing and other large filings (0-25 points).
>
> "7. Personnel and their experience and staffing (0-50 points)."

ITS submitted two proposals--one designated as an "alternate;" DCC submitted a single proposal. The proposals were evaluated as follows:

	Technical Point Score	Evaluated Price	Weighted Technical Points	Weighted Price Points	Total Points
ITS	294	$3,275,364	68.60	29.91	98.51
ITS(ALT)	277	$2,895,951	64.63	30.00	94.63
DCC	149	$3,265,235	34.77	26.61	61.37

The evaluators found many weaknesses in DCC's proposal, principally related to inadequate description of the operational procedures to be used and to the firm's inadequately explained plan to rely on an optical disk system for retrieving information. The evaluators concluded that the discrepancies in DCC's proposal were so numerous that holding discussions would inappropriately give the appearance of "coaching" the firm. Accordingly, the contracting officer made an award to ITS on the basis of its base proposal which had received the highest total score even though its total "price" was slightly higher than that proposed by DCC. In this regard, the contracting officer concluded that the technical superiority of the ITS proposal outweighed the slightly higher cost to the public.

PROTEST

DCC's protest involves three principal arguments: (1) that the FCC was required to disqualify ITS from the competition because the firm engaged in improper conduct which led to its possession of what DCC considers to be proprietary data relating to the protester's proposed staffing levels under the first competition conducted in 1990; (2) that the protester's proposal was not properly evaluated; and (3) that the FCC improperly made an award on the basis of initial proposals to other than the low priced technically acceptable offeror. For the reasons set forth below, we deny the protest.

DISQUALIFICATION

The allegedly proprietary material in ITS' possession to which DCC objects is a June [illegible], 1990, letter from DCC to the FCC in response to discussion questions posed during the first procurement. In particular, DCC stresses that a portion of the letter containing a list of all its proposed

staff and resumes of three of them as proposed in 1990 is particularly sensitive.[2]

During the course of DCC's 1991 protest, ITS' president--Mr. A. Martin Clark--submitted an affidavit stating that the letter was inadvertently contained in the copy of the FCC's August 27, 1990, report on the initial protest filed by ITS. A former ITS employee, now employed by the protester--stated that Mr. Clark showed her a portion of the letter listing DCC's staff in July 1990, shortly after DCC had been awarded its contract and prior to release of the agency report. As a result of these conflicting accounts, the contracting officer requested the agency's IG to investigate the matter.

The IG's report found that there was insufficient evidence to conclude that the FCC provided Mr. Clark with the document in question. It also concluded that there were "inconsistencies" between Mr. Clark's statements to the IG and his earlier affidavit. These "inconsistencies" concerned the packaging of the FCC report, "the arrangement and/or order of [such] documents," the chronology of the events surrounding the discovery of the document and whether Mr. Clark's attorney would testify that he observed the discovery of the information. The report further found that the former ITS employee's account of ITS' earlier possession of the document was credible, primarily because it was consistent with her earlier affidavit. The IG did not find that any impropriety had occurred and the contracting officer, on the basis of the report, decided that the record did not support ITS' disqualification from the 1992 procurement.

DCC argues that the contracting officer acted unreasonably in not disqualifying ITS because of what the protester contends was the firm's improper possession of proprietary data regarding its staff.

A contracting officer may protect the integrity of the procurement system by disqualifying a firm from competition where it reasonably appears that the firm may have engaged in improper business conduct which may have afforded it an unfair competitive advantage. Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126; aff'd on recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435. A contracting officer has wide latitude to exercise business judgment in meeting his

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[2]DCC also complains in general about ITS possessing information that it used to file its original protest on July 19, 1990, and ITS' September 11 supplement to that protest. These matters are untimely under our Bid Protest Regulations, which require such protests to be filed within 10 working days after the basis of protest is known. 4 C.F.R. § 21.2(a)(2) (1992).

or her responsibility to safeguard the government's interests in this regard. Id. Where an offeror has been allowed to compete in the face of an allegation of impropriety, our role in reviewing the contracting officer's action is to determine whether the contracting officer has a reasonable basis for the decision to allow the offeror to compete. Where the allegation involves the possession of allegedly proprietary information, in considering whether the contracting officer's decision was reasonable, we will review the information to determine whether it could likely have proved competitively useful so as to confer an unfair advantage on the firm which possessed it. General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196; Person-Sys. Integration, Ltd., B-243927.4, June 30, 1992, 92-1 CPD ¶ 546.

While, as the IG report points out, Mr. Clark's story is not without some flaws--for example, the former ITS employee's affidavit states that Mr. Clark had the letter prior to the date of the agency report--the record as a whole shows that the contracting officer had a reasonable basis for continuing ITS in the competition.

The IG report does not establish how Mr. Clark actually obtained the June 19 letter. Despite finding that "it can be reasonably but not certainly concluded that the subject information did not pass from the contracting office to Mr. Clark," the report found that the record did not support a conclusion that an impropriety actually occurred. We do not think that the other evidence in the record necessarily leads to a conclusion that the letter was obtained as the result of improper business conduct. Mr. Clark has not attempted to conceal his possession of the letter; he attached it to a November 1990 filing before the Small Business Administration and openly referred to it in a March 5, 1991, letter to the FCC. Despite the IG's conclusion concerning the likelihood of the letter having been mistakenly disclosed by the FCC, the letter was in fact an attachment to the FCC's protest report concerning ITS' July 19, 1990, protest. On at least one other occasion during the consideration of this protest, the FCC mistakenly included allegedly proprietary documents in a copy of its protest report furnished to a protest party.

More important, the letter--which refers to DCC's proposed staff in 1990--would not be useful to ITS in the 1992 procurement. The letter does not contain salary levels, and the identity of the individuals contained in the letter became known to the public in January 1991 when DCC commenced performance of its contract in the public reading rooms of the FCC. In a March 5, 1991, letter to the FCC in which ITS described DCC's staffing levels, ITS also disclosed its own proposed staffing levels and DCC

subsequently obtained that information from the FCC--well before the 1992 competition. Our examination of the proposals from ITS and DCC submitted in the 1992 procurement reveals that neither firm proposed individuals contained in the other's 1990 proposal. Further, the 1992 procurement requires the contractor to perform document search and retrieval services which were not a part of the original competition and which will necessitate staffing levels different from those proposed in DCC's June 19 letter.[3] The 1992 evaluation record reveals that the points "lost" for staffing by DCC (12 out of 50 possible) were not lost because its proposed staffing levels, per se, were questioned, but rather because the firm inadequately described when the full staff would start performance and because it failed to identify which employees were factory-trained repair personnel.

In sum, while there are some inconsistencies in Mr. Clark's account of how and when he came into possession of the protester's June 19 letter, there is no evidence that Mr. Clark had the letter prior to the award of the initial contract to DCC on July 6, 1990. In our view, it was only prior to that time that the information could be of any use. As far as the competition leading to the current award is concerned, the information related to staffing that was not only 2 years old, but pertained to an earlier solicitation which contained different and less demanding search and retrieval services. Further, we think that DCC's staffing under the current contract could easily be obtained by observing its performance in the FCC's reading rooms and comparable information concerning ITS's proposed staffing level was available to DCC. The information did not give ITS a competitive advantage.[4] Under the circumstances, we think that the FCC contracting officer acted reasonably when he concluded that the evidence of improper action on the

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[3]The original solicitation principally called for the contractor to install and maintain duplicating equipment at the FCC's library and reference rooms. See International Transcription Servs., Inc., supra. The 1992 solicitation adds contractor duties in connection with the agency's new automated Record Imagining Processing System (RIPS). These new duties include the contractor using three RIPS workstations provided by the FCC to search for, retrieve and print documents requested by the public and to assist public users of RIPS in printing documents they have directly searched on laser printers to be provided by the contractor. In addition, the contractor is required to provide supply support for the RIPS equipment.

[4]The protester has not explained the nature of the alleged competitive advantage under the most recent competition.

part of Mr. Clark was insufficient to justify excluding ITS from the competition and, in essence, creating a sole-source for DCC.

EVALUATION OF DCC's PROPOSAL.

DCC states that the evaluators improperly downgraded its proposal for including an innovative optical disk retrieval system. DCC argues that the evaluators lacked familiarity with the technology proposed and in effect penalized the firm for proposing an innovative technique which should have been viewed as a strength.

In response, FCC notes that DCC did not adequately explain in its proposal how the optical disk system would meet the agency's needs and points out that although the RFP required specific data about operational procedures, DCC failed to set forth any procedures with respect to the optical disk system.

It is not the function of this Office to independently evaluate proposals when protesters allege that they have been misevaluated. Rather, we determine whether the record shows that the evaluation had a reasonable basis and was consistent with the criteria listed in the RFP. ACM Envtl. Servs., Inc., B-242064, Mar. 7, 1991, 91-1 CPD ¶ 255. A protester's disagreement with the agency's evaluation does not render it unreasonable. Id.

DCC has provided no rebuttal to the FCC's explanation that the protester's proposed optical disk system was downgraded because it was inadequately explained in terms of how it would help meet the agency's needs and in terms of describing related operational procedures for the system. We have reviewed the evaluation record and in the absence of a specific response from the protester, we find no basis upon which to conclude that the agency's evaluation was unreasonable.

AWARD WITHOUT DISCUSSIONS

DCC contends that the FCC was required to conduct discussions before making an award to ITS on the basis of its higher "priced" proposal. The protester maintains that many of the weaknesses cited by the FCC in the initial evaluation could have been easily cured by simply providing more information in response to discussion questions.

Under the Competition in Contracting Act of 1984, 41 U.S.C. § 253(b)(1)(B) (1988), an agency may make an award on the basis of initial proposals only where the solicitation advises offerors of that possibility and the competition demonstrates that acceptance of an initial proposal will

result in the lowest overall cost to the government,[5] Mid-Atlantic Indus., Inc., B-245551, Jan. 16, 1992, 92-1 CPD ¶ 80. Stated differently, we have held that under this rule, an agency is precluded from making an award on the basis of initial proposals to any firm other than one offering the lowest cost, if the low offeror is technically acceptable or capable of being made acceptable. Id.

In this case, where services are acquired at no cost to the government, the rule--which is dependent on a determination of lowest cost to the government--is not applicable. We think that an award without discussions in a no cost procurement is proper where the agency has a reasonable basis for its selection. See Moorman's Travel Servs., Inc.--Recon., B-219728.2, Dec. 10, 1985, 85-2 CPD ¶ 643.[6]

The award to ITS was made on the basis of the proposal with the highest total score, which involved both technical considerations and on evaluation of the prices to be charged to the public. Although DCC's proposed cost to the public was slightly lower than ITS' ($3,265,235 vs. $3,275,364), the protester received a substantially inferior technical score (34.77 vs. 68.60). Since under the solicitation's evaluation scheme technical scores were to account for 70 percent of the final evaluated score and since we find no basis in the record upon which to question the evaluators' judgment in awarding the technical score that it did, we

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[5]Through an amendment to 10 U.S.C. § 2305(B)(4)(A), this restriction no longer applies to procurements by defense agencies; the corresponding statute governing procurements by civilian agencies such as the FCC has not been changed.

[6]In Moorman's Travel Servs., ... considered the propriety of the agency's decision not to conduct discussions and award a no cost contract on the basis of the initial proposals. At the time of that award, agencies were generally required to conduct discussions if an award on the basis of initial proposals could not assure "a fair and reasonable price." We concluded that the general requirement for holding discussions did not apply to no cost contracts because the "price" of such contracts could not logically be other than "fair and reasonable."

find that the agency had a reasonable basis for making its selection decision based upon the initial proposals received.

The protest is denied.

Robert P. Murphy

for James F. Hinchman
General Counsel