



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Electric Ocean and Radar Systems
Division

File: B-250418; B-250419

Date: January 11, 1993

Carl L. Vacketta, Esq., Gregory A. Smith, Esq., and Richard J. Vacura, Esq., Petit & Martin, for the protester. Kent R. Morrison, Esq., David Z. Bodenheimer, Esq., and Peter J. Lipperman, Esq., Crowell & Moring, for Westinghouse Electric Corporation, an interested party. Margaret A. Alfano, Esq., and Capt. J.D. Vellis, Department of the Navy, for the agency. Linda C. Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest filed after award that agency should not have evaluated option prices in determining lowest overall priced proposal is untimely where the solicitation included a clause which stated that option prices would be evaluated and, under the General Accounting Office Bid Protest Regulations, protests based on alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of proposals must be filed prior to that time.
2. Protest filed after award that the agency was required to evaluate awardee's prior year production special tooling and production special test equipment costs is untimely where the solicitation did not provide for the evaluation of these costs and protester was specifically advised prior to the closing time for receipt of proposals that these costs would not be included in the evaluated prices of proposals.
3. Awardee's failure to date its certificate of procurement integrity does not require rejection of proposal where certificate was properly executed by company official responsible for the preparation of the proposal and the certificate's applicability to the particular proposal is clear. Submission of a properly executed certificate imposes a continuing obligation upon firm and certifying individual during the conduct of entire procurement.

DECISION

General Electric Ocean & Radar Systems Division protests the award of two contracts to Westinghouse Electric Corporation (WEC) under request for proposals (RFP) Nos. N00024-92-R-6300(S), (No. 6300) and RFP No. N00024-92-R-6312(S) (No. 6312), issued by the Naval Sea Systems Command (NAVSEA). RFP No. 6300 required firm, fixed prices for a quantity of Surface Ship Anti-Submarine Warfare Combat Systems. RFP No. 6312 required cost-plus-fixed-fee proposals for related system design engineering services. GE argues that the Navy improperly included option prices in the evaluated price, should have evaluated prior year production special tooling and production special test equipment (PST/PSTE) costs and that WEC improperly executed the Procurement Integrity Certificates.¹

We dismiss the protests.

RFP No. 6300 was issued on May 22, 1992, requesting firm, fixed prices for a base year of fiscal year (FY) 1992 and options for variable quantities of items for FY 1992 through FY 1995. The RFP provided that the evaluated price would be determined by totaling: (1) the value of specified fixed quantity items (including both base and option quantities); (2) the value of randomly selected variable quantity items; and (3) the fair market rental value of Government Production Research Property to be used by the offeror. Not included in the evaluated price were contract line item numbers (CLIN) representing prior year PST/PSTE costs.²

¹GE also protested that the Navy failed to conduct meaningful discussions and failed to properly evaluate WEC's systems design agency proposal for cost realism. The agency in its report specifically responded to these allegations. In its comments to the agency report, GE failed to rebut the agency's position. Where, as here, an agency specifically addresses issues raised by a protester in its initial protest and the protester fails to rebut the agency's response, we consider the protester to have abandoned the issues. Mitchell Constr. Co., Inc., B-245884; B-245884.2, Jan. 17, 1992, 92-1 CPD ¶ 92; Electronic Sys. USA, Inc., B-246110, Feb. 14, 1992, 92-1 CPD ¶ 190.

²PST/PSTE costs are the costs of special tooling and special test equipment used in performing one or more government contracts. FAR S 31.204-40 (FAC 90-12). These costs are reimbursable to the contractor on an amortized basis. Prior year PST/PSTE costs are amortized costs that the agency must pay under present and future contracts in accordance with the terms of those contracts.

On May 28, RFP No. 6312 was issued requesting cost-plus-fixed-fee proposals for the design agency requirements. The solicitation included a base requirement, which included 88,800 mandays and two options for a total of 266,400 mandays. The RFP provided that proposals would be evaluated for cost realism and that the evaluated amount would be determined by the sum of: (1) the total proposed fixed fee amount and (2) 12 percent of the realistic total estimated cost.

These procurements were limited to GE and WEC under the authority of 10 U.S.C. § 2304(c)(1) (1988) as the only qualified sources capable of satisfying the agency's requirements. The successful offeror was to be selected on the basis of a price competition. The evaluated price from RFP No. 6300 and the evaluated amount from RFP No. 6312 were to be combined to derive a single total evaluated price for each offeror.

By letter dated June 10, prior to the closing date for receipt of proposals, GE questioned the Navy's decision not to include prior year PST/PSTE costs in the evaluated price especially since these costs were included in the evaluated prices of proposals submitted for both the FY 90 and FY 91 procurements. The Navy responded that prior year PST/PSTE amortization would not be included in the evaluated price for this procurement because the government is obligated to make these amortization payments, subject to the availability of appropriated funds and other conditions noted in the clause, even if no contract is awarded. The Navy did state, however, that new PST/PSTE costs required to perform the FY 92-95 contract would be included in the evaluated price.

By letter dated June 18, GE again questioned the Navy's decision not to include PST/PSTE costs in the evaluated price. GE specifically asked: "Since the government made the determination for the FY 90 and FY 91 procurement that these costs should be included and since the Government was obligated in the FY 91 procurement to make those amortization payments even if no contract was awarded, what changed in the FY 92 procurement such that the government has reversed that determination?" The agency responded that it had determined that it was not in its best interest to include amortization of prior year PST/PSTE costs in the evaluation because to do so may result in a higher overall cost to the government because the government is liable for these costs whether or not a contract is awarded.

On June 30, both GE and WEC submitted their proposals in response to the production and design agent solicitations. On July 10, written discussion questions were issued to GE and WEC relating to the production proposals. Written

responses to the discussion questions were received from both offerors on July 15. Additional questions were issued to WEC on July 28. Both offerors were also issued discussion questions on their design agent proposals on July 28.

On August 5, discussions were concluded and a request for best and final offers (BAFO) was issued to both offerors for both the production and design agent efforts. BAFOs were received on August 12. After receipt of BAFOs, the agency calculated the offerors' evaluated price and evaluated amount in order to determine the total evaluated price for each offeror. WEC was determined to be the low evaluated priced offeror and on September 11, WEC was awarded both the production and design agent contracts. At time of award, the Navy exercised certain FY 92 option items under the production contract. On September 16, the Navy debriefed GE on both contracts and GE filed its protest with our Office on September 21.

GE first contends that it was improper for the Navy to evaluate the options in the production solicitation. The protester maintains that there was no justification for inclusion of the option quantities in the evaluated price and that WEC's pricing approach in which WEC significantly reduced its per unit price for option quantities demonstrates that WEC had information indicating that the options would never be exercised. GE further argues that the Navy failed to make a determination as required by Federal Acquisition Regulation (FAR) § 17.206(a) (FAC 90-4) that the options were likely to be exercised.

We agree with the agency that this basis for protest is untimely. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of proposals must be filed prior to that time. 4 C.F.R. § 21.2(a) (1992). Here, the solicitation clearly notified offerors that option quantity pricing was requested and would be evaluated in determining the low offeror. If GE believed that this approach was improper, it should have protested this matter before the closing time for receipt of proposals. Virginia Mfg. Co., Inc., B-241404, Feb. 4, 1991, 91-1 CPD ¶ 113.

GE maintains that the basis of its protest regarding the evaluation of options is "whether the Navy should have evaluated all the options--particularly the out year options--in the absence of a clear and specific determination by the Navy that it was likely to exercise the options as required by FAR § 17.296(a)." The record shows that the contracting officer did determine that option exercise was "likely" based on projected fleet requirements

which showed a need for these systems through 1997, and on projected funding availability. In fact, at the time of award, the Navy exercised certain option items.

With respect to GE's argument that WEC's pricing approach for the fixed-price production contract demonstrates that WEC had information indicating that the options would never be exercised, our review of the record shows that WEC in fact priced its proposal under the assumption that the options would be exercised. In fact, during discussions, the agency asked WEC about its pricing and WEC explained its business decision to price to win the contract, rather than lose the work. While GE disagrees with WEC's business judgment regarding its pricing of option quantities, its disagreement is not enough to show that WEC's decision was based on inside information. To the extent GE believes that WEC's prices for the option quantity is so unrealistic it results in a "buy-in," the submission of a below-cost offer on a fixed-price contract is legally unobjectionable and whether a contract can perform at the offered price is a matter of the offeror's responsibility. Hose-McCann Tel. Co., Inc., B-240382.3, Sept. 24, 1990, 90-2 CPD ¶ 252. We will not review a contracting officer's affirmative determination of responsibility absent a showing of possible fraud or bad faith or a failure to properly apply definitive responsibility criteria. 4 C.F.R. § 21.3(m) (5); ALM, Inc., B-225679.3, May 8, 1987, 87-1 CPD ¶ 493. By awarding the contract to WEC, the Navy has necessarily determined this firm to be responsible.

GE next argues that the evaluation factors for the contract price as set out in the solicitation are fatally flawed in that the omission of PST/PSTE amortization costs as an evaluation factor clearly and unfairly creates an advantage for WEC.

We agree with the agency that this basis for protest is also untimely. As stated above, the solicitation did not include as part of the price evaluation prior year PST/PSTE amortization costs. GE was specifically advised by the Navy in writing prior to the closing date for receipt of proposals on two separate occasions that prior year PST/PSTE costs would not be used to determine the evaluated price because the Navy believed that the government was obligated to make these amortization payments even if no contract is awarded. As previously stated, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of proposals must be filed prior to that time. 4 C.F.R. § 21.2(a). Here, the solicitation did not provide for the inclusion of prior year PST/PSTE costs in the price evaluation and GE was also advised by the Navy that these costs would not be included in the evaluation. GE was aware that this procurement was

limited to GE and WEC and if GE believed that not including prior year PST/PSTE costs created an unfair advantage for WEC, it should have protested this matter before the closing time for receipt of proposals.

GE requests that even if this protest allegation is untimely, we consider it under the significant issue exception to our timeliness rules. See 4 C.F.R. § 21.2(c). We decline to do so. The significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community which have not been considered on the merits by this Office in a previous decision. Herman Miller, Inc., B-237590, Nov. 7, 1989, 89-2 CPD ¶ 445. In our view, GE's protest that not including prior year PST/PSTE costs in the evaluation created an unfair advantage for WEC does not meet this standard.

GE next argues that the award to WEC was improper because WEC failed to submit a proper Procurement Integrity Certificate by the time of award as required by the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423(e) (1991). The record shows that WEC signed both certificates for the production and design agent contracts prior to award of the contracts but failed to date the certificates.

FAR § 3.104-9(b) (3) (ii) (A) provides that for negotiated procurements, a signed certificate shall be submitted by the successful offeror to the contracting officer within the time period specified by the contracting office, but the certificate in no event shall be submitted subsequent to award of a contract. The record shows that the corporate officer in charge of preparing WEC's bid for the procurement--signed the certificates, identifying the proper solicitation for which the certificates were completed. These signed certificates were completed at time of award as required and were included in the contract. We believe the certifications' applicability to the particular procurement is clear and the failure to date the signed certificate does not render the proposals unacceptable. See generally C.B.C. Enters., Inc., B-246235, Oct. 31, 1991, 91-2 CPD ¶ 416. Furthermore, the individual executing a certificate of procurement integrity certifies that he or she has no information concerning a violation or possible violation of the OFPP Act "occurring during the conduct of any federal agency procurement of property or services." FAR §§ 3.1043(a) and 52,203-8; see also, 41 U.S.C. § 423(e) (1) (A) (i). Under FAR § 3.104-4(c), the phrase "during the conduct of any federal agency procurement of property or services" is defined as including that period of time beginning with the earliest date on which an identifiable, specific action is taken for the particular procurement and concluding with the award or modification of a contract or the cancellation of the procurement. Consequently, WEC's

certifying official has an ongoing obligation to report violations or possible violations of the OFPP Act, and the Act's prohibitions are applicable during the entire acquisition, regardless of the dating of WEC's certificate. See, e.g., W.G. Yates & Sons Constr. Co., B-248719, Aug. 11, 1992, 92-2 CPD ¶ 97.

The protest is dismissed.



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