191481

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-191195 DATE: August 31, 1978

MATTER OF: System Development Corporation

DIGEST:

1. Contention that agency is engaging in technical transfusion between competitors is based on allegation that awardee might be proselytizing protester's employees in violation of subcontract agreement under prior contract. Performance of subcontract terms is matter between private parties not appropriate for resolution in bid protest.

2. Contention that successful offeror's alleged noncompliance with terms of subcontract with incumbent under prior contract will affect ability to perform current contract is challenge to contracting officer's affirmative determination of responsibility. GAO no longer reviews affirmative determinations of responsibility absent exceptions not alleged here.

3. Allegation, first raised in protester's response to agency's report on protest, that conduct of two rounds of discussions had the effect and appearance of auctioning is untimely. Protester was participant in these discussions and should have raised objection prior to submission of best and final offers.

4. Presence of only two of seven evaluators in initial discussions is not prejudicial where all competitors are treated equally and proceedings are recorded and recordings and written submissions by competitors are provided to all evaluators.

5. Protest that technical evaluation was not conducted in manner consistent with RFP is denied where detailed criteria employed by evaluators in judging proposals were consistent with evaluation criteria specified in RFP.

6. Where agency regards proposals as essentially equal technically, cost or price may become determinative consideration notwithstanding fact that cost may have been of lesser importance than other criteria in the overall evaluation scheme.

7. Agency is estopped to deny existence of contract with intended awardee where agency consistently encouraged and assisted intended awardee in making preparation for performance, intended awardee reasonably relied on agency's representations, awardee was not aware of actual situation and agency knew true facts.

8. Award of negotiated contract resulting from improper cost evaluation is not plainly or palpably illegal and contract may only be terminated for convenience of Government where award was not due to contractor fault and contractor was not aware of improper procedures.

9. Although protest is sustained, it is not in best interests of Government to recommend termination of improperly awarded contract where award was due to oversight and made in good faith, agency has taken corrective action to preclude recurrence of errors, performance has been significant, and termination costs are substantial.

10. Claim by protester for proposal preparation costs is denied because protester was not deprived of award to which it otherwise was entitled.

11. Agency concedes liability to interested party for proposal preparation costs and has negotiated settlement with claimant. GAO will not adjudicate liability and claim may be paid on basis negotiated since claim is for damages for breach of contract to fairly and honestly consider proposal and parties have mutually agreed to settlement.

The System Development Corporation (SDC) has protested the award of a contract to Health Control Systems, Inc. (HCS), under request for proposals (RFP) No. 271-78-4600 issued by the National Institute on Drug Abuse (NIDA). The University Research Corporation (URC) has participated in SDC's protest as an interested party. Both SDC and URC have claimed proposal preparation costs.

The RFP in question sought proposals for the management and operation of the National Drug Abuse Training Center, including the development of training materials, provision of technical assistance and the coordination of activities with State and local agencies and foreign programs. The RFP contemplated a 1-year cost-plus-fixed-fee contract which NIDA intended to extend for 2 additional years. SDC, URC and HCS were the only respondents to the solicitation. All three competitors were determined to be within the competitive range and negotiations were conducted with all three offerors on December 15, 1977, and on January 17, 1978, after the submission of revised proposals. Best and final offers were solicited and received on January 23, 1978.

NIDA's technical evaluation committee concluded that the three proposals were technically comparable, that each of the firms was capable of performing the work and that no one proposal possessed any significant technical superiority over the other two. Final technical scores and estimated costs were as follows:

Proposer	Technical Score (700 max)	Estimated Cost
SDC	531	$1,841,767
HCS	530	$1,673,951
URC	521	$1,602,000

Because the technical evaluation committee was unable to recommend a specific offeror for award on the basis of technical superiority, the contracting officer requested the performance of a best-buy analysis by an independent accounting firm under contract to the

agency. It was the contracting officer's opinion that award should be based on the actual cost of salaries, wages, fringe benefits, and overhead, including subcontracts and proposed consultants, by developing a burdened hourly rate for each offeror rather than by relying on proposed total estimated costs. The contracting officer interpreted the analysis to indicate that HCS had the most favorable burdened hourly labor rate, computed incorporating factors for leasing, indirect costs and fixed fee, and that award of the contract to HCS would be in the best interests of the Government. SDC was advised of the selection on January 27, 1978, and filed its protest with us on January 31. HCS and NIDA executed a 1-year cost-plus-fixed-fee contract on April 3, 1978, during the pendency of the protest. SDC and URC have both objected to the execution of the contract. We withheld action on the protest for a brief period to permit the parties to seek additional clarifying information from the agency under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976).

SDC's initial communication to our Office stated four bases for protest:

"1. The Government did not follow the evaluation criteria and other procedures specified in the RFP.

"2. The Government is engaged in Technical Transfusion between competitors.

"3. The Government is violating procurement regulations by conducting negotiations with only one firm when two or more are in the competitive zone.

"4. The Government is negotiating with one firm after Best and Final submissions were submitted by the common cutoff date."

URC substantially adopted these bases in its submissions to our Office. We will treat these bases in reverse order.

SDC's third and fourth bases for protest enumerated above are in response to a comment made to SDC when it was advised of the selection of HCS that negotiations were being conducted with the lowest cost offeror and to advice during negotiations of two distinct dates for the submission of best and final offers and for the close of negotiations. The report furnished by the Department of Health, Education, and Welfare (HEW), NIDA's parent Department, in response to SDC's protest advises that no negotiations were conducted with HCS after the date for best and final offers and that the advice of continuing negotiations conveyed to SDC and the establishment of separate dates for the submission of best and final offers and the cost of negotiations was erroneous. We find no evidence to contradict the agency's explanation of these events. We therefore consider these bases of protest to be without merit as, we note, SDC appears to concede in its response to HEW's report.

SDC was the prime contractor for these services during the 3 years immediately preceding the contract under consideration here. HCS was a subcontractor to SDC under the prior contract. SDC's assertion that NIDA has engaged in technical transfusion between competitors is based on SDC's contention that, if HCS has proposed to employ any SDC employees as part of its staff, HCS has engaged in the proselytization of SDC employees in contravention of the terms of HCS's subcontract with SDC. SDC states that NIDA was aware of HCS's obligations under its subcontract and contends that NIDA should have considered the effect of those obligations on HCS's ability to perform the current contract without violating those obligations or being enjoined from performing in violation of those obligations. HCS denies that it proselytized any SDC employees.

At the outset, we note that the subject of HCS's performance of its obligations under its subcontract with SDC is essentially a dispute between two private parties not appropriate for resolution in a bid protest to this Office. See Bingham Ltd., B-189306, October 4, 1977, 77-2 CPD 263. And, to the extent that this assertion constitutes a challenge to HCS's ability to perform its contract with NIDA, it represents an objection to the contracting officer's affirmative determination of HCS's responsibility. We no longer review protests against affirmative determinations of responsibility unless fraud is alleged on the part of procurement officials or the solicitation contains definitive responsibility criteria which have not been applied. Berlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350; Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Neither exception has been alleged here. Consequently, we will not review this contention.

SDC has also questioned whether the revised proposals submitted prior to the second round of oral discussions were not "best and final" and suggests that NIDA's conduct of two rounds of oral discussions and the establishment of two best and final dates had the effect and appearance of auctioning in violation of FPR § 1-3.805-1 (1964 ed. amend. 53). SDC was a participant in those discussions. This contention was first raised in SDC's comments dated April 28, 1978, on the HEW report to our Office on the protest.

Our Bid Protest Procedures, 4 C.F.R. part 20 (1977), require that protests based on alleged improprieties in negotiated procurements which are not apparent in the initial solicitation, but are subsequently incorporated therein, must be filed not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 20.2(b)(1) (1977). We think the series of events to which SDC objects were apparent prior to the date established for the submission of best and final offers and, consequently, should have been protested prior to that date. Since this question was not

raised at that time, it is untimely and not for consideration on the merits.

SDC's first basis for protest questions the conformity of NIDA's evaluation of proposals to the provisions of the RFP. SDC particularly objects to the emphasis on cost factors in the selection of HCS since the RFP specifically advised that cost was to be a secondary factor to quality of the proposal. SDC does concede, however, that, if in fact the proposals were rated equally, it would be appropriate for the contract to be awarded to the lowest-cost offeror. SDC also objects to the manner in which disussions were conducted because only two of the seven evaluators were present during initial discussions.

The HEW report advises that not all of the evaluators were able to attend the initial discussions because of other commitments, but that the proceedings were tape recorded and the recordings furnished to the absent evaluators together with the written materials submitted by the competitors. We find nothing inherently wrong with this procedure and we are not convinced that it was prejudicial to SDC since all three competitors were treated equally.

In response to SDC's objections to NIDA's performance of the technical evaluation, we carefully reviewed the evaluation criteria described in the RFP and the detailed criteria employed by the evaluators in judging proposals. We see no inconsistency between the items emphasized in the instructions to offerors and those stressed in the conduct of the technical evaluation. In these circumstances, we conclude that the technical evaluation was performed in accordance with the provisions of the RFP.

We have held that, where an agency regards proposals as essentially equal technically, cost or price may become the determinative consideration notwithstanding the fact that in the overall evaluation scheme cost was of lesser importance than other

criteria. See Computer Data Systems, Inc., B-187892, June 2, 1977, 77-1 CPD 384, aff'd, August 2, 1977, 77-2 CPD 67; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325; Analytic Systems, Incorporated, B-179259, February 14, 1974, 74-1 CPD 71. Here the difference between the high and low point scores on the technical evaluation was only 10 out of a possible 700. In view of the closeness of the technical scores and the technical evaluation committee's determination that there was no marked technical difference between the proposals, we consider it entirely reasonable for the agency to differentiate among competitors on the basis of cost.

Although it was not a subject of SDC's protest, HEW also commented upon the cost evaluation performed at the contracting officer's request which led to the selection of HCS. It was HEW's opinion that the selection of HCS was in error and that URC should have been selected for award. SDC, in its comments on HEW's report, expressed agreement with HEW's assessment of the cost evaluation on the basis that no cost realism or should cost estimates were considered and that the evaluation actually performed failed to consider the ultimate cost to the Government. URC concurs. In view of the parties' agreement regarding the merits of the cost evaluation, we see no need for a discussion to express our own agreement with their position.

HEW has justified the award of the contract to HCS on April 3, 1978, after discovery of the erroneous evaluation, on the basis that it was in the best interest of the Government. In support of this conclusion, HEW states that HCS was induced by NIDA to initiate preperformance preparations and incurred significant costs in doing so for which HEW concedes liability to HCS on an estoppel theory. The actual authority to make award during the pendency of the protest is based upon public exigency to avoid additional delay and harm to the program. In this connection, HEW advises that approximately 60 contractors and State organizations are dependent upon the daily activities of this contract and that various foreign dele[illegible]tions

were in transit to participate in the international segment of the program. HEW also notes that the probable amount of the damages for which it concedes liability to HCS exceeds the difference between HCS's and URC's cost propopals so that the cost to the Government of an award to URC would exceed the cost of allowing HCS to continue performance.

SDC, however, states that "the selection of HCS for award of the contract was made solely on the basis of the concept that although the selection of HCS was improper, the Government's liability for damages to HCS was such that these damages would exceed the difference in cost between the HCS and University Research Corporation (URC) proposal estimates." SDC contests HEW's assessment of its liability to HCS and contends that the award to HCS was both inequitable and contrary to law. SDC joins URC in asking that the contract be terminated.

We considered the question of the application of the doctrine of equitable estoppel in our decision in Fink Sanitary Service, Inc., 53 Comp. Gen. 502 (1974), 74-1 CPD 36 (Fink). In Fink we stated that the agency's actions in giving a contract number to the apparent low bidder just 6 days prior to the commencement of the contract period was an action upon which a bidder could reasonably rely and act. Conversely, in Tratoros Painting and Construction Corporation, 56 Comp. Gen. 271 (1977), 77-1 CPD 37 (Tratoros), we held that the Government could not be estopped from denying the existence of a contract where the action purportedly relied upon, the assignment of a contract number and a request that the bidder obtain bonds, occurred more than 7 weeks prior to the commencement of the contract. We stated in Tratoros that in our opinion the bidder could not reasonably rely on actions occurring so far in advance of performance without obtaining written confirmation that it was the intended contractor.

In both of the cases cited above we applied the four elements of estoppel expressed in United States v. Georgia Pacific Company, 421 F.2d 92 (9th Cir. 1970),

and reasserted by the Court of Claims in Emeco Industries, Inc. v. United States, 202 Ct. Cl. 1006 (1973), which require that:

1. the party to be estopped must know the facts;

2. the party must intend that its conduct shall be acted upon or must act so that the party asserting the estoppel has a right to believe that the conduct is so intended;

3. the claimant must be ignorant of the true facts; and

4. the claimant must rely on the other's conduct to his injury.

For the reasons stated below, we believe all four elements were satisified in this case.

We think the record here provides clear and convincing evidence that the agency, by its course of conduct in its dealings with HCS, induced HCS to expend considerable resources and to materially alter its position in anticipation of performance. We note in this regard that, in the weeks after the telephone advice by the contracting officer to HCS of its selection, HCS was several times requested to and did attend meetings where HCS was introduced as the new contractor, was a participant in planning sessions with NIDA personnel, and was advised several times that the contract signing was imminent and that HCS should be prepared to begin performance. HCS states that on February 28 NIDA orally approved a lease proposed by HCS which involved prepayment by HCS of the cost of renovations. The HEW report to our Office acknowledges, in fact, that at no time after January 27, 1978, did NIDA ever represent to HCS that it was anything but the successful offeror, that NIDA continually encouraged and assisted HCS in its efforts to commence performance, and that NIDA continued this course of action even after the filing of SDC's protest.

In the foregoing circumstances, we think HCS's reliance on NIDA's representations and actions was reasonable. Furthermore, we find no evidence which suggests that HCS either knew or should have been aware of the improper cost evaluation which led to its selection and we think it clear that HCS relied on NIDA's conduct to its detriment. We think it equally clear that the Government knew of the true cost estimates in each proposal and that it was through oversight that an inappropriate evaluation was performed. We conclude, as does HEW, that NIDA was estopped to deny the existence of a contract with HCS.

Neither are we dissuaded from this view by SDC's arguments to the contrary. SDC argues that HCS knew of SDC's protest and, therefore, had no right to rely on NIDA's action. We note, however, that some of NIDA's most significant and misleading actions, including the approval of a lease, occurred after the notice to HCS on February 3 of SDC's pending protest. We think that HCS, continually barraged by NIDA assurances, had a right to rely on NIDA's representations that it was the successful awardee.

We long ago adopted the view of the Court of Claims with respect to the remedy to be afforded in cases where a contract has been improperly awarded. In 52 Comp. Gen. 215 (1972) we stated that:

> "* * * We are in agreement with the position of the Court of Claims that the 'binding stamp of nullity' should be imposed only when the illegality of an award is 'plain,' John Reiner & Co. v. United States, 325 F.2d 438, 440 (163 Ct. Cl. 381), or 'palpable,' Warren Brothers Roads Co. v. United States, 355 F.2d 612, 615 (173 Ct. Cl. 714). In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action by the contractor (Prestex, Inc. v. United States, 320 F.2d 367 (162 Ct. Cl. 620)), or if the contractor was on direct notice that

> the procedures being followed were violative of such requirements (Schoenbrod v. United States, 410 F.2d 400 (187 Ct. Cl. 627)), then the award may be canceled without liability to the Government except to the extent that recovery may be had on the basis of quantum meruit. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government. John Reiner & Co. v. United States, supra; Brown & Son Electric Co. v. United States, 325 F.2d 446 (163 Ct. Cl. 465)."

See, also, Fink, supra. We do not think that the record before us here will support a determination of "plain illegality." Accordingly, the contract with HCS may only be terminated for convenience. See Lanier Business Products, B-187969, May 11, 1977, 77-1 CPD 336.

The determination whether to recommend the termination and recompetition of an improperly awarded contract involves the consideration of several factors, including, but not limited to, the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, cost to the Government, the urgency of the procurement and the impact of a termination on the procuring agency's mission. See PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11; Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD 256, and cases cited therein. In this case, we note that the cost evaluation and selection of HCS was the result of an oversight which occurred in an effort to implement a competitive cost evaluation rather than to circumvent competition. We are mindful also that the contract is already in its fifth month of performance and that a termination would be seriously disruptive

to an ongoing program. We also attach significance to the fact that HEW has taken specific action to insure that the events which led to this protest are not repeated and that the contract with HCS was executed without provision for the option years orginally contemplated, thereby limiting HCS's award to a 1-year term. We note also that the costs of a termination would be substantial.

On balance, we do not think termination of HCS's contract would be in the best interests of the Government. Consequently, while we sustain this protest, we will not recommend termination of the contract.

Both SDC and URC have claimed proposal preparation costs incident to this protest. SDC's claim was presented directly to our Office. URC presented its claim for proposal preparation costs to HEW which has acknowledged liability to URC and stated no objection to the payment of URC's claim. We will examine SDC's claim first.

This Office first permitted recovery of bid/proposal preparation costs in our decision in T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345, wherein we adopted the standard announced by the Court of Claims in Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974). The ultimate standard is whether the procurement agency's actions were arbitrary and capricious towards the offeror-claimant. A second requirement which we apply is whether the agency's actions deprived the offeror-claimant of an award to which it otherwise was entitled. See Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344; Spacesaver Corporation, B-188427, September 22, 1977, 77-2 CPD 215; Documentation Associates, B-190238, August 7, 1978. We think SDC's claim fails on the latter basis.

In this connection, HEW has acknowledged that URC should have been the awardee. We note also that insofar as cost was the determining factor in this procurement, SDC proposed the highest cost of the

three offerors, each of which was considered technically acceptable. In these circumstances, we are of the opinion that SDC, at best, was third in line for the award and, therefore, was not "deprived of an award to which it otherwise was entitled" by the improper cost evaluation. Accordingly, SDC's claim for proposal preparation costs is denied.

On the other hand, URC's claim for proposal preparation costs is presented to us as a virtual fait accompli since the record shows that HEW has conceded liability to URC and the parties have arrived at what for all intent and purposes is a negotiated settlement. In this situation, the threshold question for our consideration is whether we will look behind the parties' agreement and independently examine the question of the Government's liability to URC or whether we should allow the agreement to take effect. For the reasons stated below, we think the agreement should stand.

The basis of liability for bid or proposal preparation costs to an offeror/claimant is the breach by the Government of its obligation which arises as an implied condition of the request for offers to fairly and honestly consider all bids. Heyer Products Company, Inc. v. United States, 135 Ct. Cl. 63 (1956); Keco Industries, Inc. v. United States, 192 Ct. Cl. 773, 428 F.2d 1233 (1970); T&H Company, supra. This obligation is contractual, originating in the contract implied by the Government's issuance of a solicitation and an offeror's submission of a proposal or bid. Heyer Products Company, Inc. v. United States, supra; Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458. We regard a claim for bid or proposal preparation costs to be a claim for damages arising from a breach of contract. See University Research Corporation - Reconsideration, B-186311, August 16, 1977, 77-2 CPD 118.

We long considered that breach of contract claims was outside the authority of a contracting agency to decide and settle. However, in August Perez & Associates,

Inc., et al., 56 Comp. Gen. 289 (1977), 77-1 CPD 48, we stated:

> "Our Office has carefully reviewed the precedents in this area, both from our Office and the courts, and believes the submission of claims for unliquidated damages for breach of contract by the Government in the future to be unnecessary where the contracting agency and the contractor mutually agree to a settlement. * * *" (Emphasis added.)

We think this holding applicable here in view of the proposed negotiated settlement. Accordingly, URC's claim may be paid administratively in an amount agreed upon by the parties. However, no disbursement should be made without an express agreement by URC to credit the cost pool as provided in University Research Corporation - Reconsideration, B-186311, February 28, 1978, 78-1 CPD 98.

R.F. Keller

Deputy Comptroller General
of the United States