

PL-1
Mr. Kleman

13661

DECISION



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

FILE: B-197458

DATE: May 5, 1980

MATTER OF: Cook Inlet Cablecom

DLG04596

DIGEST:

1. Where alleged irregular call for final offers was apparent prior to date established for submission of final offers, protest filed after that date is untimely.
2. Protester has not taken issue with Air Force denial of conflict of interest allegation levied against two members of proposal evaluation panel. In this circumstance, and because protester carries burden of substantiating allegation, GAO rejects allegation.
3. Record contains no evidence to support protester's suggestion that procurement prices were improperly disclosed.
4. Since price properly became decisive award factor given technical evaluation of competing proposals, GAO cannot question award to low offeror.
5. Protest alleging awardee is not qualified is protest against affirmative determination of responsibility no longer reviewed by GAO absent certain conditions not present here.

Cook Inlet Cablecom (CIC) protests the contract awarded to MultiVisions, Ltd. (MVL), in connection with Air Force request for proposals (RFP) No. F65501-79-R-0003. We dismiss, in part, and deny, in part, the protest for the following reasons.

DLG04597

AGC00394

[Protest Involving Contract Award]

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The RFP was issued by the Base Contracting Office, Elmendorf Air Force Base, Alaska, on March 8, 1979, for cable television service at various military installations. On May 15, 1979, five proposals were received for item I (service for Elmendorf Air Force Base and Fort Richardson) which is the subject of the protest. Discussions were then held with all offerors in June concerning technical aspects of the service. On July 20, 1979, revised proposals were received for item I; the low offer for the service was submitted by CIC.

By letter dated August 8, 1979, the contracting officer requested "best and final" offers to be submitted by August 20, 1979. In response to the request, CIC affirmed its July 20 price; however, MVL lowered its July 20 price sufficiently to become the low offeror for item I. After the contracting officer found MVL to be responsible, a contract was awarded to the company on September 20, 1979.

CIC offers the following grounds for its protest: (1) apparent irregularities in the negotiating procedure, primarily concerning the August 8 request for final offers and the resulting displacement of CIC's July 20 low offer; (2) failure of the contracting officer to consider factors other than price in selecting the contractor; and (3) unproven financial capability of MVL. CIC asks that the MVL contract be terminated and a new contract awarded based on the July 20 submissions or, in the alternative, that a new procurement be conducted. CIC further requests that we suspend action on this protest until information concerning MVL's financial capability is furnished to CIC pursuant to its Freedom of Information Act (FOIA) requests directed to the Air Force.

Irregular Procedures

CIC discusses three alleged irregularities in the conduct of this negotiation. First, CIC claims that the revised proposals received on July 20, 1979, were final offers, and that, by later allowing offerors to submit

one more round of offers on August 20, 1979, the Air Force allowed the other offerors an opportunity to undercut CIC's July 20 offer.

The Air Force contends that this protest ground is untimely filed because it concerns an alleged specification defect which should have been protested prior to the time set for receipt of proposals. The Air Force further notes that the protester chose to participate in the alleged deficient procedure by resubmitting its July 20 bid in August.

In reply, CIC states that it was "surprised" when the contracting officer, after the July 20 submissions, requested that still additional offers, i.e., "Best and Final" offers, be submitted on August 20, 1979. However, CIC went forward and reiterated its July 20 offer, withholding protest until after the award was made to MVL.

Our Bid Protest Procedures require that a protest against "alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals" shall be filed prior to that date. 4 C.F.R. § 20.2(b)(1) (1980). We have held that where a series of events relating to alleged irregular calls for final offers were apparent prior to the date established for the submission of best and final offers, and the protester was a participant in these events, the alleged irregularities should have been protested prior to that date. System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159. Since CIC did not protest the alleged irregularity until after the final offer date, this ground of protest is untimely filed and will not be considered.

Protester cites two other examples of flaws in the negotiating procedure. First, CIC claims that there was an apparent conflict of interest in the technical evaluation panel. In support of this contention, CIC notes that an initial member of the evaluation panel, who had testified on behalf of MVL in

another administrative proceeding, withdrew from the final panel to avoid an appearance of bias; nevertheless, CIC notes, one of the member's military subordinates remained on the final panel.

In response, the Air Force argues that the allegation of a conflict of interest is purely speculative. As stated by the Air Force:

"We are confident that [the initial member] never reviewed any of the proposals nor did any member of the panel discuss them with him. * * * [The subordinate] never discussed the proposals with or disclosed the contents of the proposals to [the initial member]."

CIC, which carries the burden of substantiating its case, has not taken issue with the Air Force's statement. In this circumstance, we must reject the CIC allegation. See Mainline Carpet Specialists, Inc., B-192534, May 8, 1979, 79-1 CPD 315.

CIC further claims that the security and confidentiality of the sealed offers submitted on July 20 may have been compromised. CIC argues that, since the offers were provided to the Alaska Public Utilities Commission pursuant to its order, the Air Force cannot guarantee that such information was "kept secure" pursuant to the requirements of the Defense Acquisition Regulation (DAR).

The procuring agency is prohibited from releasing, to the public or to anyone within the Government not legitimately interested, information in any proposal prior to award. DAR § 3-507.2(a) (1976 ed.). The Air Force denies any improper disclosure of CIC's price and further argues that it complied with all requirements to maintain the security of offerors' prices. Finally, the Air Force points out that the "protester, not the military, provided its prices to the Commission" and that it advised the Commission regarding the sensitivity of such prices.

The record contains no evidence to support CIC's suggestion that prices may have been improperly revealed

by the Commission or the Air Force after the July 20 submissions. Therefore, we reject the ground of protest.

We find no merit in CIC's allegations of irregularities in the negotiating procedure.

Award Factors

CIC further asserts that the Air Force failed to consider factors other than price in awarding the subject contract. CIC requests reconsideration of the contract award on the basis of "relevant factors" other than price, i.e., "on the basis of the comparative financial, technical and other strengths of CIC and MVL."

The Air Force states that it considered nonprice, proposal evaluation factors when it evaluated technical approaches in the initial May proposals. Since all technical proposals were considered to meet minimum requirements and no proposal was considered "superior to the others," the Air Force reports the contracting officer then decided that "award would be made to the lowest, responsive offeror."

The contracting officer's decision was properly conveyed in the Air Force's view, by amendment 4 to the RFP, issued on July 2, 1979, which stated:

"[Award] will be made to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the subscribers, price and other factors considered. The lowest offeror will be that offeror submitting the lowest price in the estimated total block(s) of the 'Schedule of Totals', page 16 of the solicitation. An offeror's offer to exceed the minimum requirements of the solicitation will be accepted, if advantageous to the subscribers, but will not be considered as an evaluation factor for award."

We have held that the "other factors" portion of the "price and other factors" phrase does not allow the introduction of new evaluation criteria where offerors were not given adequate notice. Joseph Legat Architects, B-190888, March 16, 1978, 78-1 CPD 214.

Technical merit was the only express, nonprice evaluation factor set forth in the RFP. Further, CIC has not contested the Air Force's reported technical evaluation that no proposal was considered "superior" and that all proposals met the minimum RFP requirements. In this circumstance, price would properly become decisive. As we said in Humanics Associates, B-193378, June 11, 1979, 79-1 CPD 408:

"* * * we agree with HEW that both offers are essentially technically equal. In such a situation [price] may become the determinative factor in award selection."

Thus, we cannot conclude that the Air Force improperly evaluated the proposals.

MVL's Financial Capability

CIC's objection is essentially a protest against an affirmative determination of MVL's responsibility. This Office no longer reviews protests against affirmative determinations of responsibility absent certain conditions not present here. Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Accordingly, this basis of CIC's protest is dismissed. Since the FOIA data requested by CIC pertains to this issue, we will not suspend consideration of the protest.

Based on the above analysis, the protest is dismissed in part and denied in part.



For The Comptroller General
of the United States