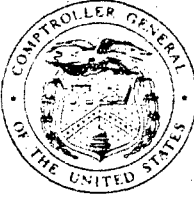


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DECISION



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

FILE: B-198846

DATE: August 25, 1980

MATTER OF: Biosystems Analysis, Inc.

DIGEST:

[Protest Alleging Agency Improperly Allowed Late Price Modification]

1. Protest filed initially with contracting agency which was subsequently filed with GAO without adverse agency action is timely since agency protest appears to have been filed within 10 days of protester's knowledge of bases of protest.
2. Allegation that agency improperly allowed late price modification to allegedly ambiguous proposal is not supported by review of cost proposal which clearly shows that agency simply erred in adding cost for one of five subitems in total evaluated price when that cost was already included in offered price.
3. Record shows that agency followed prescribed evaluation formula in awarding to low offeror rated technically equal with protester, and no doubt is cast on technical qualifications of low offeror.
4. Where agency was unaware that principal of awardee was employee of another Government agency on date of award, there is no violation of regulation against knowingly contracting with firm substantially owned or controlled by Government employee. Moreover, agency investigated allegation when raised after award and concluded that award was not affected.

Biosystems Analysis, Inc. (BSAI), protests the award of a contract to Wilderness Research Institute, Inc. (WRI), under request for proposals (RFP) R5-NCZ-80-10 issued by the Department of Agriculture, United States Forest Service (USFS).

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The RFP was for a survey of peregrine falcon nesting habitats in various locations. Since BSAI submitted the low offer of \$55,564.90 (WRI's offer was evaluated at \$56,466.25) and both firms received equal technical scores, BSAI was awarded the contract on March 10, 1980.

On the next day, when WRI was informed of the award price, the firm stated that its price was \$10,000 lower. Because a review of the WRI proposal confirmed this, BSAI's contract was terminated for the convenience of the Government immediately, and on March 13, 1980, award was made to WRI in the amount of \$45,126.25.

The survey was to begin in March 1980, and conclude by September 1980, with the submission of a final report. According to the contracting officer, as of June 10, 1980, 40-50 percent of the survey had been completed.

BSAI contends that WRI's offer was ambiguous, and that the acceptance of WRI's lower offer resulted from the allowance of an improper late modification after the closing date for offer receipt. BSAI argues that this constituted negotiations in which BSAI was not permitted to participate. BSAI further claims that WRI's inclusion of an employee of the United States Fish and Wildlife Service (Department of the Interior) as a principal member of the study team affects the contract's validity. In addition, BSAI protests the improper USFS reliance on low cost in the face of BSAI's alleged technical superiority and questions WRI's technical qualifications for the survey due to WRI's hiring a BSAI field biologist and offering to subcontract a portion of the work to BSAI.

USFS questions the timeliness of WRI's April 3 protest to it and subsequent May 12 protest to our Office. BSAI was allegedly aware of the termination of its contract and the award to WRI and the reasons therefor on March 11, 1980. Yet, BSAI's "letter of concerns"--merely an "outline and comment on the events" and not a protest--was mailed to the USFS on April 3, 1980, 17 working days later. An explicit letter of protest was not sent to this Office until May 12, 1980. According to USFS, these delays exceeded

the 10-day limit for filing a protest after the basis of protest is known, citing our Bid Protest Procedures (4 C.F.R. § 20.2(b)(2) (1980)).

We find the protest was timely filed and will consider the merits. WRI's April 3, 1980, letter to the USFS, which raised the first three protest bases, clearly was a protest calling for corrective action based on alleged illegal actions. Further, the record apparently shows that BSAI was not apprised of the specifics of the eventual award to WRI until some unspecified time after March 11, 1980, and BSAI was not advised until March 21, 1980, of the identity of WRI contract principals. Therefore, the subsequent protest to us without adverse agency action on the protest to it was timely filed. See 4 C.F.R. § 20.2(a) (1980). The last protest basis raised initially in the May 12, 1980, letter to us was based on events occurring subsequent to the April 3, 1980, letter and was timely filed.

Based on our review of the record, the protest is denied.

BSAI's first contention concerning the alleged ambiguity in the WRI offer and the acceptance by the USFS of the so-called late modification is not supported by a review of WRI's cost proposal. For separate pricing, the schedule contained one line item composed of five subitems (four reports and helicopter flight time). WRI submitted separate prices for the reports with a "GRAND TOTAL" of \$45,126.25 and a helicopter total of \$11,340 which resulted in an initial evaluation of \$56,466.25. However, WRI's cost proposal on the next page clearly showed that the "GRAND TOTAL" of \$46,126.25 included the helicopter service. Therefore, we agree with the USFS that what occurred was simply an error in the evaluation.

The record does not show that the USFS relied improperly on low cost. The RFP prescribed an evaluation formula with cost weighted at 15 percent. The evaluated technical equality of the two firms and WRI's lower cost called for and the Forest Service did award to WRI after the evaluation error was discovered. As to WRI's technical qualifications, we agree with the

USFS that the events described by BSAI do not necessarily cast doubt on WRI's qualifications since they occurred after an objective technical evaluation was performed.

BSAI's final concern relates to the fact that one of the principals of WRI was employed by the United States Fish and Wildlife Service at the time of award. Contracts between the Government and its employees have been considered subject to criticism from a public policy standpoint on the grounds of possible favoritism and preferential treatment.

In this regard, Federal Procurement Regulations § 1-1.302-3 (1964 ed. amend. 95) states:

"(a) Contracts shall not knowingly be entered into between the Government and employees of the Government or business concerns or organizations which are substantially owned or controlled by Government employees, except for the most compelling reasons, such as cases where the needs of the Government cannot reasonably be otherwise supplied."

See Department of Agriculture Procurement Regulations, 41 C.F.R. § 4-1.302-3(a) (1979); Metro Electric, Inc., 58 Comp. Gen. 802 (1979), 79-2 CPD 226.

Apparently, prior to award, the USFS was unaware of this situation, and the record shows that this unawareness was not due to any misrepresentations in the WRI proposal. Therefore, the USFS did not violate the above-quoted regulation by "knowingly" entering into the contract. Despite this, when BSAI raised this after award, an investigation was conducted, and the contracting officer concluded that the award was not affected. USFS relied on the fact that the employee works for a different Government agency under a temporary appointment; the employee will be on "Leave Without Pay" during the contract term, and the appointment will expire prior to the submission of the final contract report; the employee is one of three principals of the contractor, a nonprofit corporation whose principals

have made no financial investment; and the employee will receive only a small percentage of the total salaries for the contract.

In these circumstances, we see no basis to disturb the award. Therefore, the protest is denied.

Harry R. Van Cleave

For the Comptroller General
of the United States