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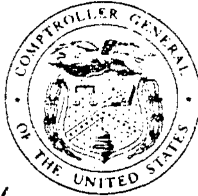

DECISION

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

[Protest Involving Issues in Litigation]

FILE: B-197872

DATE: September 18, 1980

MATTER OF: Systems Consultants, Inc. CNG00081

DIGEST:

1. GAO will consider protest where issues involved are in litigation when court expresses interest in GAO decision.

2. Even if DOE's price/cost analysis, upon which offeror was selected for final negotiations, did not comply with FPR requirement for detail, DCAA audit confirmed that selected offeror was significantly lower in cost than protester. Therefore, there was no prejudice to protester.

3. While preaward survey and DCAA audit occurred after selection of offeror for final negotiations, both confirmed DOE review of responsibility for purposes of selection in evaluation of technical, business, management, and price proposals. Conclusive determination of selected offeror's responsibility need not be made prior to selection, but should be made as close to award as possible.

4. Ordinarily, GAO does not review protests against affirmative determinations of responsibility unless fraud is alleged on part of procuring officials or solicitation contains definitive responsibility criteria which have not been met. Standard is much the same as that followed by courts which view responsibility as discretionary matter not subject to judicial review absent fraud or bad faith. Since protester does not so allege, protester has failed to meet standard for review by GAO or courts.

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5. GAO's in camera review disclosed nothing to contradict DOE's finding that technical proposal of offeror selected for final negotiations complies with RFP requirements. Protester's assumptions were found to be misconceptions since it did not have access to evaluation documents or selected proposal.

Systems Consultants, Inc. (SCI), protests the Department of Energy's (DOE) selection of Meteor Communications Consultants (MCC) for final negotiations and eventual award of a contract pursuant to request for proposals (RFP) No. DE-RP01-79AD-10612. The RFP solicited a Meteor Burst Emergency Communications System to provide for the interexchange of teletype messages between 11 designated DOE offices, with an option for three additional sites, located throughout the continental United States.

The protest issues are also the subject of litigation (Systems Consultants, Inc. v. The United States of America, et al., Civil Action No. 80-869) in the United States District Court for the District of Columbia. The presiding judge has expressed an interest in a decision by our Office. Therefore, the protest will be considered on the merits. See Fort Riley Cable TV Services, Inc., B-197035, March 14, 1980, 80-1 CPD 200; 4 C.F.R. § 20.10 (1980).

DOE has given our Office certain materials (e.g., technical and cost proposals, evaluations of these proposals) and requested that these materials not be disclosed outside the General Accounting Office. Further, SCI has restricted the disclosure of submitted information due to its proprietary nature. To comply with these requests, our discussion of the protest is necessarily limited. However, in deciding this protest, we have carefully reviewed all of the material.

Western Union (WU), a proposer and interested party, has raised various issues concerning the procurement. However, this decision will not address them since WU did not protest to our Office and is not a party to the court action. In any event, we note that our response to SCI's contentions essentially responds to some of the issues raised by WU.

Background

The RFP was issued on May 23, 1979, with a closing date for receipt of initial proposals of July 20, 1979. Three firms, SCI, MCC and WU, responded to the RFP.

DOE's technical evaluation committee performed an initial technical evaluation, and the business management committee performed an initial evaluation of contract and price proposals. The technical evaluation committee ranked SCI slightly higher than MCC and made the determination that WU's proposal was unacceptable. The business management committee's initial analysis (including cost or pricing data) disclosed that MCC took exception to the firm-fixed-price requirement and offered a cost-plus-fixed-fee proposal. SCI offered a firm-fixed-price proposal. The total price estimated by MCC was lower than that offered by SCI. The technical evaluation committee determined that "both SCI and MCC [could] provide an operational meteor burst (forward scatter) system in accordance with the provisions of the RFP." Accordingly, on August 13, 1979, a recommendation was made that best and final fixed-price offers be solicited from both companies, MCC's cost-plus-fixed-fee proposal notwithstanding, "so that award [could] be made on the basis of lowest comparable cost."

On November 26, 1979, DOE placed MCC and SCI in the competitive range. Oral discussions were held on December 12, 1979, and best and final offers were received on December 26, 1979.

The final offers were reviewed. Both firms were still technically responsive to the RFP and the technical scores remained the same. In addition, the evaluators concluded:

> "* * * The wide variance in cost is due to the different processing equipment proposed by each offeror. SCI is proposing highly sophisticated processing equipment which is more expensive than that proposed by MCC."

The final business management report indicates that MCC withdrew its exception concerning the cost proposal and submitted a firm-fixed-price revised proposal significantly lower in price than SCI's. In addition, we note that SCI in its revised proposal took exception to and requested deviations from certain terms and conditions of the RFP. Furthermore, DOE believed such exceptions and deviations would require protracted negotiations with little expectation of resolution in the best interest of the Government. As a result, on February 14, 1980, MCC was selected for final negotiations.

Subsequently, DOE requested that the Defense Contract Audit Agency (DCAA) perform an evaluation of MCC's firm-fixed-price proposal. The initial (preaward) audit was completed on March 25, 1980, and was favorable to MCC. It included a review of the cost elements of MCC's proposal and MCC's organization, operations, and accounting system. We note that a copy of the negotiation memorandum,which will contain final recommendations, is to be furnished to DCAA for a final audit.

A preaward survey was performed on April 29, 1980. The survey concluded that MCC can comply with the RFP solicitation requirements and recommended complete award.

Cost Analysis

SCI argues that the RFP requires an analysis of total proposed price, including cost realism and reasonableness. SCI believes that DOE's cost analysis should include:

> "* * * verification of cost data, evaluation of specific cost elements, the reasonableness of estimated amounts, analysis of overhead and verification of pricing submissions as being in accordance with contract cost principles * * *."

SCI contends that this analysis must be completed prior to selection of an offeror for final negotiations. It is SCI's position that the cost analysis was not completed at the time of MCC's selection based on the fact that DOE did not perform an audit of MCC's or SCI's

cost proposal, or the quotes of their respective suppliers. Furthermore, SCI argues that DOE did not seek verification of MCC's offer. Therefore, SCI concludes that DOE did not conduct an adequate cost evaluation and violated the pertinent procurement regulations.

Federal Procurement Regulations (FPR) § 1-3.807-2(a) (1964 ed. amend. 103) stresses that the method and degree of price or cost analysis are dependent on the facts surrounding the particular procurement and pricing situation. The regulation provides mandatory factors to be considered.

DOE advises that the price proposals, including price lists and all supporting labor, G&A and overhead, and profit, were independently evaluated by its cost price analyst and contract specialist. MCC's price proposal was compared to that of SCI.

It is our view that the procuring agency's evaluation of proposed price or costs is entitled to great weight since the agencies are in the best position to determine realism of price or costs. Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 CPD 253, and 55 Comp. Gen. 499 (1975), 75-2 CPD 344. In the instant situation, however, the record does not detail how DOE independently analyzed MCC's cost proposal and precludes any definitive conclusion on whether DOE complied with the FPR's mandatory requirements. Although DOE's narrative summaries imply that the FPR's requirements were utilized as a guide for analysis, it appears from the record before us that, essentially, DOE only compared the offerors' estimated costs. Notwithstanding this, DOE's conclusions that the significantly lower MCC price was viable and reasonable were confirmed by DCAA's in-depth audit. Therefore, even if DOE's price or cost conclusions were reached in a procedurally deficient manner, the DCAA's confirming audit eliminates any prejudice to SCI in the conclusions of DOE's preselection analysis.

With respect to SCI's allegation that DOE should have verified MCC's offer prior to selection, we

disagree. The DCAA audit confirmed that MCC's price was reasonable. See Wismer & Becker Contracting Engineers, B-198674, September 3, 1980, 80-2 CPD ____.

It should be recognized that DOE could have reopened discussions with MCC and SCI if the DCAA audit was unfavorable to MCC, or other matters affecting the selection surfaced. While a preselection audit would have been preferable to prevent the possible premature selection of MCC, the post-selection audit's confirmation of DOE's findings renders the question of timing irrelevant.

Responsibility

SCI argues that the DOE contracting officer, prior to the selection of MCC for final negotiations, was required pursuant to FPR, subpart 1-1.12, to make a conclusive responsibility determination on MCC. More specifically, SCI refers to DOE regulations containing evaluation procedures where, prior to selection, matters closely related to responsibility are to be evaluated. 41 C.F.R. § 9-3.805-50(e) (1979). SCI argues that no certificate of competency (COC) has been requested or issued by the Small Business Administration (SBA) for MCC. Furthermore, SCI submits that no preaward survey was made by DOE prior to selection of MCC. Also, SCI questions the information bearing on responsibility that was before the agency prior to selection.

There is no provision in the FPR, subpart 1-1.12, requiring that a conclusive responsibility determination be made prior to the selection of an offeror for final negotiations. Rather, the FPR requires that such determination be made as close to award as possible. See FPR § 1-1.1205 (1964 ed. amend. 95). Furthermore, DOE's procurement regulations are subject to the FPR provision with respect to the timing of responsibility determinations. 41 C.F.R. § 9-3.800 (1979).

DOE states and the record confirms that its review prior to selection included information supplied by

MCC as the RFP and its evaluation procedures required relative to:

> "* * * place of performance; financial statements; program plan, schedule, organization, personnel qualifications, facilities and equipment, government contracts; management system and subcontract management."

DOE's review concluded essentially that MCC's proposal was technically acceptable and that MCC possessed the capability to perform. This is confirmed by the preaward survey and DCAA's audit following selection. The contracting officer was intricately involved in the evaluation procedure and selection. In these circumstances, we see no prejudice to SCI or basis to take legal objection.

With respect to SCI's specific objections concerning MCC's responsibility, our Office will not review them since we do not review protests against affirmative determinations of responsibility except in circumstances not applicable here. See Mayfair Construction Company, 58 Comp. Gen. 105 (1978), 78-2 CPD 372. Our standard is much the same as that followed by the courts. They have taken the view that responsibility is a matter of discretion not subject to review absent fraud or bad faith. Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974); Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955); O'Brien v. Carney, 6 F. Supp. 761 (D. Mass. 1934). Since SCI does not allege fraud or bad faith on the part of the contracting officer, SCI has failed to meet the standard for review by us or the courts. Accordingly, notwithstanding the court's involvement in this case, we find it unnecessary to engage in any further consideration of SCI's specific objections concerning the preliminary review because of the limited judicial standard of review.

Because of the above, the noninvolvement of SBA is inconsequential since, in order to request a COC from the SBA, an offeror must have been found nonresponsible, which is not the case here. See 13 C.F.R. § 125.5 (1980); FPR § 1-1.708-2(a)(2) (1964 ed. amend. 192).

Technical Requirements

SCI's last argument is expressed in the alternative. Either MCC's proposal does not satisfy the RFP's technical requirements, or DOE has relaxed the requirements without giving SCI an equal opportunity to revise its offer. SCI bases its arguments on the "single fact" that MCC's offer is less than $5 million. SCI has submitted what it perceives are the possible technical alternatives available to MCC which result in cost savings but do not meet the RFP's requirements.

SCI's argument assumes that MCC (1) is using only one computer per site which cannot meet the RFP's environmental or reliability requirements, (2) proposes less back-up equipment than the RFP required, and (3) proposes a system configuration with less than an average of three, "the minimum acceptable number," bidirectional links per site. Furthermore, SCI argues that MCC's proposal must not include provisions to combat noise at certain sites in violation of the RFP.

SCI requests that we use outside experts to evaluate its alternative approaches and MCC's proposal. Although in the past we have utilized outside experts, in the instant case, we are equipped to evaluate SCI's allegations.

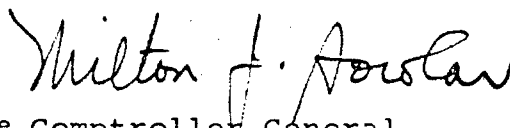
Our review disclosed that MCC is not utilizing one computer per site. SCI admits that use of more than one processor for each site will meet the RFP's reliability requirements. In addition, MCC's proposed backup equipment does comply with the RFP's requirements. With respect to the environmental requirements (heat and humidity), MCC's equipment configuration also complies with the RFP's requirements. MCC's proposed system configuration provides for an average of three or more bidirectional links. Moreover, MCC's proposal, contrary to SCI's belief, does include procedures to combat noise as appropriate.

While we can appreciate SCI's misconceptions since it does not have access to the evaluation

documents or MCC's proposal, our review of MCC's technical proposal and DOE's evaluation disclosed nothing to contradict DOE's findings.

With regard to SCI's alternative allegation concerning relaxation of the RFP's requirements, because of our conclusion above that MCC's proposal complied with the RFP's requirements, no further discussion of this issue is necessary.

Accordingly, SCI's protest is denied.



For the Comptroller General
of the United States