

DECISION



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

FILE: B-218196; B-218196.3 DATE: June 19, 1985

MATTER OF: Uniserv Inc.; Marine Transport Lines, Inc.

DIGEST:

1. Protest issue is untimely when it is not raised in initial protest to the contracting agency or in a protest to GAO within 10 days after basis for it is known or should have been known.
2. Submission, after best and final offers, of additional evidence of an offeror's financial resources does not constitute improper discussions or require an agency to request revised proposals from all offerors when the information does not affect the acceptability of the proposal. Rather, it relates to the offeror's responsibility.
3. Award of a fixed-price contract for required services is not precluded because the offeror allegedly proposes to pay wages that are below the minimum required by the Fair Labor Standards Act. A below-cost proposal may be rejected only if the offeror is determined not to be responsible, and GAO will not review an agency's affirmative determination of responsibility except in limited circumstances not present here.

Uniserv Inc. and Marine Transport Lines, Inc., protest the award of a contract to Sea Mobility, Inc., under request for proposals (RFP) No. N00033-84-R-4003, issued by the Military Sealift Command, Department of the Navy, for the operation and maintenance of up to 12 T-AGOS-1 class ships. Uniserv alleges that it did not receive the award solely because the Navy provided misleading information to it during discussions, causing Uniserv to raise its offered price. Marine Transport Lines alleges the Navy improperly conducted discussions with Sea Mobility after receipt of best and final offers and allowed that firm to modify its proposal without providing a similar opportunity to other

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offerors. Marine Transport Lines also contends that Sea Mobility proposed to pay wages that are below required minimums, making it ineligible for award.^{1/}

We dismiss the protest of Uniserv. We deny the protest of Marine Transport Lines in part and dismiss it in part.

Background

The Navy sought proposals for the operation and maintenance, over a period of 5 years, of ships assigned to transport passive underwater surveillance systems in the Atlantic and Pacific Oceans. The solicitation required offerors to propose fixed prices for 48 different line items. These covered ship operation and crew maintenance support while the ships are in full operational status, repair availability status, and reduced operational status, all on a per diem basis; shore management and logistical support, on a monthly basis; and predelivery shore support. The Navy evaluated proposals by multiplying proposed prices for ship operation by the number of days the ships were anticipated to be in each status. Similarly, proposed prices for shore management were multiplied by the anticipated number of months that this service was to be provided. These figures were added to the price for predelivery shore support to establish total evaluated prices for the 5-year period.

According to the solicitation, the contract was to be awarded to the responsible offeror whose offer, conforming to the solicitation, was considered most advantageous, price and other factors considered. The solicitation also stated that each offeror was required to demonstrate affirmatively its responsibility. It required submission of numerous documents and information to establish, among other things, that the offeror had the necessary organization, experience, operational and logistical controls, and technical skills to perform the contract adequately.

^{1/} Marine Transport Lines initially also alleged that Sea Mobility had not been granted necessary security clearances. The firm withdrew this basis of protest when the Navy demonstrated that the clearances had in fact been granted.

The Navy received 16 proposals on August 20, 1984. After discussions and receipt of best and final offers from each offeror, the agency conducted preaward surveys of the three offerors with the lowest priced proposals. Officials conducting the preaward survey of Sea Mobility concluded that the firm had not secured adequate working capital to perform the contract, and they recommended that Sea Mobility not receive the award. However, a member of the preaward survey team told Sea Mobility that if it could provide a bank commitment letter for a working capital loan exceeding the amount already committed, the negative recommendation would be reconsidered. Sea Mobility obtained a commitment for substantially more financing than it had had at the time of its best and final offer, and, as a result of this commitment, the preaward survey team reversed itself and recommended an award to the firm. The contracting officer based his determination that Sea Mobility was responsible in part on the revised recommendation. On February 1, 1985, the Navy awarded a \$41,725,259 contract to Sea Mobility as the low offeror.

Uniserv's Protest

Uniserv asserts that it initially offered a price that was lower than the contract price, but that during discussions, the Navy told Uniserv that its proposal was not adequate in a number of areas and that Uniserv should increase its proposed price in those areas. Uniserv argues that the Navy's "direction" to increase its offered price was improper and that, absent this direction, Uniserv would have received the award.

The procurement record reflects that the Navy was concerned that several offerors did not fully understand the requirements described in the RFP, and had proposed inadequate shore staff, relief crews and overtime for crews to perform the contract. As a general matter, it would be proper for an agency to point out deficiencies in a proposal that raised substantial questions about the offeror's ability to perform, whether or not addressing those deficiencies might result in an increased price proposal. However, we will not consider this protest. Uniserv knew or should have known of its basis for protest shortly after the Navy publicly announced the award to Sea Mobility at an estimated price of \$41,700,000 by issuance of a press release on February 1. Announcement of the award and the estimated price was carried in the Wall

Street Journal on February 4; in addition, the Navy notified all offerors of the award--including the dollar amount--by telex on February 8.

Our Bid Protest Regulations generally require protests to be filed within 10 working days after the protester knew or should have known the basis for the protest. 4 C.F.R. § 21.2(a)(2) (1985). Uniserv protested on February 15 to the Navy that Sea Mobility's proposal "did not satisfy industry practices," but did not complain of the Navy's allegedly improper price negotiations. This issue was first raised in Uniserv's protest to our Office, filed on March 15, more than 6 weeks after the Navy's announcement of the award to Sea Mobility and the estimated contract price.

Consequently, we dismiss Uniserv's protest as untimely.

Marine Transport Lines' Protest

A. Allegedly Improper Discussions

Marine Transport Lines first alleges that the Navy improperly conducted discussions with Sea Mobility after receipt of best and final offers, allowing that firm to revise its proposal without providing a similar opportunity to other offerors. In support of this allegation, the protester argues that the Navy used financial information--usually a measure of an offeror's responsibility--as a test of the "acceptability" of Sea Mobility's proposal. Since the revised bank commitment letter was allegedly essential for determining acceptability, Marine Transport Lines argues that its submission to the Navy constituted improper discussions and a revision of Sea Mobility's proposal.

We have defined "discussions" as communications between an agency and an offeror involving information essential for determining the acceptability of a proposal. Providing an offeror an opportunity to revise its proposal also constitutes discussions. See Alan Scott Industries, et al., 63 Comp. Gen. 615 (1984), 84-2 CPD ¶ 349. Adequacy of financial resources is ordinarily a question of the offeror's responsibility, i.e., whether it is able to perform the contract, rather than whether the offeror's proposal is acceptable for purposes of negotiations or a

contract award. See Defense Acquisition Regulation (DAR) § 1-903.1(i), reprinted in 32 C.F.R. pts. 1-39 (1984).^{2/}

Since a prospective contractor's responsibility should be measured at the time of award, rather than earlier, submission of information solely relating to responsibility after best and final offers and/or a preaward survey does not constitute discussions or a revision of the offeror's proposal. Radiation Systems, Inc., B-180268, July 29, 1974, 74-2 CPD ¶ 65.

In appropriate circumstances, agencies may use factors that are usually matters of responsibility as technical evaluation factors and thereby measure the acceptability of a proposal. See, e.g., Anderson Engineering and Testing Co., B-208632, Jan. 31, 1983, 83-1 CPD ¶ 99. We do not believe that this occurred here. As Marine Transport Lines points out, the RFP states that failure to submit certain information may result in a proposal being found to be "unacceptable." This statement, however, appears solely in the context of responsibility:

"Offerors must submit with their offers sufficient information to enable the Contracting Officer to make a reasonable evaluation of the ability of prospective Contractors to meet minimum standards of responsibility to ensure adequate contract performance. These minimum standards are set forth in DAR 1-903.1 and 1-903.2(a). As a minimum, the offeror must submit as part of its proposal the following information and documents in the order given below. Failure to provide all the required information may result in finding an offer unacceptable."

The required information included the following:

"A copy of the offeror's latest certified balance sheet, and latest profit and loss statement if for a date later than covered by certified statements. Offeror must furnish evidence of adequate financial

^{2/} The Defense Acquisition Regulation is applicable to this procurement because the RFP was issued on March 15, 1984, before the April 1 effective date of the Federal Acquisition Regulation, 48 C.F.R. Chapter 1 (1984).

resources or the ability to obtain such resources during the period of performance under this contract."

While the Navy referred to the possible unacceptability of a proposal omitting the required information, we find it clear that this did not relate to technical acceptability. Rather, the Navy in this provision set forth the information that it needed to determine whether offerors met minimum standards of responsibility. Under the terms of the solicitation, the Navy could not have rejected an offer as technically unacceptable because of inadequate evidence of financial resources, even though this inadequacy might have been grounds for determining that the offeror was not responsible.³/ See 52 Comp. Gen. 47 (1972).

The record reflects the fact that the agency shares this view, since it conducted discussions with all offerors, including at least one whose initial proposal led the Navy to believe that it was not financially capable of performing. Thus, the revised bank commitment letter was not information essential for determining the acceptability of Sea Mobility's proposal, and its submission did not constitute discussions between the Navy and Sea Mobility. Marine Transport's protest on this basis is denied.

B. Alleged Below-Minimum Wages

Marine Transport Lines also alleges that Sea Mobility proposed to pay wages to its seamen that are below the minimum wages required by the Fair Labor Standards Act, 29 U.S.C. § 206 (1982). According to the protester, acceptance of Sea Mobility's proposal therefore was unfair to offerors that intended to comply with the statute. Marine Transport Lines argues that we should consider this basis of protest because under the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3551-3556 (West Supp. 1985), our Office is required to determine if procurement actions violate applicable statutes, and that

³ / We note that, unlike the procuring agency in Delta Data Systems Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984), the Navy did not include technical evaluation factors in this RFP that could encompass considerations of financial condition. In upholding the use of offerors' financial strengths in evaluating proposals in Delta Data, the Court found that a listed technical factor, "vendor considerations," was broad enough to include the vendors' financial condition. Here, the Navy provided no technical evaluation factors in the RFP, so that the offerors' financial condition related solely to their responsibility.

this authority includes determinations regarding the Fair Labor Standards Act.

We are aware of no statute or regulation, including the Fair Labor Standards Act and implementing regulations, see 29 C.F.R. pt. 783, that precludes an award of a fixed-price contract simply because the contractor may have proposed a wage rate below the minimum wage. Cf. SEACO, Inc., B-211226, Aug. 1, 1983, 83-2 CPD ¶ 146 (bid below the minimum Service Contract Act rate does not mean that the bidder intends to violate the act; it may have submitted a below-cost bid). Here, the wages to be paid by Sea Mobility are included in its fixed price for ship operation and maintenance. Thus, the contract price will not depend upon what the firm may be required to pay its seamen under the Fair Labor Standards Act. If the protester is correct, and Sea Mobility must pay wages above those proposed, the firm may receive lower profits than anticipated or even suffer a loss on the contract.

In order to reject Sea Mobility's offer because of the risk or even the certainty that the firm will be required to pay higher wages than indicated in its proposal, the Navy would have to determine that the firm is not responsible. It has not done so in this case. Rather, the contracting officer has affirmatively determined that the firm is responsible. To the extent that Marine Transport Lines is challenging this determination, our Office does not review protests against affirmative determinations of responsibility absent a showing of either possible fraud on the part of procuring officials or that definitive responsibility criteria in the solicitation have not been met. 4 C.F.R. § 21.3(f) (1985). While the RFP requires offerors to have adequate financial resources, this is required of all prospective government contractors, DAR § 1-903.1, and is not the type of specific and objective standard that we regard as a definitive responsibility criterion. See Alliance Properties, Inc., B-214769, July 3, 1984, 84-2 CPD ¶ 14.

Finally, Sea Mobility's compliance with the act during contract performance is a matter within the jurisdiction of the Department of Labor and the United States courts, 29 U.S.C. §§ 216, 217 (1982), and not our Office. Consequently, we dismiss Marine Transport Lines' protest on this basis.

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We dismiss Uniserv's protest, deny the protest of Marine Transport Lines in part and dismiss it in part, and deny both protesters' claims for proposal preparation and associated costs.

for Seymour Egan
Harry R. Van Cleve
General Counsel