

# DECISION



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

FILE: B-220049 DATE: January 16, 1986  
MATTER OF: Price Waterhouse

## DIGEST:

1. Procuring agency's delay in providing portions of the procurement record relevant to a protest issue is inconsistent with its obligation under the Competition in Contracting Act of 1984 to submit a complete report to the General Accounting Office, including all relevant documents. The General Accounting Office will not consider the untimely submission since to do so would delay resolution of the protest.
2. Procuring agency's failure to alert offerors during discussions to the fact that their estimated levels of effort and offered prices are considered unreasonably high does not meet its obligation to conduct meaningful discussions with all offerors within the competitive range. Such discussions with only one of the offerors would also be improper.
3. The General Accounting Office will not review an allegation that an offeror is not responsible because proposed key personnel may be committed to work on another contract, since this allegation does not fall within the exception under which affirmative determinations of responsibility are reviewed.
4. Acceptance of a below-cost offer for a fixed-price contract is not itself grounds for protest, and the procuring agency, not the General Accounting Office, is responsible for ensuring that losses from a below-cost offer are not recovered during contract performance.
5. The Competition in Contracting Act requires the General Accounting Office to disregard

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the costs of contract termination and recompetition in making recommendations where it determines that an award was not in accord with applicable statutes and regulations after the procuring agency determines that continued performance is in the government's best interest although the protest was filed within 10 days of award.

Price Waterhouse protests the award of a contract to Arthur Young & Company under solicitation No. A-85-9, issued by the Department of the Treasury. Price Waterhouse contends that because of the substantial difference in proposed prices, either the two firms did not compete on an equal basis or Arthur Young submitted a below-cost proposal. The firm also alleges that Treasury misled it during discussions and provided Arthur Young with access to information that was not disclosed to Price Waterhouse.

We sustain the protest in part and dismiss it in part.

#### Background

In September 1984, Treasury contracted with Price Waterhouse to establish detailed specifications and a logical design for a department-wide payroll system. The system was to be based on an Army payroll system that Price Waterhouse had recently designed, with additions and deletions necessary to meet requirements of the Treasury. The Treasury solicitation in question here, issued on April 10, 1985, sought offers to design, develop, and implement the new payroll system based upon the work previously performed by Price Waterhouse.

The solicitation provides that in evaluating proposals for the new system, cost will be given a weight of 50 percent, with a maximum score of 100 out of 200 possible points. The solicitation contemplates a fixed-price incentive contract and states that each offeror's proposed target cost and ceiling price are to be given equal weight in scoring the cost factor.<sup>1/</sup> The

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<sup>1/</sup> A fixed-price incentive contract provides for a variable profit for the contractor if its costs fall above or below its target cost, based upon a sharing formula. This potential increase or decrease in profit is intended to provide an incentive for effective contract management. The final price is limited by an agreed price ceiling. Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.403 (1984).

other evaluation factors and their respective weights and possible points are as follows: plan of accomplishment (19 percent or 38 points), corporate experience and capacity (12 percent or 24 points), qualifications of professional staff (12 percent or 24 points), and qualifications of project manager (7 percent or 14 points).

Treasury received four proposals but found only those of Arthur Young and Price Waterhouse to be technically acceptable. Both firms' estimated levels of effort--how many staff members and hours would be required to perform the work--were greatly in excess of the government's estimates. (Treasury further states that its estimates were based upon the effort that will be necessary for a contractor less familiar with the payroll system than either of these two offerors.) Arthur Young offered a ceiling price of approximately \$6.3 million, and Price Waterhouse offered a ceiling price of approximately \$7.4 million.

Treasury conducted a "fact finding" session with each offeror to discuss assumptions in their proposals and, on August 9, requested them to submit best and final offers by August 20. In the interim, Treasury reopened a reading room that it had previously established for potential offerors. The reading room had been opened initially because of the volume of applicable standards and procedures, including the specifications for the Army payroll system and summaries of additions and deletions to that system prepared by Price Waterhouse. Price Waterhouse's contract to establish detailed specifications for the Treasury system had not been completed when offers were first submitted. Consequently, to the material previously available in the reading room the agency added detailed analyses of the required modifications to the Army payroll system that had been submitted by Price Waterhouse through August 13. (Previously, only one-page summaries of the modifications had been available, and the number of modifications had been reduced from 157 to 111 after the reading room had been closed with submission of initial offers.)

Only Arthur Young was notified of the reopening of the reading room; Treasury states that since Price Waterhouse had prepared all of the additional information, the agency did not consider it necessary to invite that firm.

In its best and final offer, Arthur Young decreased its target cost and ceiling price by more than 45 percent each, while the protester increased its price slightly. Arthur Young's final technical score was slightly lower than that of Price Waterhouse; its cost score was

substantially higher (100 points versus less than 50 points). This difference in cost scores resulted primarily from a difference in the offerors' estimated levels of effort. At the contracting officer's request, the evaluators reviewed the sufficiency of Arthur Young's revised estimated level of effort for each task. They concluded that the firm's revised estimates were achievable and that Price Waterhouse had "grossly overestimated" the necessary levels of effort and, consequently, had greatly overpriced the work. Treasury announced its intention to award a contract to Arthur Young on September 3; this protest followed.

#### Price Waterhouse's Protest

Price Waterhouse contends that the more than 100 percent difference between the two offerors' prices, as well as other factors, establish either that Arthur Young and Price Waterhouse did not compete on a common basis or that Arthur Young bid well below cost. If the latter is true, the protester argues that the opportunities for change orders and follow-on contracts at artificially high prices are so great that acceptance of the offer would undermine the integrity of the procurement system.

The protester learned from the administrative report that it was considered to have "grossly overestimated" much of the level of effort required, and that Treasury recognized this early in the procurement, before the fact finding sessions. Price Waterhouse also learned from the report that Treasury had reopened an augmented reading room but had informed only Arthur Young. As a result, during a conference at our Office on October 21, Price Waterhouse presented two additional bases of protest: (1) that Treasury's failure to indicate during discussions that the firm had overestimated the level of effort required and its "instructions" to increase the firm's efforts in some areas clearly prejudiced Price Waterhouse; and (2) that while the reading room materials had been prepared by Price Waterhouse, the firm was prejudiced by not knowing which documents Treasury deemed material.

#### GAO Analysis

A threshold issue involves Treasury's request that we not consider Price Waterhouse's protest concerning the scope of discussions because the agency has not had a full opportunity to respond. As noted above, the matter was expressly raised by Price Waterhouse at the conference, when our Office asked agency officials in attendance to provide those portions of the procurement record concerning

the subjects discussed with both offerors. The agency thus had an opportunity to address the issue in its post-conference comments. On November 13, following an oral request, the agency was given another opportunity to supplement the record specifically with respect to the protester's written contentions about Treasury's discussions with the offerors and the agency's obligations in that regard. Treasury declined to do so on grounds that it would be inappropriate to provide any information without a finding by us that the issues had been raised in a timely manner by the protester and a written explanation from our Office of the issues being considered.

On January 15, 87 working days after Price Waterhouse filed its protest, the agency provided an affidavit regarding subjects discussed with the offerors and a letter dated August 2 from Arthur Young to Treasury answering questions asked during the firm's fact finding session. Treasury does not indicate whether there are other documents in its possession relevant to the subject matter of discussions. As required by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. § 3555(a) (West Supp. 1985), our Bid Protest Regulations provide that a protest decision may not be delayed by the failure of a party to meet filing time limits. 4 C.F.R. § 21.3(g) (1985). Failure to comply with prescribed time limits may result in resolution of a protest without consideration of the untimely submission. Id. In this case, consideration of Treasury's new evidence, including any response by Price Waterhouse, would clearly delay resolution of the protest. Consequently, we have not considered the January 15 filing.

Moreover, we believe that Treasury's delay in providing documents in its possession concerning discussions conducted in this procurement is inconsistent with its obligation to submit a "complete report (including all relevant documents)" under CICA, 31 U.S.C.A. § 3553(b)(2). Our Bid Protest Regulations provide that we will dismiss protests that are untimely on their face without requiring an agency report. 4 C.F.R. § 21.3(f) (1985). On November 13, our Office advised Treasury that the issues raised at the conference by Price Waterhouse did not appear untimely on their face, and, thus, were not suitable for dismissal at that time. Since the issues were raised less than 10 days after the protester received the agency report filed in our Office on October 15, we find that they are timely. See 4 C.F.R. § 21.2(a)(2). In any event, even if the new issues had been untimely, we believe that the discussion record was relevant to the original protest

issue--that the two offerors did not compete on an equal basis--and should have been provided in the initial agency report. In our view, Treasury had a reasonable opportunity to consider and respond in a timely manner to Price Waterhouse's claim that discussions were inadequate, and we will consider the protest issue.

The governing CICA provision, 41 U.S.C.A. § 253b(d)(2) (West Supp. 1985), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful, and in order for discussions to be meaningful, agencies must point out weaknesses, excesses, or deficiencies in proposals unless doing so would result either in disclosure of one offeror's approach to another or in technical leveling. The Advantech Corp., B-207793, Jan. 3, 1983, 83-1 CPD ¶ 3; Ford Aerospace & Communications Corp., B-200672, Dec. 19, 1980, 80-2 CPD ¶ 439. Once discussions are opened with an offeror--and a request for best and final offers constitutes discussions, Decision Sciences Corp., B-196100, May 23, 1980, 80-1 CPD ¶ 357--the agency must point out all deficiencies in that offeror's proposal and not merely selected ones. Checchi and Co., 56 Comp. Gen. 473 (1977), 77-1 CPD ¶ 232.

During discussions, agencies are prohibited from advising an offeror of its price standing relative to other offerors, Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d)(3) (1984), and are not required to point out that a proposed price is too high if the price is still below the government estimate. University Research Corp., B-196266, Jan. 28, 1981, 81-1 CPD ¶ 50. On the other hand, discussions cannot be meaningful if an offeror is not apprised that its price exceeds what the agency believes to be reasonable. See Washington School of Psychiatry/The Metropolitan Educational Council for Staff Development, B-192756, Mar. 14, 1979, 79-1 CPD ¶ 178.

Here, the only two technically acceptable offerors, both of whom Treasury believes have a clear, complete understanding of the work, proposed levels of effort substantially in excess of the agency's estimates. For some tasks the two firms projected levels of effort relatively close to those of Treasury, while for others and in total their estimates greatly exceeded those of the government. Moreover, Treasury believes that its estimates are accurate, and bases its conclusion that Price Waterhouse "grossly overestimated" and "grossly overbid" key portions of the work on those estimates.

The record for our consideration is incomplete, and therefore we cannot determine whether Treasury gave the protester any indication of this significant deficiency, which was apparently recognized early in the procurement.<sup>2/</sup> The only other offeror also initially proposed levels of effort greatly in excess of the government estimates. In view of the substantial reduction in total estimated level of effort in Arthur Young's best and final offer, we cannot dismiss the possibility that Treasury did discuss this matter with Arthur Young.

In the context of the record before us, we conclude that the agency either did not discuss estimated levels of effort with the offerors or that it discussed the issue only with Arthur Young. We believe that neither approach would be proper. Failure to apprise the only two offerors in the competitive range that they proposed unreasonably high levels of effort would violate the requirement for meaningful discussions and, in this procurement for a fixed-price contract, would pose a risk that the government would procure for an unreasonably high price. Discussing the issue only with Arthur Young would not cure Treasury's failure to conduct meaningful discussions with all offerors in the competitive range, but would raise an additional question, i.e., whether the offerors were treated fairly and equally. Accordingly, we sustain Price Waterhouse's protest on this basis.

Price Waterhouse's other contentions regarding the propriety of Treasury's actions are largely not for our consideration. The firm argues that in finding Arthur Young to be responsible, Treasury may not have considered the fact that Arthur Young's personnel may have been proposed to work on another government contract. Our Office does not review protests against affirmative determinations

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<sup>2/</sup> Copies of Treasury's request for Price Waterhouse's Best and final offer, with attached summaries of the four items discussed during the fact finding session with the firm have been provided by the protester. From these it appears that the items discussed generally involve areas in which Treasury believed that Price Waterhouse had underestimated the scope of the project. The protester also submitted affidavits by those attending the Price Waterhouse/Treasury fact finding session on the protester's behalf, stating that Treasury never stated or implied that Price Waterhouse had overestimated necessary levels of effort or submitted a price proposal that the agency considered too high. As noted above, the agency declined to provide documents or other accounts of the nature of the fact finding sessions or other discussions with offerors until January 15. We have not considered Treasury's untimely submission in this decision.

of responsibility absent specific circumstances, and this allegation does not fall within the exceptions to the rule. See 4 C.F.R. 21.3(f)(5).

Price Waterhouse also claims that a below-cost offer should not be accepted by Treasury. A fixed-price incentive contract is subject only to limited adjustment based upon the contractor's cost experience during performance, and it places no obligation on the agency to pay more than the agreed ceiling price. See ABA Electromechanical Systems, Inc., B-188735, Nov. 28, 1977, 77-2 CPD ¶ 411. There are a number of legitimate reasons why a firm might submit a below-cost offer, 50 Comp. Gen. 788 (1971), and such an offer does not, in itself, provide grounds for rejection.

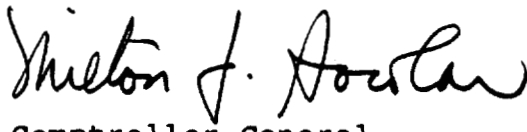
The protester argues that the incentive and opportunity for change orders and follow-on contracts at artificially high prices are so great in this procurement that acceptance of a below-cost offer would undermine the integrity of the procurement system. Contracting officers are required to take appropriate action to ensure that buying-in losses are not recovered through change order or follow-on contract pricing. FAR, 48 C.F.R. § 3.501-2(b). The nature and extent of such actions are largely matters of contract administration, and not within the scope of our bid protest function. See Columbia Loose-Leaf Corp., B-184645, Sept. 12, 1975, 75-2 CPD ¶ 147.

Finally, Price Waterhouse has not suggested specifically how it was prejudiced by not knowing what documents were placed in the reading room for Arthur Young's review before submission of best and final offers. Treasury has provided the protester with a list of those documents, and we expect that access to any additional documents will be provided to both firms.

On September 20, Treasury found that it was in the best interest of the government to proceed with Arthur Young's performance of the contract based on its projections of savings that will result from the new payroll system. Under CICA, 31 U.S.C.A. 3554(b)(2), when such a finding has been made and our Office determines that an award was not in accord with applicable statutes or regulations, we are required to make recommendations without regard to any cost or disruption from terminating, recompeting, or reawarding the contract, although in this case performance has been underway for a relatively short period.

We therefore are recommending that the Treasury reinstate the request for proposals, conduct additional discussions with both offerors, and, if appropriate, terminate the current contract for the convenience of the government and reaward to Price Waterhouse.

We sustain the protest on grounds of failure to conduct meaningful negotiations and dismiss the remainder of the protester's contentions.

*for*   
Comptroller General  
of the United States