

DECISION



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

Celnowitz
PL-IT/4

FILE: B-220320 **DATE:** January 27, 1986
MATTER OF: ABC Building Services

DIGEST:

1. Protest that an agency improperly considered the cost of extending a predecessor contract when awarding the successor contract is denied where the record contains no evidence that the agency considered such alleged economic incentives in calculating offerors' probable costs.
2. Federal Acquisition Regulation permits the National Aeronautics and Space Administration to use alternative source selection procedures, under which, following discussions, all offerors in the competitive range must be given a reasonable opportunity to revise and clarify their proposals by a common cutoff date. Since these procedures are published, protester should have known that it should have presented its most advantageous offer or risk elimination from the competitive range.
3. When National Aeronautics and Space Administration considers an offeror's level-of-effort and probable costs to be appropriate for the technical approach selected, the agency is not required to advise the offeror that its costs may be so high that it may be eliminated from the competitive range, since this is a weakness inherent in the offeror's management approach.
4. When a solicitation states that the Source Selection Official can determine the weight to be accorded costs factors only after he has determined the relative merits of proposals from a technical standpoint and has judged the significance of experience and past performance, a cost-technical

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tradeoff and an award to a lower rated but also lower priced offeror is not legally objectionable.

5. Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements of Bid Protest Regulations.

ABC Building Services protests the proposed award to W&F Building Maintenance Co., Inc., under request for proposals (RFP) No. 2-31448, issued by the National Aeronautics and Space Administration (NASA), Ames Research Center, Moffett Field, California. ABC contends that delays in the negotiation process provided an unfair advantage to the incumbent contractor, W&F; that NASA improperly failed to seek best and final offers from each offeror in the competitive range before eliminating ABC on the basis of higher probable costs; and that the estimate of the historical staffing levels included in the RFP was ambiguous and also gave the incumbent an unfair advantage.

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

BACKGROUND

In the solicitation, issued as a 100-percent small business set-aside on February 8, 1985, NASA sought janitorial and laboratory glassware sterilization services. The cost-plus-fixed-fee contract to be awarded covers a base period of 2 years plus 3 option years (of which only the first was to be priced by offerors and evaluated by NASA). The amended closing date for receipt of initial proposals was April 9, 1985.

The RFP set forth the following evaluation criteria:

1. Mission Suitability;
2. Cost;
3. Experience and Past Performance; and
4. Other (including but not limited to financial condition and labor relations considerations).

The solicitation further provided that these factors were generally of equal importance.

Only Mission Suitability was numerically scored, with NASA considering four subcriteria: (1) understanding the requirement; (2) key personnel; (3) corporate and company resources; and (4) management plan. Under the Cost criterion, NASA analyzed proposed costs and fees to determine their validity, the probable cost to the government of accepting a particular offer, and differences among offerors in the competitive range. To facilitate offerors' calculations of proposed costs, NASA included in the solicitation a list of job titles and the historical staffing levels (for example, 40 janitors/windowwashers) for each.

Nine offerors responded to the solicitation, and NASA initially included four in the competitive range.^{1/} Of these, ABC received the highest score for Mission Suitability and an adjective rating of excellent. W&F was ranked second for this factor, receiving an adjective rating of good. Offerors were requested to respond to written questions and submit any proposed revisions by July 15, 1985. NASA considered ABC's revised proposal excellent; W&F's proposal, although still considered good, fell to third after this evaluation.

NASA's evaluation with respect to the three other evaluation factors was based on initial submissions; the offerors were not questioned in these areas. For the Experience and Past Performance and Other factors, evaluators found the proposals submitted by ABC and W&F to be virtually equal. With respect to Cost, however, evaluators found there was an 8.6 percent difference, in W&F's favor, between these two proposals. They considered this amount significant.

NASA's Source Selection Official ultimately concluded that while ABC's technical proposal was clearly superior, this superiority was offset by the firm's high probable costs. W&F's technical proposal, while lower ranked, was believed to demonstrate that the firm could satisfy the agency's minimum needs at a lower probable cost. The agency states that this cost difference was the "overriding factor" in the Source Selection Official's recommendation

^{1/} The offerors included in the competitive range were ABC, W&F, Dragon Services, Inc., and Professional/Ohmar, a Joint Venture. The offers submitted by Dragon Services and Professional/Ohmar were not as highly rated as the ones submitted by ABC and W&F, and they are not at issue here.

to commence final negotiations leading to a contract with W&F. NASA, however, has postponed award pending the outcome of this protest, with W&F performing under an extension to its existing contract in the interim.

ABC's PROTEST

ABC first contends that NASA unreasonably delayed evaluation, requiring offers to be extended until September 30, 1985. The protester alleges that this benefited the incumbent contractor by leaving insufficient time for startup by any other offeror. An extension of W&F's contract beyond an agreed-upon 30-day phaseout period, ABC maintains, would be at considerable cost to the government. These potential costs, ABC states, provided an economic incentive to NASA to award to the incumbent.

The record does not support ABC's contention that NASA considered this hypothetical economic incentive when deciding to award the contract to W&F. It demonstrates that NASA evaluated proposed costs and fees and calculated probable costs for all offerors, adjusting for such factors as number of proposed employees and escalating labor rates. The record, however is completely devoid of any evidence giving credence to ABC's speculations. Accordingly, this basis of protest is denied.

ABC's second ground of protest is that NASA failed to seek best and final offers before eliminating its proposal on the basis of higher probable costs. By letters dated June 28, NASA requested those offerors whose proposals had been included in the competitive range to respond to enclosed questions and submit all other proposed revisions by July 15, 1985. ABC contends that these letters did not comport with the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.611 (1984), which sets forth the information required to be included in a request for best and final offers. ABC alleges that the letters improperly (1) failed to advise offerors that discussions had been completed; (2) failed to give notice that best and final offers were being solicited; and (3) failed to provide information concerning the handling of late submissions.

ABC does not explicitly argue that the discussions that preceded the request for revised proposals were not meaningful or that NASA failed to point out weaknesses or

deficiencies in its cost proposal. Rather, it only appears to be arguing that it should have had yet another opportunity to revise its proposal. NASA responds that requesting and receiving revised proposals at the conclusion of discussions was tantamount to requesting and receiving best and final offers from all except the offeror ultimately selected--on the basis of the revised proposals--for final negotiations.

Initially, we note that NASA conducted this procurement under its alternative source selection procedures, 48 C.F.R. § 1815.617-71 (1984), and in accord with its Source Selection Board Manual. Use of the alternative procedures is permitted by the FAR, 48 C.F.R. § 15.613. The NASA regulation provides that in negotiating a cost-type contract, the contracting officer, at the conclusion of discussions, shall give each offeror in the competitive range a reasonable opportunity to revise and clarify its proposal by a common cutoff date. 48 C.F.R. § 1815.613-71(b)(5).

We find that NASA complied with the above-cited regulation, since it directed written questions to each offeror and afforded each the opportunity to revise its proposal by July 15, 1985. We think that in this case, NASA's actions can be characterized as a revision of the competitive range, eliminating ABC as a result of its higher probable costs. NASA's alternative source selection procedures, which do not specifically mention best and final offers, are published, and the protester therefore has constructive knowledge of them. ABC therefore should have known that it should have presented its most advantageous offer or risk elimination from the competition.

To the extent that ABC is arguing that NASA should have advised it that its probable costs were considered too high, the record indicates that NASA specifically did not discuss this because it felt that ABC's proposed level-of-effort and probable costs were appropriate for the approach set forth in the firm's Mission Suitability proposal. Under these circumstances, we do not believe discussions were required, since NASA considered this to be a weakness inherent in ABC's management approach. See FAR, 48 C.F.R. § 15.601(d)(1); 48 C.F.R. § 1815.613(b)(5)(c); Physicon, Inc., B-219967.2, Dec. 27, 1985, 85-2 CPD _____. When ABC's costs remained high in its revised proposal, NASA reasonably could have eliminated the firm from the competitive range.

~~Nor~~ do we find, as ABC implies, that the Source Selection Official was prohibited from making the cost-technical tradeoff that resulted in the selection of W&F. While the solicitation stated that costs and other evaluation factors were generally considered equal, it did not give each factor a precise weight. Rather, it stated that:

"Cost factors are not scored because the weight to be accorded to them can be judged by the Source Selection Official only after he has determined the relative merits of the proposals from a Mission Suitability standpoint and the significance of the differences in this regard and after he has judged the significance of Experience and Past Performance factors."

This, in our opinion, permits the type of discretion NASA exercised here in making the decision to award the contract to W&F after receipt of revised proposals. Consequently, ABC's second basis of protest is denied.

ABC's last contention is that the historical daily staffing levels included in the solicitation were ambiguous, giving the incumbent contractor an unfair competitive advantage. ABC maintains that it considered the solicitation's staffing levels as excluding vacation and sick leave, and that it therefore added labor hours for these purposes. However, during a debriefing on September 26, 1985, ABC discovered that NASA and W&F interpreted the staffing levels as already including vacation and sick leave. According to ABC, this latent ambiguity accounts for the difference between its own and W&F's proposed costs.

NASA contends that this argument is untimely because it is based upon an alleged impropriety apparent in the solicitation, and therefore should have been filed by the closing date for receipt of initial proposals. We find this basis of protest untimely for a different reason. ABC first raised it in a letter dated October 7, 1985; however, we did not receive this letter until October 15. Under our Bid Protest Regulations, new and independent grounds of protest must independently satisfy our timeliness requirements. Star Line Enterprises, Inc., B-210732, Oct. 12, 1983, 83-2 CPD ¶ 450. Protests based on other than alleged solicitation defects must be filed, meaning received, not later than 10 days after the basis of protest is known or should have been known, whichever is earlier.

4 C.F.R. § 21.2(a)(2). Here, ABC admittedly learned of this new basis of protest during the September 26 debriefing, but it did not protest within 10 days thereafter. We therefore will not consider the matter.

The protest is denied in part and dismissed in part.

for Seymour E. Egan
Harry R. Van Cleve
General Counsel