DECISION

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

FILE: B-219934.2 **DATE:** March 12, 1986

MATTER OF: CDI Marine Company

DIGEST:

1. Dismissal for failure to furnish agency copy of protest within 1 day of filing at GAO, as required by GAO Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1985), is not warranted where agency is already on notice of bases for protest, through prior letter from protester to agency, and agency is able to submit protest report within time limit prescribed under Competition in Contracting Act, 31 U.S.C.A. 3553(b)(2)(A) (West Supp. 1985).

2. It would not be appropriate to dismiss protest for failure to cite any legal authority or request specific relief where protest provides all information essential to protest.

3. Contention that protester was misled in negotiations about the adequacy of its proposal, first raised in protester's comments on agency report, is untimely where protester knew of content of negotiations when it filed initial protest and that its proposal had not received highest rating. GAO Bid Protest Regulations require that protests be filed within 10 days of when protester knew or should have known of basis for protest. 4 C.F.R. § 21.2(a)(2).

4. Contention that evaluation of technical proposals in procurement of marine engineering and design services was improper is without merit where record demonstrates that awardee, including subcontractor, may reasonably be judged to have offered superior personnel and corporate experience to that proposed by protester. Absent

prohibition in RFP, proposed subcontractor's experience and personnel may be considered in evaluation.

5. Where transition costs were not included among the evaluation criteria, they could not be considered. Consequently, protest against agency's failure to consider transition costs, not raised until protester learned of impending award to another offeror, is untimely because not raised prior to closing date for receipt of proposals. GAO Bid Protest Regulations require that an impropriety apparent on the face of a solicitation be filed prior to the next closing date of solicitation. 4 C.F.R. § 21.2(a)(2).

6. Challenge to agency's conduct of cost realism evaluation, which raised protester's costs, is denied where cost was the least important evaluation factor and protester has not responded to specific contention that it would not have been selected even if its proposed costs were realistic or provided evidence that it could have reduced its costs sufficiently to overcome awardee's substantial technical advantage.

CDI Marine Company (CDI), the previous contractor, protests the award of a contract to Marine Services Company (MSC) under request for proposals (RFP) No. N00140-85-R-BB71 issued by the Department of the Navy. The protest is dismissed in part and denied in part.

Background

The Navy issued this RFP on July 6, 1984, to acquire marine engineering and design services to support the Supervisor of Shipbuilding (SUPSHIP) in Boston. The RFP identified and described various categories of personnel for which offerors were to propose hourly labor rates. In addition, offerors were to select from their personnel at least a minimum

number of "key" personnel and provide resumes and the hourly labor rates for those personnel. The RFP contemplated the award of a 3-year indefinite-delivery, requirements contract on a cost-plus-fixed-fee basis.

The RFP specified the evaluation factors, in descending order of importance, as: (1) Personnel, (2) Corporate past experience, (3) Technical approach/ quality assurance program, (4) Facilities, and (5) Cost. Cost was to be evaluated on the basis of cost realism. The Navy received seven proposals. After a technical evaluation by SUPSHIP, the Navy conducted discussions with offerors in the competitive range and set the date for the receipt of best and final offers (BAFOs) at July 9, 1985.

The results of evaluation were as follows:

Offeror	Technical Rating	BAFO	Cost Realism
MSC	Highly Acceptable	$5,523,132	$5,636,340
CDI	Acceptable	$4,930,850	$5,853,784

The Navy awarded the contract to MSC on the basis of MSC's higher technical rating and lower evaluated cost.

CDI learned of the impending award in a telephone conversation with Navy personnel in which CDI was advised that MSC had received a higher overall technical evaluation, especially in the areas of personnel and corporate past experience, and had a lower evaluated cost. CDI presented a letter to the Navy on the same day in which CDI expressed its intent to protest the award. In this letter, CDI contended that, as the incumbent, it had greater experience with the subject matter of this particular contract than did MSC and that CDI was the technically superior, lower cost offeror. CDI also asserted that the Navy failed to consider the transition costs of moving to a new contractor in its evaluation and argued that the Navy should have awarded the contract to CDI.

CDI filed a protest with our Office on substantially the same bases as expressed in its letter to the Navy.

After the Navy's report on CDI's protest was filed with our Office, CDI requested and received a debriefing from the Navy. In its comments on the Navy report, CDI asserted that the Navy's cost realism methodology was improper and contended that it was misled in negotiations regarding the nature of the cost realism evaluation and into believing that its proposal required no further correction or expansion.

The head of the procuring activity authorized contract performance, notwithstanding the pending protest, under the provisions of the Competition in Contracting Act (CICA), 31 U.S.C.A. 3553(d)(2)(A)(1) (West Supp. 1985).

Procedural Questions

Initially, the Navy states that it did not receive a copy of CDI's August 20 protest to our Office until 2 days after it was filed and asserts that CDI's protest therefore should be dismissed for failure to comply with our Bid Protest Regulations, 4 C.F.R. part 21 (1985), which require that a protester file a copy of its protest with the contracting officer or designee within 1 day after the protest is filed with our Office. 4 C.F.R. § 21.1(d). We do not automatically dismiss protests on this basis, however, but consider whether the agency otherwise had knowledge of the basis for the protest and was able to submit its response to the protest within the time limits prescribed under CICA, 31 U.S.C.A. 3553(b)(2)(A). Colt Industries, B-218834.2, Sept. 11, 1985, 85-2 CPD ¶ 284.

In our judgment, the Navy was aware of the bases for CDI's protest when it was filed with our Office, notwithstanding the absence of a timely copy, because the Navy already had CDI's earlier letter, stating virtually the same objections. Moreover, the 1-day delay in the Navy's receipt of a copy of the protest does not appear to have hampered the Navy's ability to file its response to the protest in a timely manner. In these circumstances, we do not think that the dismissal of the protest on this basis is warranted.

The Navy also contends that CDI's protest should be dismissed because CDI's initial protest to our Office failed to cite any legal authority for CDI's challenge to the Navy's evaluation of proposals or to request specific relief. In this respect, our regulations require a protester to set forth a detailed statement of the legal and factual grounds of protest, including copies of relevant documents, and state the form of relief requested. 4 C.F.R. §§ 21.1(c)(4), 21.1(c)(5).

Although CDI's initial protest was not exhaustive, it did identify the contracting agency, solicitation, and work to be performed, and it did assert that CDI was the most technically qualified and cost-effective offeror based on a brief description of its experience, level of staffing, and qualifications vis-a-vis MSC's, as well as on the cost difference between CDI's and MSC's BAFOs. The protest also objected to the Navy's failure to consider transition costs, and requested a ruling by our Office on the propriety of the award.

In our opinion, this was adequate to provide the information essential to CDI's initial protest against the Navy's evaluation of the proposal. Cf. John C. Grimberg Company, Inc.--Reconsideration, B-219422.2, Aug. 7, 1985, 85-2 CPD ¶ 143. Consequently, it would not be appropriate to dismiss CDI's protest on this basis.

Nevertheless, some aspects of CDI's protest are untimely under our regulations. CDI's contention that it was misled in negotiations about the technical merit of its proposal and a related assertion that CDI was downgraded for corrections to its proposal that the Navy instructed CDI to make are untimely. Our regulations require that protests be filed within 10 working days after the protester knew or should have known of the basis for the protest. 4 C.F.R. § 21.2(a)(2). Each new basis of protest raised after the filing of an initial protest must independently satisfy the criterion. Westinghouse Electric Corp., B-215554, Sept. 26, 1985, 85-2 CPD ¶ 341; Radionic Hi-Tech, Inc., B-219116, Aug. 26, 1985, 85-2 CPD ¶ 230. These allegations arise from Navy comments made during negotiations and the fact that CDI's proposal was not rated as highly as MSC's in the key areas of personnel and corporate experience. CDI was aware of these factors no later than August 14, 1985, when CDI learned of the impending award of the contract to MSC and the fact that MSC's proposal was evaluated higher than CDI's, "especially in the areas of personnel and corporate experience." Since CDI did not raise these bases for protest until its comments on the Navy's report, these bases for protest are untimely. Radionic Hi-Tech, Inc., B-219116, supra.

Technical Evaluation

CDI's initial protest, which emphasizes CDI's lower proposed costs, staff qualifications and experience as the incumbent, and its assertion that the awardee relied in part on a subcontractor to enhance its own experience, is a challenge of the Navy's evaluation of proposals.

We have held that the determination of the needs of the government and the best method of satisfying those needs is primarily the responsibility of the procuring agency, 46 Comp. Gen. 606 (1967), which therefore is responsible for the overall determination of the desirability and adequacy of technical proposals. Agencies enjoy a reasonable degree of discretion in making these determinations, and we will not question their determinations unless there is a clear showing of unreasonableness, an arbitrary abuse of discretion, or a violation of the procurement statutes and/or regulations. Westinghouse Electric Corp., B-215554, supra.

We find that the Navy's technical evaluation was reasonable. As noted above, the RFP identified personnel and corporate experience as the two most important evaluation criteria. In responding to these factors, offerors were required to provide resumes of their "key" personnel, identifying their experience as it relates to the contract work. They also were required to discuss the offeror's corporate management and organizational capability and versatility in all types of naval ship engineering, as demonstrated in contracts completed within the preceding 5 years. MSC's proposal, including the resources of its subcontractor--an organization with almost three times as many years of experience as either MSC or CDI--offered what the Navy considered to be generally better qualified key project and key senior engineers. In addition, MSC proposed more than three times as many senior engineers in a variety of related disciplines. The Navy considered MSC's mix and breadth of disciplines to be the best of any offeror and concluded that MSC's proposal was "highly acceptable" while CDI's was "acceptable" under the Personnel criterion.

The Navy also viewed MSC's experience--with specific reference to MSC's subcontractor--to be superior to CDI's, particularly when considered in light of quality problems which the Navy found in CDI's performance under the prior contract. The consideration of the extensive experience of MSC's subcontractor was proper since it was reasonably related to the announced past experience criterion and was not prohibited by the evaluation plan in the RFP. Rolen-Rolen-Roberts Int'l, et al., B-218424.2 et al., Aug. 1, 1985, 85-2 CPD ¶ 113.

In our judgment, the Navy's assessment of these factors was reasonable. These bases for protest are denied.

Regarding the protester's contention that the Navy should have evaluated the transition costs of changing contractors, transition costs may be an evaluation factor in appropriate circumstances but, because they are a significant cost factor, an agency may only evaluate them if offerors were advised such costs would be evaluated. See Rockwell Int'l Corp., 56 Comp. Gen. 905 (1977), 77-2 CPD ¶ 119; Ecology and Environment, Inc., B-209516, Aug. 23, 1983, 83-2 CPD ¶ 229. Since it was obvious that the RFP did not contemplate the consideration of transition costs, any protest that such costs must be considered should have been filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1); Olympic Container Corp., B-219424, July 24, 1985, 85-2 CPD ¶ 83.

This basis for protest is dimissed.

Cost Realism

The Navy states that it conducted its cost realism analysis using the average direct labor rates for proposed personnel times the number of hours of labor estimated for that category unless the offeror proposed to use some "key" personnel within a category, in which case the average labor rates of "key" personnel were used and non-key personnel were disregarded. The Navy asserts that CDI was apprised of this method of analysis in negotiations and has provided a statement from its negotiator in support of this assertion. The Navy also asserts that given the paramount importance of technical factors in the evaluation, CDI would not have been selected even if its proposed costs were considered realistic.

CDI contends that it advised the Navy in negotiations that this method of analysis would distort the evaluation, because it would emphasize the higher salaries of key personnel, and understood the Navy to respond affirmatively, which CDI took to mean that the Navy would change the method of evaluation. In support of this contention, CDI has provided an affidavit from its negotiator and a copy of its minutes of the negotiating session, purportedly reflecting CDI's understanding of the cost realism evaluation, which CDI states it furnished to the Navy shortly after the negotiations and to which the Navy never responded. CDI contends that the Navy's cost realism evaluation method was unreasonable and states that had CDI known of the basis for the evaluation, it would have

adjusted its BAFO to assure its position as the lowest cost offeror.

We find that the question of what CDI may have been told or should have understood from the negotiations need not be resolved since there is no persuasive evidence that CDI was prejudiced regardless of the answer. As stated in the RFP, cost was the least important evaluation factor and CDI has neither responded to the Navy's specific assertion that CDI would not have been selected even if its proposed costs were reasonable nor provided evidence that it could have reduced its realistic costs sufficiently to overcome MSC's substantial technical advantage in the areas of personnel and corporate experience. Consequently, we have no basis upon which we might conclude that CDI was prejudiced by the Navy's conduct of the cost realism evaluation. Southwestern Bell Telephone Co., B-200523.2 et al., Mar. 5, 1982, 82-1 CPD 203.

The protest is denied in part and dismissed in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel