



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Wylie Mechanical
File: B-228695
Date: October 27, 1987

DIGEST

1. Protest, filed after protester learned of the contract award and price, that an amendment requesting the submission of best and final offers (BAFOs) based on a change in contract period should not have been issued and that the award should have been made on the basis of the initial offers is untimely since the protest bases were apparent, and should have been protested, prior to the deadline for the submission of BAFOs.
2. Contention that protester's initial prices improperly were disclosed to awardee before BAFOs were submitted is without merit where it is based solely on substantial price reduction in awardee's BAFO; contracting agency denies disclosing prices; and there is no other evidence in the record showing that prices were disclosed.
3. Submission of below-cost prices does not by itself constitute a basis for challenging an otherwise valid contract award.
4. General Accounting Office does not review an affirmative determination of responsibility made by a contracting officer absent a showing that the determination may have been made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met.

DECISION

Wylie Mechanical protests the award of a contract by the Air Force to O'Toole Mechanical Services, Inc., for maintenance of air conditioners at the San Antonio Air Logistics Center (ALC) under request for proposals (RFP) No. F41650-87-R-0013. Wylie contends that, as the initial low-priced

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offeror, it should have received the award, and that the subsequent issuance of an amendment calling for best and final offers (BAFOs) was improper and unfairly gave O'Toole an opportunity to submit revised prices. Wylie also believes that O'Toole was made aware of Wylie's initial prices and, as a consequence, was able to submit revised prices substantially lower than its original prices, so as to displace Wylie as the low offeror.

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

The RFP, issued on March 13, 1987, required offerors to submit monthly unit (along with total) prices for the maintenance of each ALC air conditioner over a 12-month base period running from July 1, 1987, through June 30, 1988, and unit and total prices for 4 yearly option periods. As of the May 20 deadline for the submission of proposals, two proposals had been received. One was from O'Toole with a total price for the base and option periods of \$1,028,068; the other was from Wylie with a total price of \$928,918. On the abstract recording these prices, the contracting officer noted that "I certify that I have made the award or rejected the bids as indicated on this abstract." Below this notation was written Wylie's name and a price.

Although the RFP originally called for a 12-month base performance period from July 1, 1987 to June 30, 1988, funding for the contract was available only through March 31, 1988. In view of the funding limitation and administrative delay in awarding the contract, the contracting officer issued an amendment to the RFP on June 26, changing the original 12-month base period to an 8-month period running from August 1, 1987, through March 31, 1988; beginning the yearly option periods in line with the new completion date for the base period; and requesting offerors to submit BAFOs by July 6 on the basis of these changes. O'Toole's BAFO totaled \$866,524.50; Wylie's BAFO totaled \$898,562. Award then was made to O'Toole.

Wylie first contends that it actually was awarded the contract on the basis of its initial proposal in view of the contracting officer's notation on the abstract containing the initial prices.^{1/} We disagree. The notation,

^{1/} In its initial submission, Wylie also argued that it, not O'Toole, had submitted the lowest priced best and final offer. Wylie did not pursue this argument in its subsequent comments on the Air Force's report on the protest, and it is clear from the record that after submission of best and final offers O'Toole was the lowest priced offeror.

standing alone, did not constitute award of a contract to Wylie; at most, it represented the contracting officer's intention to make award to Wylie based on its initial proposal, before the availability of funding issue arose.

Wylie also states that the contracting officer improperly recorded the best and final prices, received on July 6, on an abstract of offers dated May 20. As Wylie states, the abstract is dated May 20; however, it also contains a handwritten notation, "abstract resulting from best and final offers." In any event, despite the apparent error in the date of the abstract, it is clear that no prejudice resulted to either offeror since, as Wylie concedes, the actual best and final prices were recorded accurately on the abstract.

Wylie next contends that the change in the base performance period due to the lack of funding for the entire original base period did not justify issuing the amendment calling for BAFOs, and that the contracting officer instead should have unilaterally adjusted the offeror's initial prices to reflect the shorter performance period, or at most allowed offerors to revise only their base period prices. We find this argument to be untimely. Our Bid Protest Regulations provide that in negotiated procurements alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested before the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1987). Here, although BAFOs were due on July 6, Wylie did not file its protest challenging the request for BAFOs until August 4, after it learned that award had been made to O'Toole. As a result, its protest is untimely. In any event, issuance of the amendment calling for another round of offers based on the change in the performance period clearly was proper in our view in order to give the offerors the opportunity to respond to the Air Force's revised requirements. See Federal Acquisition Regulation, 48 C.F.R. § 15.606(a) (1986).

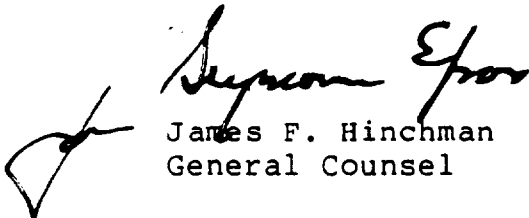
Wylie also argues that its initial prices were disclosed to O'Toole, which allowed O'Toole to substantially reduce the prices in its BAFO and displace Wylie as the lowest priced offeror. As support for its contention, Wylie states that the prices in O'Toole's BAFO are significantly lower than both its initial prices and the prices for equivalent line items under O'Toole's prior contract with the Air Force. We find this argument to be without merit. The Air Force denies that Wylie's prices were disclosed and there is no other evidence in the record supporting Wylie's contention. Further, the price reduction in O'Toole's BAFO is insufficient by itself to support a conclusion

that the protester's pricing information has been leaked by the government, where, as here, the record fails to show any evidence of this action. Le Don Computer Services, Inc., B-225451, Jan. 9, 1987, 87-1 CPD ¶ 46.

Wylie also maintains that in view of its substantial price reduction, O'Toole may be unable to perform the contract. Even if O'Toole is able to perform, Wylie contends that the award should not have been made to O'Toole because its prices either constitute an improper buy-in, or they show that O'Toole greatly overcharged the government on its prior contract and therefore cannot be considered a responsible offeror for purposes of award under this RFP.

The allegation that a below-cost price has been submitted does not itself provide a basis to challenge the validity of a contract award. Independent Metal Scrap Co. Inc., B-223894, Aug. 18, 1986, 86-2 CPD ¶ 197. Further, as to whether O'Toole should be considered a responsible offeror, our Office does not review a contracting officer's affirmative determination of responsibility, absent a showing that the determination may have been made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(f)(5); Environmental Technology Corp., B-225479.3, June 18, 1987, 87-1 CPD ¶ 610. Neither has been alleged or is evident here.

The protest is dismissed in part and denied in part.



James F. Hinchman
General Counsel