



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of:     Devres, Inc.  
File:           B-228909  
Date:           December 30, 1987

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### DIGEST

1. Protest challenging agency's award of a delivery order pursuant to an existing indefinite-quantity contract (IQC) will not be dismissed as a matter involving issue of contract administration where underlying IQC does not establish several significant terms which had to be negotiated prior to execution of the delivery order.
2. Assertion that agency failed to enter into good faith negotiations is without merit where record indicates agency questioned several price-related elements of protester's proposal.
3. Assertion that agency has never previously requested multiple proposals for a single delivery order is insufficient basis to conclude that such agency action constituted unfairness.
4. General Accounting Office will not attribute improper action to agency officials on basis of unsupported allegations that officials disclosed proprietary information.

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### DECISION

Devres, Inc., protests the actions taken by the Agency for International Development (AID) regarding AID's decision not to issue a delivery order under Devres' indefinite-quantity contract No. PDC-1406-I-00-7013-00. Devres maintains that AID refused to enter into good faith negotiations with Devres concerning the proposed delivery order; that AID improperly solicited proposals from other firms; and that AID disclosed proprietary information to a competing firm.

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

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AID awards indefinite-quantity contracts (IQCs) under the authority of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.504 (1986), to obtain quick responses to AID's needs for technical services throughout the world. AID awards multiple IQCs to several different firms regarding several different subject areas. Delivery orders against existing IQCs are issued in situations where AID employees and/or consultants are unable to provide required services.

AID's internal procedures provide that when a requiring office needs services that must be performed by an IQC contractor, the requiring office should informally contact several firms holding IQC contracts for the type of services needed. If the requiring office determines that a particular contractor has available personnel to meet its needs, the requiring office must make a recommendation to AID's contracting office that a written proposal from that particular contractor be formally requested. Upon receipt of the contractor's proposal, the AID contracting office is responsible for negotiating and executing a delivery order for the specific services sought.

In January 1987, AID awarded Devres IQC No. PDC-1406-I-00-7013-00, under which Devres agreed to provide agricultural-related services for AID during the following 3 years. The terms of the contract guaranteed that AID would issue delivery orders to Devres totaling at least \$10,000.

On August 5, 1987, the AID mission in Costa Rica, after informally discussing its needs with Devres, asked the AID contracting office to formally request a written proposal from Devres to provide certain specified agricultural-related consulting services in Costa Rica. Accordingly, AID's contracting office contacted Devres and requested a written proposal. Devres submitted a proposal to AID's contracting office dated August 7. Prior to that time, AID had already fulfilled its commitment to issue delivery orders totaling at least \$10,000 under Devres' IQC.

On August 10, the AID official assigned to negotiate this delivery order called Devres and questioned several elements of its proposal relating to its proposed price. Specifically, the AID official questioned the multiplier Devres had

used;<sup>1/</sup> the level of salaries Devres proposed for its personnel; Devres' classification of its personnel as "intermittent employees" rather than "consultants";<sup>2/</sup> and the need for a pre-departure briefing Devres had proposed. Devres acknowledges that these issues were discussed and that no overall agreement was reached.

Both AID and Devres agree that one of the more controversial issues discussed was Devres' classification of its proposed staff as intermittent employees rather than consultants. Classifying the staff as intermittent employees triggered the use of a higher multiplier than would have been applied if Devres' proposed staff had been classified as consultants, thus, increasing the overall cost of the proposal.

AID states that after it raised the classification issue, Devres failed to provide any convincing evidence supporting its position. Further, AID states that information was available to it which demonstrated that these persons were more properly classified as consultants. Devres disputes AID's assertion that it failed to provide adequate support for its classification, stating that it spent a great deal of time in telephone conversations with several AID employees, justifying the intermittent employee classification. Devres also disputes AID's conclusion that the personnel it proposed were more properly classified as consultants. Devres maintains that it was prohibited from reclassifying the proposed individuals as "consultants" by accounting principles enforced by the Internal Revenue Service and the Defense Contract Audit Agency.

On August 11, AID and Devres again discussed the price of Devres' proposal. Again, no agreement was reached. AID states that, following this discussion, Devres was advised that, since its proposed costs were not fair and reasonable,

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1/ The terms of the IQC provide that the price of a given delivery order is established, in part, by the "fixed daily rates" for the contractor's proposed personnel. The "fixed daily rate" for each proposed staff member is computed by multiplying the staff member's daily salary/fee by a factor, referred to as a "multiplier," established in the IQC. Devres had, apparently inadvertently, used a multiplier slightly higher than the one designated in its IQC.

2/ The IQC establishes individual multipliers to be applied to each category of personnel, that is, full time employees, intermittent employees, and consultants. Devres' IQC establishes an intermittent employee multiplier that is higher than the consultant multiplier.

negotiations would begin with other firms. Devres denies that it was so informed.

On August 13, AID contacted several other IQC contractors and requested submission of proposals for the services needed in Costa Rica. Proposals were received from three contractors. AID states that, at about the time these proposals were received, the requiring office in Costa Rica recommended that the delivery order be negotiated with International Resources Consultants, Inc. (IRC), one of the three firms that had submitted proposals. Accordingly, AID began negotiating with IRC and, on August 27, AID and IRC executed a delivery order priced significantly lower than Devres' proposal.

As a preliminary matter, AID argues that its award of the delivery order should be considered as merely the exercise of a contract option and therefore, the protest should be dismissed as a matter of contract administration under our Bid Protest Regulations, 4 C.F.R. § 21.3(f)(1) (1986). We do not agree. In considering whether an agency's procurement actions constitute the exercise of a contract option, our Office has stated that the essential terms of an option must be established at the time the underlying contract is awarded. Exercise of a contract option should not require further negotiation to establish significant terms of the agreement. Varian Associates, Inc., B-208281, Feb. 16, 1983, 83-1 C.P.D. ¶ 160; Department of Health and Human Services, B-198911.3, Oct. 6, 1981, 81-2 C.P.D. ¶ 279.

Here, as AID acknowledges in its report to our Office, several significant terms of the protested delivery order were not established by the underlying IQC. For example, AID states that the number of staff days required, the type of personnel proposed, and the level of compensation for the proposed personnel were matters left open for negotiation prior to execution of this delivery order. Accordingly, we do not view AID's award of this delivery order as the exercise of a contract option and will consider the protest on its merits.

Devres first protests that the AID contracting office improperly refused to enter into good faith negotiations with Devres. Devres maintains that, rather than discussing properly negotiable elements of its proposal, the AID contracting office attempted to renegotiate the multipliers previously established in Devres' IQC.

AID denies making any attempt to renegotiate Devres' multipliers, as demonstrated, it states, by the fact that one of the first matters it discussed with Devres was Devres' mistaken use of a multiplier slightly different than

any of the multipliers specified in its IQC, an error Devres agreed to correct. AID maintains that, rather than attempting to alter the terms of the IQC, it simply questioned which of the IQC's multipliers--intermittent employee or consultant--was properly applicable to Devres' proposed staff. AID notes that, in addition to its questions concerning the proper multiplier, it questioned the level of staff salaries Devres had proposed--which Devres declined to alter--and also questioned the need for a proposed briefing of the team by Devres in Washington, D.C. prior to the team's departure for Costa Rica, since the AID mission there could brief the team. AID summarizes that it did, in fact, attempt to negotiate and maintains that "it was [Devres'] recalcitrance and failure to negotiate that prevented Devres from receiving the delivery award."

Devres' protest concerning AID's alleged failure to negotiate appears to assume that AID was legally obligated to negotiate with Devres due to the requiring office's recommendation that it do so. Since Devres has not identified any statute, regulation, or IQC provision which mandates that legal conclusion, we are reluctant to endorse the proposition. In any event, we need not here resolve that issue since we believe the record supports AID's assertion that negotiations, in fact, occurred. Devres acknowledges that AID questioned the level of salaries Devres had proposed for its personnel and indicates that it declined to lower them. Devres also acknowledges that AID discussed the number of staff days required to perform the required work, as well as the classification of AID's proposed staff, and agrees that no overall agreement was reached. We find nothing in the statutes, regulations, or terms of Devres' IQC which would prohibit AID's inquiry into these matters. Further, we find no basis for concluding that AID was legally compelled to accept the terms of the proposal as offered by Devres. Rather, as AID has pointed out in its report to our Office, it is a general principal of contract law that government contracting officers must obtain goods and services at "fair and reasonable prices." 48 C.F.R. § 15.802 (1986). In this instance, AID determined that Devres' proposed price for this delivery order was not fair and reasonable and therefore, no delivery order was executed.

A determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment which our Office will not question unless that determination itself is unreasonable or there is a clear showing of fraud or bad faith. Crown Laundry & Dry Cleaners, Inc., B-224374.2, Jan. 20, 1987, 87-1 C.P.D. ¶ 71. Here, the delivery order was ultimately executed at a price substantially below that proposed by Devres. Accordingly,

we do not find the contracting officer's determination to be unreasonable. We also do not find that Devres has shown fraud or bad faith. Devres' protest alleging that AID refused to negotiate is denied.

Devres next maintains that AID acted improperly in soliciting proposals from other firms, arguing that this violated the principle of federal procurement law that all contractors must "receive impartial, fair, and equitable treatment." 48 C.F.R. § 1.602. Devres asserts that AID's solicitation of alternative proposals was unfair since, in Devres' past experience, a formal request for proposal following a requiring office's recommendation had been "tantamount to an award, and . . . [Devres] has never known of more than one formal request for a proposal to be issued by a contracting officer for a single work order." In requesting relief on this issue, Devres asks that "AID be required to negotiate the delivery order exclusively with Devres."

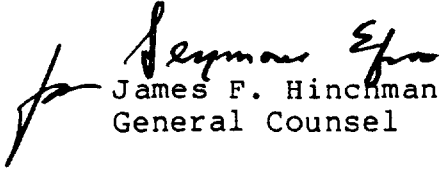
Other than referring to its past experience, Devres has not identified any authority supporting the proposition that AID was legally limited to negotiating exclusively with Devres. Devres' assertion that AID has never before requested more than one proposal for a given delivery order is an insufficient basis for concluding that AID acted unfairly or improperly here. Rather, AID's action to solicit alternative proposals appears reasonable on its face in light of AID's decision that Devres' proposed price was not fair and reasonable. Accordingly, Devres' protest that AID's solicitation of alternative proposals deprived it of fair and equitable treatment is denied.

Finally, Devres protests that AID disclosed proprietary information to the firm which ultimately received the delivery order. Although Devres asserts that the AID Inspector General is currently investigating this allegation, Devres has not provided our Office with any evidence supporting its charge. AID denies that any proprietary information was disclosed.

Our Office will not attribute improper action to agency officials on the basis of unsupported allegations, since the protester has the burden of proving its case. E.H. Pechan & Associates, Inc., B-225648, Feb. 17, 1987, 87-1 C.P.D.

¶ 176. Devres' protest concerning disclosure of information is dismissed.

The protest is denied in part and dismissed in part.

James F. Hinchman  
General Counsel