The Comptroller General
of the United States

Washington, D.C. 20548

135955

Decision

Matter of: PTI Environmental Services

File: B-230070

Date: May 27, 1988

DIGEST

1. Objections to matters which are alleged to have improperly affected the competition and evaluation of follow-on contract are untimely raised, and will not be considered on the merits, when protested more than 10 working days after the protester was aware of their occurrence.

2. Modification of existing level-of-effort contracts, to extend the performance period until a competitive follow-on contract could be awarded, is proper where incumbent contractor was the only source of the services before protesting firm (organized, in part, by former employees of the incumbent) began operation, and the protester is competing for the follow-on contract.

3. General Accounting Office will not disturb an agency's evaluation of cost realism unless it is unreasonable, and where the agency both obtained Defense Contract Audit Agency advice on the reasonableness of proposed costs, based in part on audits of the offeror's accounts, and conducted its own review based on its prior cost experience, the evaluation is not unreasonable.

4. In a cost reimbursement situation, an alleged "buy-in" (offering cost estimate less than anticipated costs with expectation of increasing costs during performance) by low-priced offeror furnishes no basis to challenge an award where agency knew the realistic estimated cost of contractor's performance before award and made award based on that knowledge.

5. Allegation that the agency improperly conducted proposal evaluation using a ceiling overhead rate which exceeded the overhead rate proposed in protester's best and final offer (BAFO) lacks merit where agency discussed matter of a ceiling with the protester and the protester did not address it in its BAFO, since agency, in its evaluation of competing proposals, is free to use any reasonable ceiling for purposes of cost realism analysis and the ceiling appears reasonable under the circumstances.

04232

6. Where selection officials reasonably regard proposals as being essentially equal technically, cost or price properly may become the determinative factor in awarding a contract.

7. Where solicitation provision requiring the submission of small business subcontracting plan encouraged goals of at least a certain percentage, award to offeror submitting a lesser, but acceptable, goal is not objectionable.

DECISION

PTI Environmental Services protests the Environmental Protection Agency's (EPA) award of a contract to Tetra Tech, Inc., under request for proposals (RFP) NO. CI87-W430. The contract is a follow-on level-of-effort, cost-reimbursement contract to two contracts Tetra Tech held for marine discharge monitoring evaluation technical support services. PTI contends that the award is defective because of (1) the agency's improper modification of the predecessor contracts, and (2) the agency's subsequent improper administration of the same predecessor contract modifications. PTI further contends (3) that the awardee may have improperly received agency proposal evaluation information during the evaluation; (4) that the agency assigned an unqualified person to chair the technical evaluation panel; (5) that the assessment of the cost realism of the awardee's proposal was defective; (6) that the agency improperly used a ceiling overhead rate in proposal evaluation which exceeded the overhead rate proposed in PTI's best and final offer (BAFO); (7) that PTI's higher-ranked technical proposal should have been selected; and (8) that the awardee did not meet the RFP's mandatory 59 percent small business subcontracting goal requirement.

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

Background

The predecessor contracts, with final option terms that expired at the end of September 1987, were competitively awarded to Tetra Tech in April of 1984. In March of 1987, EPA began work on the follow-on procurement (i.e., the instant RFP) with the goal of issuing a solicitation in April; however, unforeseeable events delayed issuance approximately 3 months, until mid-July.

In the meantime, in June, Tetra Tech employees working on the predecessor contracts approached Tetra Tech's parent corporation, Honeywell, offering to purchase the section of Tetra Tech responsible for marine discharge monitoring

evaluation technical support services. Honeywell rejected the offer. In mid-July, the employees left Tetra Tech and joined PTI.

As the end of the contracts' final option terms neared, EPA announced, in the July 30 Commerce Business Daily (CBD), its intention to negotiate a modification of the predecessor contracts with Tetra Tech extending the final option term 3 months beyond the September deadline, and increasing the level of effort in order to complete four previously issued work assignments by the end of December, when the agency expected to award the successor contract. PTI responded to the CBD announcement by submitting its qualifications as an alternate source to Tetra Tech on August 27. PTI simultaneously (from August 11 through September 16) attempted to negotiate a teaming arrangement with Tetra Tech that would use PTI personnel on the modified Tetra Tech contracts. Neither effort was successful because Tetra Tech refused to enter into PTI's proposed teaming agreement and, although EPA found PTI technically qualified, there was insufficient time in which to conduct a competitive procurement for the work without incurring an unacceptable break in contractor support.

EPA received and evaluated two proposals (the awardee's and the protester's) in response to the RFP; both were considered technically acceptable and were included in the competitive range. After BAFO's were received, the agency evaluated and ranked them as follows:

	TECH SCORE	TECH RANK	COST	COST RANK
PROTESTER	969.5	1	$6,158,088	2
AWARDEE	958	2	$5,775,342	1

Based on its evaluation, the agency concluded that the two offers were technically equivalent and selected Tetra Tech for award on the basis of its lower cost ($382,746 lower BAFO cost, and $247,036 lower evaluated cost).

PTI learned of the agency's award of the follow-on contract to Tetra Tech on January 13, 1988, and filed its protest with our Office on January 22.

Protest

(1) The protester contends that its competitive standing in the competition for the follow-on contract was prejudiced by the agency's improper award of the modifications to Tetra Tech. PTI argues that the agency should have competed the work called for under the modifications, and states that

during telephone conversations with agency officials, on September 11 and 24, 1987, it warned the agency that the predecessor contracts' modifications could influence the result of the competition for the follow-on contract. PTI further complains that the agency improperly pressured the protester to withdraw its objections to the sole-source award of the modifications to Tetra Tech. The protester claims that it acceded to the pressure and did not file a protest because of its understanding that the modifications would be limited to completion of the previously assigned work and that the work would terminate at the end of December 1987. The protester professes that it was not until January 8, 1988, when it received the response to an October 16, 1987, Freedom of Information Act (FOIA) request for copies of the modifications, that it learned that Tetra Tech's receipt of the modifications had given Tetra Tech a competitive edge because in evaluating Tetra Tech for the follow-on contract the agency had considered Tetra Tech's performance of the modifications as evidence of the awardee's corporate qualifications. In the protester's view, this unfairly afforded Tetra Tech the advantages of an incumbent contractor.

The agency denies pressuring the protester into not filing a protest against the noncompetitive modifications. The agency reports that it did not solicit competition for those modifications because to its knowledge only Tetra Tech and PTI were capable of performing the work. The agency reports that since the protester was newly established and lacked a cost or pricing data history, PTI's cost proposal would have to be audited before it could be awarded a cost-reimbursement contract. The 3-month audit would result in a corresponding 3-month break in contractor support, which the agency could not tolerate because of the nature of the program being supported.

PTI's objections to the consequences of the alleged improper modifications and to the alleged pressuring are untimely, since the protester knew both grounds of protest at the latest on October 16, 1987, when it filed its FOIA request. Our Bid Protest Regulations require that a protest alleging other than solicitation improprieties be filed no later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1988). The protester admits recognizing in September that award of the modifications to its competitor could influence the competition for the successor contract, and PTI knew that the modifications had been issued when it made its FOIA request. Since PTI knew the bases of its protest on October 16, the protest should have been received in our Office by October 30. The protest was not filed until January 22, 1988, however.

(2) The protester next objects to the agency's administration of the predecessor contract, as modified. The protester initially urged that the agency improperly allowed Tetra Tech to work on developing guidance related to "secondary equivalency," a subject not encompassed by the predecessor contracts. Later, however, in its comments on the agency report, the protester admitted that the work was within the scope of the predecessor contracts, and instead contended that the work was improper because it was beyond the scope of the modifications announced in the CBD. Second, the protester objects to the agency permitting performance to continue beyond the end of December 1987. In the protester's view both actions prejudiced its competitive position by giving Tetra Tech an advantage in answering BAFO questions and by allowing the awardee to improve its technical score in the area of corporate experience. The protester asserts that these issues are timely because it was not until January 8, 1988, that it could document the fact that the agency had altered the work assigned under the modifications from the work and the term initially described.

We dismiss the first aspect of this contention, since the protester admits that it observed Tetra Tech personnel working with agency personnel on matters of secondary equivalency on November 18, 1987. PTI therefore had to protest within 10 working days later, so that this matter, first raised in the January 22 protest, is untimely. 4 C.F.R. § 21.2(a)(2).

As to PTI's objection to the extension of the term, the agency advises that it extended the performance period because award of the follow-on contract was delayed beyond January 1, 1988. We find no reason to object to the extensions here since it is unquestioned that the agency had a continuing need for the contractor support provided under the predecessor contract, the support was only available from one established source until the protester could show that it was a responsible alternative, and the extension was for the limited purpose of continuing support until the conclusion of a competitive follow-on procurement which included the protester.

(3) The protester contends that EPA proposal evaluation information may have been disclosed to the awardee's employees and that access to this information could have helped Tetra Tech improve its BAFO.

This protest issue is untimely. In its comments on the agency report, the protester produced supporting affidavits bolstering its argument; however, these documents also show that the protester knew, or should have known, this basis of

protest as early as September 11, 1987, and no later than December 19. Consequently, the issue will not be considered, since it first was raised on January 22, more than 10 working days after the basis of protest was first known.

(4) Likewise, the protester's further contention that the chairman of the technical evaluation panel lacked minimum agency-prescribed qualifications, is also untimely, since the protester submitted an affidavit showing the information underlying this basis of protest was furnished to an upper-level PTI employee by two different Tetra Tech employees, on two separate occasions, in August of 1987. In any event, our Office will not appraise the adequacy of the qualifications of agency contracting personnel absent a showing of possible fraud, conflict of interest or actual bias on their part. Microeconomic Applications, Inc., B-224560, Feb. 9, 1987, 87-1 CPD ¶ 137.

(5) The protester contends that the agency improperly allowed the awardee to "buy" the contract when EPA decided to award on the basis of the awardee's lower proposed cost without first conducting a detailed audit, because the awardee's proposed cost was unrealistically low. Specifically, the protester argues that the awardee's proposed costs for the follow-on contract are lower than its costs for similar work under the predecessor contract modifications.

An agency is not required to conduct an in-depth cost analysis or to verify each and every item in conducting a cost realism analysis. Hager, Sharp & Ambramson, Inc., B-201368, May 8, 1981, 81-1 CPD ¶ 365. Rather, the evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency involved, since it is in the best position to assess the realism of cost and technical approaches and must bear the major criticism for the difficulty of expenses resulting from a defective cost analysis. Since the cost realism analysis is a judgment matter on the part of the contracting agency, our review is limited to a determination of whether an agency's cost evaluation was reasonably based and was not arbitrary. Research Analysis & Management Corp., B-229057, Nov. 25, 1987, 87-2 CPD ¶ 523.

EPA admits that the awardee's labor rates for the follow-on contract are lower than the rates used under the modifications, but urges that the rates are not unrealistic because there are acceptable reasons why the rates differ. Specifically, the agency notes that not all the tasks called for by the follow-on contract are called for in the same proportion by the modifications; that because the agency

knew the nature of the work required under the modifications, and the identity of the persons who would perform it, the rates proposed in the modifications were the actual rates of identified individuals rather than the average rates of a category of labor proposed for the follow-on contract; and that the Defense Contract Audit Agency (DCAA) recommended to EPA's Cost Advisory Office acceptance of the current rates1/ based on certain confidential information.

We have reviewed the referenced confidential information and find that it supports the conclusion that awardee's rates are reasonable. Moreover, the record shows that the EPA's Cost Advisory Office performed a detailed review of the offeror's proposed costs to determine whether they were based on the RFP's requirements and whether they were reasonable in light of cost and pricing data available to the agency. As noted above, the agency also discussed the proposed costs with the cognizant DCAA office which offered advice based on DCAA's audit of offerors' data and records. We therefore have no legal basis to take exception to EPA's cost analysis. See Ecology and Environment, Inc., B-209516, Aug. 23, 1983, 83-2 CPD ¶ 229.

To the extent that the protester contends that the awardee attempted to "buy in" by submitting a below-cost proposal, we have held that in a cost-reimbursement situation, an alleged "buy-in" (offering cost estimate less than anticipated costs with expectation of increasing costs during performance) by a low-priced offeror furnishes no basis to challenge an award where the agency knows the realistic estimated cost of contractor's performance before award and makes award based on that knowledge. Bell Aerospace Co., et al., 54 Comp. Gen. 352 (1974), 74-2 CPD ¶ 248. Moreover, a below-cost proposal provides no basis to challenge an award as long as the contracting officer finds the offeror "buying in" to be responsible, a finding made here. Fresh Flavor Meals, Inc., B-208965, Oct. 4, 1982, 82-2 CPD ¶ 310.

1/ The record shows that the reference to "current" rates refers to the lower rates under the follow-on contract. The deletion of certain documents and passages from the protester's copy of the agency report apparently resulted in the protester misreading the DCAA recommendation and concluding that DCAA had instead recommended that the agency use the higher rates used in the modifications to the predecessor contract rather than the lower rates found in the follow-on contract.

(6) The protester contends that the agency improperly used an overhead rate ceiling in evaluating PTI's proposal which exceeded the overhead rate proposed in PTI's BAFO. The protester argues that while this subject was discussed during negotiations, no agreement was reached as evidenced by the fact that PTI did not address the subject in its BAFO. The protester further states that if EPA had asked it to, it would have agreed to even a lower ceiling than the one EPA used. We find no merit in this argument, since the protester admits that the topic was discussed and consequently it had an opportunity in its BAFO to address the subject by agreeing, for example, to a ceiling equal to its proposed rates. In any event, a contracting agency is free to use any reasonable ceiling when evaluating competing proposals for purposes of a cost realism analysis, see Ecology and Environment, Inc., B-209516, supra, and the ceiling applied to the protester's overhead rates appears reasonable in view of EPA's concerns regarding the dynamic nature of indirect costs in a small company like PTI.

(7) The protester contends that the cost difference between the two proposals is not significant and that the evaluated costs are essentially equal. In this respect, notwithstanding the agency's determination that the difference in the evaluated costs is $247,036, the protester calculates that the real difference in the awardee's proposed costs and its proposed costs is $155,266. The protester notes that the solicitation provided that relative technical quality would become more important as evaluated cost became closer in amount, and urges that because it had the higher technical score it should have received the award under the above criteria.

PTI's argument is premised on the assumption that the awardee's costs are unrealistically low. As indicated above, however, we cannot agree with this premise. Moreover, where selection officials reasonably regard proposals as being essentially equal technically, cost or price then usually becomes the determinative factor in awarding a contract no matter how it is weighted in the evaluation scheme, unless the agency also regards the proposals as being essentially equal as to cost. See Group Hospital Service, Inc. (Blue Cross of Texas), 58 Comp. Gen. 263 (1979), 79-1 CPD ¶ 245. This rule applies even if the contemplated contract is a cost reimbursement type, under which there exists uncertainty as to the ultimate cost to the government for evaluation purposes. The reason is that the agency, instead of merely comparing offerors' proposed costs, essentially evaluates this uncertainty as well through the cost realism analysis. Ecology and Environment, Inc., B-209516, supra. Accordingly, the protest on this issue is denied.

(8) The protester contends that the agency improperly waived an RFP provision for the awardee. The provision, "SUBCONTRACTING PROGRAM PLAN FOR UTILIZATION OF SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS," required an offeror to submit with its initial proposal a subcontracting plan as called for by Federal Acquisition Regulation (FAR) § 52.219-9 (FAC 84-10), and stated that an acceptable plan "must include the following required goals: Small Business 59 percent . . . " The protester contends, and EPA admits, that the awardee's offer did not meet the stated small business goal. PTI argues that it was prejudiced by the failure to enforce the requirement because enforcement would have improved the protester's competitive position by eliminating the only other offeror in the competitive range. The protester alternatively states that if it had known that the requirement would not be enforced it would have provided more hours to less expensive subcontractors or proposed a less experienced, lower-cost staff.

EPA responds that it found Tetra Tech's plan acceptable and argues that despite the RFP language that the plan "must include the following required goals," such plans are always subject to negotiation, as evidenced by the provisions at FAR §§ 19.705-4 and 19.705-5 (FAC 84-18) states that the contracting officer should consider a wide range of factors, most of which are peculiar to the nature of the particular offeror's business, in determining whether proposed goals are acceptable. The agency further urges that the protester was not prejudiced by acceptance of Tetra Tech's plan because PTI, a small business itself, was exempt from the requirement to submit a plan.

We will not object to the acceptance of Tetra Tech's subcontracting plan. The 59 percent participation provision clearly was stated in the RFP as a goal and, as EPA points out, goals on that matter necessarily and expressly are viewed by the procurement regulations to be negotiable with each offeror. In this respect, FAR § 19.705-4 states that the contracting officer, in reviewing each particular offeror's subcontracting plan, should set goals "at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small and small disadvantaged subcontractors." Basically, then, as long as an offeror's plan reasonably is considered acceptable, we do not think an RFP's stated goal necessarily should serve as a basis to reject an otherwise proper offer.

Moreover, we find PTI's argument that it was prejudiced unpersuasive. An offeror proposing an inflated price in what is on its face a competitive procurement, based on an assumption concerning the impact of a solicitation provision

on the nature of the competition that it faces, does so at its own risk when the assumption proves to be wrong. See DataVault Corp., B-223937, et al., Nov. 30, 1986, 86-2 CPD ¶ 594. This ground of protest is denied.

The protest is dismissed in part and denied in part.

James F. Hinchman
General Counsel