The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ultra Technology Corporation

File: B-230309.6

Date: January 18, 1989

DIGEST

1. In light of evidence presented by the protester to the effect that at least one individual proposed as a lead technician had not given the awardee permission for his name to be used, General Accounting Office recommends that the agency terminate the contract unless it determines that the awardee has a satisfactory explanation regarding the use of the individual's name.

2. Fact that awardee's prices for two different length work weeks are the same, or that its base period and option period prices did not conform to what the protester states should have been expected does not render the offer unbalanced.

3. Agency's failure to provide timely notice of award is a procedural defect which does not affect the validity of the award.

DECISION

Ultra Technology Corporation protests the award of a contract to Applied Retrieval Technology, Inc. under request for proposals (RFP) No. N00600-88-R-1135, issued by the Navy for the maintenance and repair of automated storage and retrieval equipment.1/ The protester challenges the evaluation of the awardee's technical and price proposals,

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1/ This post-award protest was filed on September 6, 1988, as a supplement to Ultra Tech's then-pending request for reconsideration of our earlier decision dismissing in part and denying in part a preaward protest under the same solicitation. See Ultra Technology Corp., B-230309.2, Aug. 2, 1988, 88-2 CPD ¶ 107. The request for reconsideration was denied. See Ultra Technology Corp.--Reconsideration, B-230309.4, Nov. 2, 1988, 88-2 CPD ¶ 429.

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objects to an award being made in the face of a size appeal pending before the Small Business Administration (SBA), and alleges that the agency provided it with neither timely notice of award nor a debriefing.

We sustain the protest in part because we are concerned that at least one of the individuals proposed for a key position by the awardee may have not authorized the use of his name. We are recommending that the Navy terminate the contract unless it determines that Applied Retrieval has a satisfactory explanation regarding the use of the proposed key individual's name. We deny the remainder of the protest.

The RFP was issued on December 2, 1987, as a small business set-aside contemplating the performance of maintenance and repair services at three locations--Oakland, Norfolk and San Diego--during a base period with options for 4 additional years. Offerors were required to submit base and option prices for each of the locations for 3 alternative work weeks--5, 6 and 7 days--which the agency could alter upon 1 month's notice during performance. Award was to be made to the offeror with the lowest evaluated price who was determined to be technically acceptable. The RFP provided that, for evaluation purposes, base and option prices for all work week alternatives at each location would be totaled; the resulting prices for each location were then to be compared to determine whether or not it was in the government's interest to make one award for all three locations or to split the award by location.

The RFP also required offerors to submit resumes of certain key personnel, known as lead technicians; letters of commitment or other similar evidence were not, however, required to be submitted. Further, the RFP provided that substitutions of key personnel would not be permitted during the first 90 days of performance unless necessitated by illness, death or termination of employment. Additionally, the RFP required offerors to submit at least three recent customer references.

All offers submitted were found to be technically acceptable. The awardee and the protester's evaluated prices were as follows:

Offeror	Oakland	Norfolk	San Diego
Applied Retrieval	$2,450,945	$2,402,144	$2,843,486
Ultra Tech	$2,946,984	$2,977,194	$3,280,590

On April 7, 1988, the Navy advised Ultra Tech and the other unsuccessful offeror--Cybernated Controls Corporation--of its intention to award to Applied Retrieval. Cybernated subsequently filed a challenge to the proposed awardee's small business size status with SBA. On May 20, SBA found Applied Retrieval to be a small business. On June 2, Cybernated appealed that determination to the SBA Office of Hearings and Appeals. Award was made on August 18 during the pendency of that appeal. On September 1, the Office of Hearings and Appeals determined Applied Retrieval to be other than a small business based on negative inferences drawn as a result of the awardee's refusal to provide certain portions of its proposal to Cybernated as ordered by SBA during the appeal process. Applied Retrieval continues to maintain that the materials ordered released to Cybernated are, in fact, proprietary, and is currently challenging the decision in District Court. See Applied Retrieval Technology v. Abdnor, Civ. No. 88-2829 (D.D.C., filed Sept. 30, 1988).2/

EVALUATION OF TECHNICAL AND PRICE PROPOSALS

Technical Proposal

Ultra Tech's primary concern about the evaluation of the awardee's technical proposal involves the fact that none of the individuals proposed as lead technicians at the three locations is currently working in that capacity.

With respect to the individual proposed as a lead technician for the Norfolk location, the Navy states that the awardee had his permission to submit a resume and that he in fact provided one for that purpose; the agency then states that the individual failed to abide by his commitment to the firm--a circumstance which the Navy argues it could not foresee at the time of proposal evaluation when it reasonably relied on the resume. Regarding the employee of Applied Retrieval proposed as lead technician for the Oakland location, the Navy reports that, at the time of the submission of Applied Retrieval's best and final offer (BAFO), he expected that his previously failing health would

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2/ In light of this pending litigation involving a dispute concerning the propriety of the order to release the awardee's proposal, and in view of our two prior decisions in which we denied Ultra Tech's request for the awardee's proposal, we will not release it in connection with this protest. Bid Protest Regulations, 4 C.F.R. § 21.3(d)(2) (1988); Ultra Technology Corp., B-230309.2, supra; Ultra Technology Corp.--Reconsideration, B-230309.4, supra.

permit him to relocate from Florida to California but, following the submission of the BAFO, he decided upon the advice of a physician not to relocate; the agency notes that the contract permits the substitution of key personnel for health reasons. Finally, the Navy reports that Applied Retrieval made a business decision to remove the individual proposed as lead technician at San Diego after the submission of BAFOs because his employment with another Navy contractor at that location had been terminated under circumstances which had an adverse impact on Navy personnel involving the indictment of his co-worker for theft.

On the other hand, Ultra Tech has submitted an affidavit from the individual proposed for Norfolk stating that, although he had earlier given permission to have his name proposed by another firm (now teaming with the awardee but then offering on its own), he had never authorized Applied Retrieval to submit his name in connection with an offer. With respect to the individual proposed for the Oakland position, Ultra Tech submitted affidavits containing second- and third-hand statements to the effect that he was not precluded by ill-health from relocating, but that he had not been asked to take the Oakland job by Applied Retrieval. Finally, with respect to the individual proposed for the San Diego position, Ultra Tech submitted affidavits containing second- and third-hand accounts to the effect that the Navy itself requested his discharge on July 13 from his former employment, and later refused to accept him as Applied Retrieval's lead technician for Norfolk when the awardee sought to place him at that location in September.

The protester submits that these examples indicate that the agency's technical evaluation was irrational because the Navy accepted the resumes submitted by the awardee at face value without requiring evidence of personnel commitments from the firm. The agency argues that since the circumstances involving each individual changed following the evaluation of offers, they are reflective of neither bad faith upon the part of Applied Retrieval nor any lack of diligence on the part of the Navy. The agency also argues that whether Applied Retrieval substitutes lead technicians in a manner consistent with the requirements of its contract is a matter of contract administration.

While we recognize that the RFP did not require the submission of letters of commitment and that the agency reviewed the resumes for general acceptability as the solicitation required, we believe that it is unusual that none of the three individuals proposed by Applied Retrieval as lead technicians has in fact been placed in such a position. Further, we are concerned that, at least in one

instance, Applied Retrieval may have proposed an individual without his permission. In this connection, the protester has submitted an affidavit from the individual stating that he had not given Applied Retrieval permission to use his name. We have no response from the awardee and only a statement in the agency report that Applied Retrieval believed it had the individual's authorization to include him in its proposal. Based on this record, it appears that Applied Retrieval did not have the individual's permission to use his name for the lead technician position. We therefore sustain the protest as far as this issue is concerned, and are recommending that the Navy terminate the contract unless the Navy determines that Applied Retrieval has a satisfactory explanation regarding the use of the proposed key individual's name. Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD 53.

Ultra Tech also alleges that Applied Retrieval did not provide the requisite three references of contract experience for service work as called for in the RFP and further suggests that the firm's proposal did not adequately address requirements relating to maintenance plans and materials, safety and reports. With respect to the references, our review of the awardee's proposal indicates that it provided numerous references independent of those supplied by the company it teamed with, and that the Navy contacted four of them--three of which related to service work--and received positive recommendations. With regard to the other questions raised by Ultra Tech, we note that the protester has provided us with little information other than a brief reiteration of the opinions of Cybernated, whose post-award protest was dismissed for failure to respond to the agency's report addressing its concerns. In any event, we note that Applied Retrieval's proposal contained sections addressing each of the areas of Ultra Tech's concern.

Price Proposal

In questioning the Navy's evaluation of Applied Retrieval's price proposal, the protester alleges that it in fact submitted lower prices than did the awardee for the 5-day work week, which was the alternative awarded. The protester also contends that the awardee failed to provide detailed cost information as required by the RFP. Finally, the protester argues that Applied Retrieval's offer was unbalanced and below cost.

It appears that Ultra Tech's assertion that it offered lower prices than Applied Retrieval's involves the awardee's prices for the base period and two option periods for the 5-day work week alternative at the Oakland location.

However, the RFP provided that, even to be considered for a split award at one location, an offeror would have to be low for all three of the work week alternatives, and low for all, not just two, of the option periods as well as for the base period. Since the protester was low under only one of the three work alternatives and for two of the four option periods, on its face Ultra Tech's argument is without merit. To the extent that the protester is now objecting to the price evaluation formula set forth in the RFP, the protest is untimely since the matter should have been raised prior to the closing date set for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988).

Likewise, we do not agree with the contention that Applied Retrieval failed to provide detailed cost information. Although technically denominated as a cost proposal, all the RFP required was that offerors provide base period and option period prices for all work week alternatives at the three locations. The awardee's proposal contained the required prices.

The protester argues that Applied Retrieval's prices were unbalanced. This argument is based on the fact that the awardee's proposed prices for two different work week alternatives were the same and on Ultra Tech's view that the awardee's prices do not conform to its estimation of what a comparison of base period prices and option period prices should have been. These arguments simply do not, in view of very small difference between all of the awardee's prices--in every category the awardee's prices are lower than the protester's--establish that the price of some work was understated while the price of other work was enhanced, that is, that the offer was mathematically or materially unbalanced. See Unidynamics/St. Louis, Inc., B-232295, Dec. 21, 1988, 88-2 CPD ¶ ___.

AWARD NOTWITHSTANDING THE SBA APPEAL

The award to Applied Retrieval was made on August 18, following the Navy's receipt of a determination by the SBA regional administrator that the awardee was a small business for the purposes of this procurement and prior to the agency's receipt of the September 1 appellate decision which reversed the regional administrator. The protester argues that since the Navy knew of the appeal on August 18 and knew that the decision was imminent, the agency abused its discretion by not awaiting the final action in the matter. Further, the protester argues that, following its receipt of the September 1 decision, the agency acted in violation of SBA's regulations in not terminating the contract.

The agency responds by noting that it was under no obligation to await the outcome of the appeal. We agree. Although the regulations provide for an appeal from an initial SBA size determination by any concern that has been adversely affected, there is no requirement that the contracting officer withhold award during the appeal period. Federal Acquisition Regulation (FAR) § 19.302(i). Even when the contracting officer knows of the appeal when award is made, the award is valid. Suddath Moving Systems, Inc., B-229992, Apr. 1, 1988, 88-1 CPD ¶ 332. Therefore, we have no legal basis upon which to conclude that the agency abused its discretion by making the award here.

Ultra Tech's argument that SBA regulations required termination of the contract following the September 1 decision likewise lacks merit. The protester relies on SBA's regulation governing the filing of appeals which provides, in part: "[a]n appeal from a size determination concerning a bidder or offeror in a pending procurement . . . shall be filed in writing no later than five (5) days after receipt of the determination made by a Regional Administrator. . . ." 13 C.F.R. § 121.11(e)(2) (1988). The protester contends that the implication of this regulation is that whenever a timely appeal is filed, as it was in the case, the subsequent appellate decision shall apply to the pending procurement, notwithstanding FAR § 19.302(i), which states that appellate rulings received after award do not apply to the pending procurement. The protester argues that FAR § 19.302(i) must be ignored because it conflicts with the regulations of SBA--the agency charged by statute with conclusively determining size status.

Although the SBA regulations do provide that untimely initial challenges to an offeror's size status will be considered for application to prospective procurements, 13 C.F.R. § 121.9(a), they are silent with respect to the effect of an appellate decision rendered after award on an otherwise timely protest. Thus, there is no conflict; in our view, the clear language of FAR § 19.302(i) simply

complements the SBA regulations.3/ See Dakota Tribal Industries, Inc.--Reconsideration, B-227939.2, Dec. 17, 1987, 87-2 CPD ¶ 602.

NOTICE AND DEBRIEFING

Ultra Tech did not receive notice of award until August 29. The protester contends that the agency did not timely notify it of the August 18 award to Applied Retrieval and suggests that this contravened specific promises made by agency counsel to the effect that it would be telephonically notified and further suggests that this was an attempt by the Navy to deny Ultra Tech an opportunity to obtain a stay of performance by filing a protest within 10 calendar days of award. Moreover, the protester alleges that the Navy has refused to conduct a debriefing.

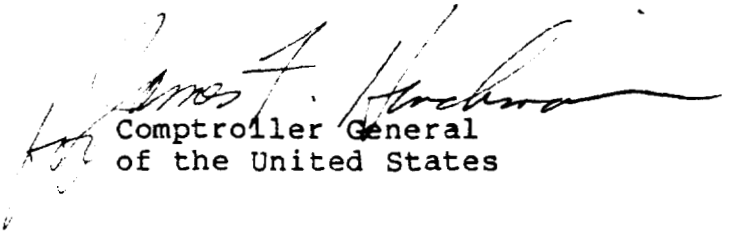
While the agency's explanation as to why the notice of award was not sent until 4 calendar days (2 work days) after the award was made is unconvincing, tardiness in notifying unsuccessful offerors is a procedural defect which does not affect the validity of the contract award. Vacco Industries, B-230036, Apr. 21, 1988, 88-1 CPD ¶ 393. As to its failure to telephonically notify Ultra Tech sooner, the agency states that the omission was an oversight. Also, the agency states that it has not refused Ultra Tech a debriefing but has informed the protester that debriefings are not usually given where, as here, the solicitation provides for award to the low priced technically acceptable offeror and the party requesting the debriefing was determined to be acceptable. The agency states that it will hold a debriefing if the protester requests one in writing. We have no basis upon which to doubt the agency's explanation in this regard.

3/ In its September 1 decision, SBA's Office of Hearings and Appeals stated that "[h]ere, a final decision by SBA that [Applied Retrieval]" is other than small might be taken by the Appellant to another forum for enforcement and is, thus, not moot. Ultra Tech argues that this expression means that, contrary to the language of FAR § 19.302(i), we should apply the decision retroactively to the protested procurement. We disagree. The "Appellant" referred to in the decision is Cybernated, not Ultra Tech. In any event, we do not believe that the Office of Hearings and Appeals intended to advocate that our Office, or any other forum, issue a ruling that is inconsistent with the FAR.

CONCLUSION

Although we find no merit to most of the issues raised by the protester, we do sustain the protest with respect to the issue involving the possibility that the agency accepted a proposal that offered the services of an individual who did not authorize the offeror to represent that this individual would be available to provide those services. We also find the protester entitled to the costs of filing and pursuing its protest, including attorneys' fees, to the extent they relate to the issue regarding individuals proposed as lead technicians. See Interface Flooring Systems, Inc.--Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106.

The protest is sustained in part and denied in part.



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