White

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Research Management Corporation

File: B-237865

Date: April 3, 1990

Donald P. Young, Esq., Saul, Ewing, Remick & Saul, for the protester.
Lori S. Chofnas, Esq., Office of the General Counsel, Department of the Navy, for the agency.
Aldo A. Benejam, Esq., Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contention that where solicitation contemplates award of a fixed-price, time and materials contract and requires the submission of cost and pricing data, agency must perform a cost analysis, is denied where adequate price competition was obtained, permitting agency to waive further submission of such cost data and perform a price analysis in lieu of a cost analysis.

2. Where none of the personnel required to perform the statement of work were "professional employees" as defined in the Federal Acquisition Regulation (FAR), contracting officer was not required to evaluate proposed professional employee compensation as specified in the standard FAR clause regarding evaluation of such compensation.

3. General Accounting Office will not review a protest of an affirmative determination of responsibility absent a showing that it may have been made fraudulently or in bad faith, or that definitive responsibility criteria set out in the solicitation were not met.

4. Whether awardee actually complies with its contractual obligations is a matter of contract administration that is not reviewable under General Accounting Office's bid protest function.

DECISION

Research Management Corporation (RMC) protests the award of a contract to George G. Sharp, Inc., under request for proposals (RFP) No. N00140-89-R-1901, issued by the Navy as a total small business set-aside, for engineering and technical advisor services in support of the Habitability Self-Help Program. RMC, the incumbent contractor, contends that the Navy improperly failed to conduct a cost analysis of all offers as required by the applicable regulations and the RFP; failed to follow the evaluation criteria stated in the RFP; and failed to evaluate proposed compensation for professional employees in accordance with applicable regulations. RMC alleges that if the Navy had evaluated offers properly, it would have concluded that RMC was the lowest realistically-priced, acceptable offeror.

We deny the protest.

The Navy issued the RFP on March 29, 1989, for a 1-year base period with four 1-year options. The RFP sought offers for an indefinite quantity, time and materials contract, with fixed hourly labor rates, under which tasks would be required by delivery orders. The estimated level of effort for this project was 243,000 hours during the base year and each of the option years. Offerors responding to the RFP were directed to submit their technical and price proposals separately, with the price proposals showing "all elements of cost and such other cost data as . . . considered appropriate to support your [technical] proposal." Each offeror was also required to submit cost and pricing data with its proposal on a standard form (SF) 1411, "Contract Pricing Proposal Cover Sheet."

Three offerors responded to the RFP: Commercial Building Services, Inc. (CBS), Sharp and RMC. The Navy initially found only RMC's proposal technically acceptable, but concluded that the proposals submitted by Sharp and CBS could be made acceptable after discussions. Thus, the Navy held written and oral discussions only with CBS and Sharp, since there were no technical issues requiring discussions with RMC. After discussions, all three offerors were found technically acceptable and remained in the competitive range.

By letters dated October 18, the contracting officer requested best and final offers (BAFOs) from all three offerors. Each offeror was directed to review all aspects of its price proposal, including profit, in light of the competitive nature of the acquisition. Each offeror was

also reminded that award would be made to the lowest priced, technically acceptable offeror, as explained in the RFP. The contracting officer also directed offerors to potentially questionable costs in their initial price proposals, and advised each of possible pricing mistakes.

BAFOs were received on October 25. Sharp's final price was $28,150,377, while CBS's was $28,943,218 and RMC's was $30,765,426. After receiving notification from the Navy advising that Sharp was the apparent successful offeror, RMC protested to this Office.1/

RMC protests that the Navy improperly failed to perform a cost analysis of all offers before awarding a contract, in violation of the RFP and applicable regulations. According to RMC, since the RFP required submission of cost and pricing data; contemplated award of a time and materials type contract; and required that proposed costs be consistent with the offeror's proposed technical approach, the Navy was required to conduct a cost analysis. RMC argues that as a result of the Navy's failure to conduct a cost analysis, the Navy did not realize that RMC had submitted the lowest realistic price.

The Navy responds that while the RFP required the submission of cost and pricing data, a cost analysis was not required because the range of offered prices comprised adequate price competition within the meaning of FAR § 15.804-3(b). The Navy also argues that, contrary to the protester's characterization of the solicitation, the time and materials contract contemplated by the RFP is a fixed-price contract rather than a cost reimbursement type contract because offerors were required to commit to firm labor, overhead and profit rates, and, as a result, the contractor bore the risk of increases in labor or overhead costs. Further, the Navy

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1/ The Navy informed our Office on December 28, 1989, that it would proceed with award to Sharp, notwithstanding the protest, pursuant to Federal Acquisition Regulation (FAR) § 33.104(b). RMC objects to the Navy's determination and finding of urgent and compelling circumstances. However, where an agency makes a determination to award a contract while a protest is pending, the agency's only obligation is to inform our Office of that decision, as the Navy has done here. See 31 U.S.C. § 3553(d)(2) (Supp. V 1987); FAR § 33.104(b). There is no requirement that a protester be allowed to rebut the agency's finding nor do we review such a determination. See, e.g., The Taylor Group, B-234294, May 9, 1989, 89-1 CPD ¶ 436.

argues that nothing in the solicitation advised offerors that proposals would be subjected to a cost analysis.

As noted above, the RFP required offerors to submit cost and pricing data on SF 1411, "Contract Pricing Proposal Cover Sheet." Submission of such cost data is mandated by the Truth in Negotiations Act, 10 U.S.C. § 2306a (1988), for all negotiated contracts in excess of $100,000, except in certain circumstances. The Act specifically exempts contracts awarded with "adequate price competition" from the requirement to submit such data. See 10 U.S.C. § 2306a(b)(1)(A); FAR § 15.804-3(b).

RMC correctly asserts that a contracting officer must perform a cost analysis when cost or pricing data are required under the Act. FAR § 15.805-1(b). When cost or pricing data are not required, the contracting officer must perform a price analysis to ensure that the overall price offered is fair and reasonable. Id. Guidelines for performing a price analysis are set forth at FAR § 15.805-2, although the FAR permits a contracting officer to use whatever price analysis he deems appropriate to ensure fair and reasonable prices.

As a preliminary matter, we note that the contracting officer conducted a price analysis in this procurement, consisting of comparing each offeror's price with current and historical cost data.2/ These cost data included information found in recent audit reports prepared by the Defense Contract Audit Agency (DCAA), the cost and pricing information submitted by each offeror, and historical data available to the Navy from previous contracts. Using this information, the contracting officer developed estimated prices for each offeror, and compared the estimate to the offeror's price to confirm that each offeror fully understood the RFP's requirements. The contracting officer also evaluated the proposals for pricing mistakes. Further,

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2/ Each cost proposal listed the offeror's fully burdened, fixed hourly labor rates for estimated levels of effort for each of seven labor categories. Also, each proposal provided any burden rates to be applied to fixed annual amounts for travel/subsistence ($1 million) and special materials ($75,000), furnished in the RFP for evaluation purposes. These fully-burdened fixed hourly rates multiplied by the estimated level of effort for each labor category, combined with the offeror's burdened travel/subsistence and special materials costs, provided the basis for determining the price of each proposal.

despite RMC's assertions to the contrary, the contracting officer performed a price analysis both before and after submission of BAFOs. Based on these price analyses and a comparison of the offerors' prices, the contracting officer determined that the prices offered were reasonable, and that Sharp was the lowest-priced offeror. See FAR § 15.805-2.

With respect to RMC's assertion that the contracting officer was required to perform a more detailed cost analysis because the RFP required submission of cost or pricing data, there is simply no requirement that a cost analysis be performed in every instance where an RFP requires offerors to submit cost data. See Contract Servs., Inc., B-232689, Jan. 23, 1989, 89-1 CPD ¶ 54. As explained above, the Truth in Negotiations Act does not require submission of cost or pricing data where adequate price competition is achieved, and, when cost or pricing data are not required by the Act, there is no requirement for a cost analysis. FAR §§ 15.804-3(a), 15.805-1(b). Thus, we agree that since three offerors submitted proposals in response to this solicitation, which provided for award "to the low priced responsible offeror whose offer has been deemed technically acceptable," adequate price competition was obtained and the agency was not obligated to perform a cost analysis.

RMC next asserts that the Navy was required to perform a cost analysis because the RFP contemplated award of a time and materials contract. According to RMC, a cost analysis is required because a time and materials contract is a cost-type contract providing the government little protection from contractor cost overruns. RMC also argues that a time and materials contract is more like a cost-type contract than a fixed-price contract because the government is generally obligated to reimburse the contractor for all direct labor hours expended in the performance of the contract.

The time and materials contract here has elements of both fixed-price and cost-type contracts. The contract price is fixed to the extent that offerors were required to propose fixed labor and burden rates for each of the seven labor categories involved in performance; on the other hand, the number of hours each offeror will require to perform the necessary services may vary depending on the tasks involved in each work order and the contractor's efficiency at performing that task. Thus, while we do not agree that a full-blown cost analysis is required whenever an agency uses a time and materials contract, in our view, contracting agencies should conduct a review of the proposals adequate

to ensure that the proposed prices are reasonable and that the government will obtain the lowest overall cost.3/

Here, we find that the price analysis performed by the Navy addressed the fixed-price portions of the contract, and that sufficient additional analysis was performed to protect the government's interest with respect to the one uncertain area of the contract price that could vary from one offeror to another--i.e., the capabilities, and hence efficiency, of the personnel proposed by the contractor for performance. Specifically, the Navy's independent Technical Evaluation Committee (TEC) reviewed the qualifications and work experience of each offeror's proposed personnel according to the criteria in the solicitation to ensure that they were acceptable. In addition, the contract provides for notification and prior approval by the Navy of any key personnel proposed to be substituted during the performance of the contract. In our view, the TEC evaluation and the contract provisions regarding substitution of key personnel, together with the fixed-price rates for all labor, provide the government with the protection necessary to ensure that the contract price will not be unreasonable.4/

3/ In support of its position, RMC cites our decision in Cerberonics, Inc., B-199924, B-199925, May 6, 1981, 81-1 CPD ¶ 351. In Cerberonics, we upheld an agency's decision to exercise options in both a cost-type contract and an indefinite quantity time and materials contract, even though the protester offered to perform the work at a lower cost. We observed that Cerberonics' promise to provide the agency a minimal savings--$35,000 on a contract estimated to cost more than $1 million--did not require the contracting officer to refrain from exercising a valid option because time and materials type contracts do not encourage effective cost control and require constant government surveillance. Our description of time and materials contracts in that decision simply does not create a requirement that contracting officers perform a full-blown cost analysis whenever an agency uses such a contract.

4/ RMC also argues that a cost analysis should have been performed because paragraph L23 of the RFP incorporates the entire FAR and DFARS as if listed in their entirety in the contract, including DFARS § 215.805-70(a), which states that a cost realism analysis may be appropriate in certain circumstances even when adequate price competition exists. The provision cited by RMC, on its face, makes such analysis a matter of discretion.

Finally, we do not agree with RMC's assertion that the RFP itself anticipates that all offers will be subject to a cost analysis. Paragraph M31 of the RFP states, in relevant part:

> "Costs which are supported in the price proposal must be reconcilable to the personnel and methodology defined in the technical proposal or the overall proposal may be removed from the competitive range."

This provision, putting offerors on notice that proposed costs must be linked to performance, does not state that a cost analysis will be performed and does not create a requirement in addition to the requirement for a price analysis found in the regulations and performed by the contracting officer. Thus, none of RMC's arguments shows that the Navy erred in not performing a cost analysis on offers submitted in response to this solicitation.

RMC also protests that the contracting officer failed to evaluate each offeror's proposed compensation of professional employees consistent with the requirements of the solicitation and applicable regulations. RMC correctly notes that the RFP incorporates FAR § 52.222-46, "Evaluation of Compensation for Professional Employees." RMC argues that both the program manager and the assistant program manager positions required by the RFP must be filled by professional employees, and that RMC relied to its detriment on that RFP provision by proposing significantly higher hourly labor rates than did Sharp. RMC also implies that Sharp's lower hourly labor rates for these positions reflect its misunderstanding of the requirements of the RFP, and its failure to appreciate the importance of employing qualified personnel to fill these key positions.

The Navy responds that even though the RFP included the FAR clause regarding professional employee compensation, no professional employees were required to perform the work under this RFP, and hence the clause was inapplicable. The Navy argues that amendment No. 0004 to the RFP removed the solicitation's college education requirement for the two highest-ranking employees under this RFP--the program manager and the assistant program manager. Thus, according to the Navy, after release of amendment No. 0004 none of the labor categories in this procurement required a degree above a high school diploma, and no professional employees were required within the meaning of the professional employee clause.

Contracting officers are required to include the clause at FAR § 52.222-46, "Evaluation of Compensation for Professional Employees," in "solicitations for negotiated service contracts when the contract amount is expected to exceed $250,000 and the service to be provided will require meaningful numbers of professional employees." FAR § 22.1103 [Emphasis added]. The FAR defines a "professional employee" as ". . . any person meeting the definition of 'employee employed in a bona fide . . . professional capacity' given in 29 CFR 541." FAR § 22.1102. The FAR further explains that professional employees are those "having a recognized status based upon acquiring professional knowledge through prolonged study," and cites several examples of such professions. Id. The purpose of a review of compensation for professional employees under FAR § 52.222-46 is to evaluate whether offerors will obtain and keep the quality of professional services needed for adequate contract performance, and to evaluate whether offerors understand the nature of the work to be performed. See MAR, Inc., B-215798, Jan. 30, 1985, 85-1 CPD ¶ 121.

Based on the facts here, we concur with the Navy's assessment that none of the employees required to perform the work at issue were professional employees for purposes of the evaluation of professional compensation clause. RMC fails to explain convincingly why these employees fall within the scope of a clause written to apply to persons who have completed a period of prolonged study, when there is no requirement that these employees have a college education provided they have significant work experience. Further, RMC fails to show that the two program manager positions fit within the other definitions found in the FAR, or the additional guidance set forth at 29 C.F.R § 541.3 (1989).

In addition, even assuming that the personnel required under the RFP, as amended, are "professional employees," as RMC argues, we find no support in the record for RMC's bare assertion that Sharp's lower compensation rates will not provide the Navy with the quality of personnel required under the RFP, or that Sharp did not fully understand the nature of the work to be performed.

Finally, RMC also questions whether Sharp can or will devote the resources necessary to successful performance of the contract. These allegations relate to the contracting officer's affirmative determination of Sharp's responsibility, which our Office will not review 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). No such showing has been made here. Further, whether Sharp will

comply with its contractual obligations is a matter of contract administration that is not reviewable under our bid protest function. 4 C.F.R. § 21.3(m)(1).

The protest is denied.

for James F. Hinchman
General Counsel