Jordan

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Harding Lawson Associates; ICF Technology, Inc.--Reconsideration

File: B-239231.7; B-239231.8

Date: December 4, 1990

Thomas J. Touhey, Esq., and George W. Stiffler, Esq., Dempsey Bastianelli, Brown & Touhey, for Harding Lawson Associates; Kenneth M. Bruntel, Esq., and Joan H. Moosally, Esq., Crowell & Moring, for ICF Technology Inc., the protesters.
John B. Denniston, Esq., Covington & Burling, for R.L. Stollar & Associates, Inc.; Robert M. Moore, Esq., Morgan, Lewis & Bockius, for Environmental Resources Management, Inc., interested parties.
William R. Medsger, Esq., and Robert W. Poor, Esq., Department of the Army, for the agency.
Paul E. Jordan, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Dismissal, as academic, of protest challenging agency's evaluation of offers and award decisions, was proper where agency took corrective action of amending solicitation, reopening negotiations, and providing opportunity for offerors to revise their proposals and submit best and final offers. Requests for reconsideration of dismissal are denied, notwithstanding corrective action did not include contract award to protesters, since such relief would have been inappropriate.

2. Where agency has complied with Competition in Contracting Act of 1984, by making written determination and notifying General Accounting Office (GAO) of urgent and compelling circumstances significantly affecting the interests of the United States which would not permit staying contract performance until GAO rendered decision on protests, and is allowing performing contractors to continue performance pending the outcome of reopened negotiations, GAO will not review the agency's determination.

DECISION

Harding Lawson Associates (HLA) and ICF Technology, Inc. request reconsideration1/ of our August 7, 1990, decision to dismiss as academic the protest of HLA (B-231239.5). Both contend that the Army's intended corrective action is inappropriate to remedy the agency's alleged errors in conducting the procurement.

We deny the requests.

Request for proposals (RFP) No. DAAA15-90-R-0009 sought proposals to provide various environmental services in support of the expanded environmental missions of the Army Toxic and Hazardous Materials Agency. The contracting agency, the Army Armament, Munitions and Chemical Command, anticipated award of up to 15 indefinite quantity/indefinite delivery (task order) contracts, with task orders being issued on a cost-plus-fixed-fee completion-form basis. Technical proposals were to be evaluated on the basis of acceptability in all stated factors and subfactors.

Cost evaluations were to be based on the magnitude and realism of the proposed costs and fees for a sample task order. The adjusted costs were next to be extrapolated to project the cost of the amount and mix of work anticipated under the entire contract and then compared with competing proposals. Award was to be made to the 15 acceptable offerors with the lowest projected cost proposals.

Forty-two offerors submitted proposals, 24 of which, including those of HLA and ICF, were found technically acceptable. After discussions and submission of best and final offers (BAFO), proposed costs were evaluated. The contracting officer decided not to extrapolate the adjusted sample task order costs over the entire contract because he found that the sample task contained essentially the same amount and mix of work as all of the other task orders anticipated under the contract, and thus extrapolation would not change the offerors' relative standings. Fifteen contracts were awarded on March 30, 1990. Neither HLA nor ICF were among the original awardees.

A number of protests followed the announcement of awards and debriefings of the unsuccessful offerors. On April 17, 1990,

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1/ While ICF terms its correspondence with our Office a new protest, it essentially is a request for reconsideration by an interested party who participated in the dismissed protest. Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1990).

ICF filed a protest alleging flaws in the evaluation process including a failure to properly evaluate and adjust ICF's costs. Throughout April and May, the agency conducted debriefings of those offerors in the competitive range which did not receive awards. As a result of questions raised regarding the cost realism evaluations, additional information was obtained from all 24 offerors to "clarify" various cost elements. After a reevaluation, probable cost standings changed and ICF was determined to be among the 15 low offerors. Since it was to receive an award once the existing protests were resolved, ICF withdrew its protest. As a further result of the change in standings, Environmental Resources Management, Inc. (ERM), one of the original awardees, had its contract terminated for the convenience of the government. In June, ERM and HLA filed protests challenging the evaluation process.

Also in June, the agency furnished our Office a written determination that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for our decision on the protests then pending. In accordance with the determination, contract performance on 14 of the contracts commenced upon issuance of an initial task order. ICF was not one of the 14.

On August 7, 1990, the agency advised our Office that it intended to take corrective action to resolve the protests, including reopening negotiations with all 24 offerors in the competitive range and provision of an opportunity to submit revised proposals and BAFOs. Pending the outcome of an evaluation of BAFOs, the agency intended to have the 14 original awardees continue performance. We then dismissed the protests of HLA and ERM as academic.

In their requests for reconsideration, both HLA and ICF raise matters they believe will not be corrected by the agency's corrective action, thus making inappropriate the dismissal of the protests as academic. Specifically, both contend that the proposed corrective action will not cure the agency's failure to extrapolate sample task costs over the entire contract requirements. In addition, ICF contends that the corrective action will not prevent "buy-in" or "low ball" offers, and that some offerors have a competitive advantage due to pricing information revealed during the protest process and performance of the contracts.

We find the agency's proposed corrective action will cure the matters identified by ICF and HLA. With regard to the agency's determination that the sample task was representative of the entire contract, eliminating the need for extrapolation, the agency has amended the solicitation to revise the evaluation criteria. As amended, the solicitation provides

that, for evaluation purposes, the sample task is to be considered representative of the amount and mix of anticipated work under all task orders, making the probable cost of the sample the sole basis for determining probable cost. In addition, amendments to the solicitation require offerors to include and identify specific cost information to assist in the evaluation of cost realism. To prevent "buy-ins" and unfair competitive advantages due to pricing disclosures, the agency explains that it will conduct a comprehensive cost realism analysis and has provided each offeror with a copy of all protests filed including disclosed information. Discussions will be reopened with all offerors in the competitive range and each will be provided an opportunity to submit a revised technical and cost proposal. At the close of discussions, each will be allowed to submit a BAFO. In our view, the agency's decision to amend the solicitation, reopen negotiations, and provide an opportunity for proposal revision and submission of BAFOs, did render the protests--which challenged the agency's cost evaluations and award decisions--academic. See Maytag Aircraft Corp.--Recon.; Claim for Protest Costs, 69 Comp. Gen. 83 (1989), 89-2 CPD ¶ 457.

We recognize that HLA and ICF believe that their entitlement to awards makes the corrective action inappropriate. HLA contends that the agency improperly added certain costs and failed to subtract other costs in adjusting its original BAFO, which, if properly accomplished, would result in a projected cost among the 15 low offerors. The agency concedes that one of its prior additions was erroneous and a worksheet representing a subsequent reevaluation, apparently taking into consideration that error, results in an adjusted cost which HLA believes places it within the low 15 offerors. ICF relies upon the first reevaluation which made it an awardee by supplanting another awardee. However, ICF's and the other competitive range offerors' costs were adjusted in the same reevaluation upon which HLA relies. The result of that reevaluation has placed both HLA and ICF above the low 15 offerors' adjusted costs.

This continued turnover in positions among offerors evidences the seriousness of the flaws in the cost realism analysis. Given the number of questions raised concerning the original and subsequent evaluations, and the various "debriefings" of and "clarifications" from the offerors, had we sustained HLA's or ERM's protest, we would have recommended relief similar to that proposed by the agency. Since the proposed corrective action is appropriate for the deficiencies alleged, no useful purpose would be served by further consideration of the protests, and thus, they are academic. Maytag Aircraft Corp.--Recon.; Claim for Protest Costs, 69 Comp Gen. 83, supra.

ICF also contends that it is inappropriate for the agency to allow the 14 contractors to continue performance pending the outcome of evaluation of BAFOs, especially since it believes it would also be entitled to the 15th award. First, we note that based on the last reevaluation performed by the agency, ICF would no longer be in line for award. Thus, it would suffer no prejudice from the continued performance of the 14 contracts. Second, where, as here, an agency has made the appropriate written determination of urgent and compelling circumstances and notified our Office, it has complied with the requirements of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (1988). Our Office does not review such determinations and we perceive no reason to do so here based on the circumstances of this case.

The requests for reconsideration are denied.

Robert M. Strong
Associate General Counsel