

Perry



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Adrian Supply Company
File: B-241502; B-241504; B-241504.2
Date: February 7, 1991

Peter F. Garvin, III, Esq., and Rosemary Maxwell, Esq., Jones, Day, Reavis & Pogue, for the protester.
Kathryn L. Breslin for North Coast Electric Co., an interested party.
Harriet C. R. Wright, Esq., and Douglas P. Larsen Jr., Esq., Department of the Navy, for the agency.
Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting officer's decision to cancel a negotiated procurement because of doubt as to price reasonableness was not unreasonable where only one proposal is received, the items being procured are not commercially comparable and recent specification changes render government estimate unreliable and past procurements not comparable.
2. Although protester's allegation that agency's justification for limiting competition to two sources was based upon an urgent need that was primarily the result of a lack of advance planning is correct, protest is denied where protester, as one of the sources solicited, was not prejudiced thereby.
3. Awardee need not submit certified cost and pricing data where award is based on adequate price competition.

DECISION

Adrian Supply Company protests the cancellation of request for proposals (RFP) No. N00406-90-R-1141 (RFP-1141), and the award of a contract to North Coast Electric Company under RFP No. N00406-90-R-1282 (RFP-1282), both issued by the Department of the Navy for two 7500 KVA portable transformers/substations for the Puget Sound Naval Shipyard. Adrian alleges that the Navy's cancellation of RFP-1141 lacked a rational basis and that the award of a contract under RFP-1282, issued under

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other than full and open competitive procedures violated the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(f)(5)(A) (1988).

We deny the protest.

RFP-1141, issued August 3, 1990, was a reprocurement for items to be supplied under an earlier contract that was awarded to North Coast, at a price of \$1,429,000, but which was terminated for the convenience of the government when it was discovered that relaxed specifications would both meet the government's needs, and potentially result in costs savings of an amount between \$300,000 and \$400,000.^{1/} Essentially, the change in specifications concerns the switch gear, which was required to be metal clad, but now must only be metal enclosed.^{2/}

Although 16 known sources were solicited, and the procurement was synopsized in the Commerce Business Daily (CBD), only Adrian submitted a proposal by RFP-1141's closing date of September 4. Adrian's offer for the two transformers was \$1,296,954, with a delivery of 360 days.^{3/} Technical discussions between Adrian and the agency followed in which certain exceptions which Adrian had taken to the specifications were resolved; Adrian's technical proposal was therefore considered acceptable.

Since it had received only one proposal, on September 14 the agency determined that adequate price competition did not exist, and pursuant to Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 215.804-3(b)(2), the contracting officer requested that Adrian submit certified cost or pricing data, a standard form (SF) 1411, to be

^{1/} The award was subject to a prior protest filed by Adrian, Adrian Supply Co., B-237531, Feb. 12, 1990, 90-1 CPD ¶ 182, wherein we denied its protest that the Navy had improperly permitted North Coast to deviate from mandatory requirements of the specifications.

^{2/} This change reflects a modification in the American National Standards Index (ANSI) for this type of equipment.

^{3/} Adrian was the only other offeror under the prior solicitation which resulted in an award to North Coast. Under the more stringent requirements of that solicitation, Adrian offered the two transformers for a price of \$1,667,250; this is \$370,269 higher than its offer under RFP-1141.

verified by an audit, and a certificate of commercially comparable pricing, an SF 1412. On September 17, Adrian submitted only the certified cost and pricing data, and informed the agency that its product was not a commercial item and, therefore, it could not complete the SF 1412.

The contracting officer determined that given the lack of commerciality and adequate price competition, he could not determine whether Adrian's price was fair and reasonable without an audit to verify the accuracy of Adrian's cost and pricing data. The contracting officer concluded that since it was not possible to complete an audit before the end of the fiscal year on September 30, when the funds for the project would expire, he had no choice but to cancel the procurement. Consequently, on September 20, the contracting officer issued amendment No. 3 canceling RFP-1141.

Three working days later, on September 25, the contracting officer was informed by the shipyard that a hazardous safety condition necessitated the immediate acquisition of the 7500 KVA transformers. This hazard had been identified in the shipyard's July/August readiness report and came to fruition in a fire which occurred on August 23 but apparently was not taken into account by the contracting officer earlier. As a consequence of this "urgent" need, the contracting officer telephoned Adrian and North Coast on September 25, to determine whether they would each compete under an urgent oral solicitation.

During the morning of September 26, the Navy orally issued RFP-1282 with a closing date of 1 p.m. that day, informing both Adrian and North Coast that the terms of RFP-1282 were identical to those of RFP-1141. Both Adrian and North Coast submitted timely offers. North Coast proposed to deliver the two transformers in 180 days at a price of \$1,118,750, and Adrian proposed to deliver the transformers in 360 days at a price of \$1,296,954, the exact terms Adrian had offered under RFP-1141. As both offerors were determined to be technically acceptable, award based on initial proposals was made to North Coast on September 27, since it was the low, technically acceptable offeror with the best delivery terms.^{4/}

Adrian challenges both the cancellation of RFP-1141 and the award of a contract to North Coast under RFP-1282 in a protest filed in our Office on October 5, and supplemented by additional grounds on October 25.

^{4/} Although RFP-1411 included a "desired" delivery schedule of 300 days after the date of the contract, there was no mandatory delivery schedule included as part of RFP-1141 or RFP-1282.

RFP-1141

Adrian contends that the contracting officer's determination to cancel RFP-1141 on the ground that the agency was unable to determine before the end of the fiscal year whether Adrian's price was fair and reasonable lacked a reasonable basis.^{5/} The protester argues that the information possessed by the contracting activity was sufficient to conclude that Adrian's offer was fair and reasonable. Specifically, the protester alleges the following information available to the contracting officer demonstrated the reasonableness of Adrian's price: (1) the procurement was conducted under full and open competition; (2) the offers under the earlier procurement were substantially higher, in fact Adrian's price under RFP-1141 was \$370,000 less than its initial offer and \$132,046 lower than North Coast's original offer; (3) the government cost estimate for RFP-1141 was \$1.5 million and; (4) prior procurement history of comparable items revealed higher prices than Adrian's offer.^{6/} Adrian alleges that the only evidence relied upon by the agency in determining that Adrian's price "might not be" fair and reasonable was a "suspicion" that the agency would save between \$300,000 and \$400,000 from North Coast's contract price under the original solicitation. We disagree.

In a negotiated procurement, such as this, the contracting officer has broad discretion in deciding whether to cancel a solicitation; a reasonable basis to do so will suffice. G.K.S. Inc., 68 Comp. Gen. 589 (1989), 89-2 CPD ¶ 117. A finding that all prices received are unreasonable justifies such a determination. Security Fence Co., B-218587, July 22, 1985, 85-2 CPD ¶ 67. The determination concerning price reasonableness involves the exercise of business judgment and is, thus, a matter of administrative discretion that we will

^{5/} The protester also questions whether RFP-1141 was adequately canceled before the award of a contract to North Coast under RFP 1282 was made, since it did not receive a signed copy of the amendment, and the copy it did receive, did not arrive until October 2. The record clearly demonstrates, however, that the solicitation was canceled on September 20, regardless of when Adrian received notice, and at best the contracting officer's failure to sign the copy was a procedural irregularity not prejudicing Adrian.

^{6/} The government estimate was carried over from the original solicitation for these transformers; it was not modified to account for North Coast's contract price or the estimated savings expected due to the relaxed specifications.

not question unless the determination is unreasonable or the protester demonstrates bad faith on the part of the contracting agency. Airborne Servs., Inc., B-221894; B-222046; B-222960, June 4, 1986, 86-1 CPD ¶ 523. The agency may base its determination of price reasonableness upon a comparison with such factors as government estimates, past procurement history, current market conditions, or other relevant factors. Id.

The contracting officer's decision to cancel RFP-1141 was not unreasonable given the lack of adequate price competition and commerciality, and the recent specification change which rendered the government estimate unreliable. The mere fact that RFP-1141 was conducted under full and open competition does not demonstrate that a fair and reasonable price was obtained. Since the agency received only one offer, it was necessary to base a determination that the offered price was fair and reasonable on other information, such as commerciality or an audit. Commerciality was not an option because, according to Adrian, there were no commercially comparable items. Prior procurement history and the government estimate were inadequate bases since the only price experience of the agency was with procurements that used more stringent requirements.

The protester also disputes the agency's conclusion that an audit was necessary to determine whether Adrian's price was fair and reasonable on the ground that the Federal Acquisition Regulation does not permit agencies to have a policy requiring audits in circumstances such as these, but rather the FAR only allows agencies to formulate policies to waive pre-award audits. In support of this argument, Adrian cites FAR § 15.805-5(a)(1), which essentially provides agencies with the authority to exempt or waive an audit in limited circumstances.

We do not find Adrian's interpretation of the FAR provision, or its general proposition in this regard, to be reasonable. Although the regulations do permit a contracting officer to waive an audit, there is no regulation which prohibits agencies from formulating internal policies as to when audits ought to be performed. FAR § 15.805-5(a)(1) merely grants agencies the authority to formulate procedures for waiving audits which might otherwise be required, it does not remove the discretion of the contracting officer to decide when to require such an audit.

Since the contracting officer reasonably determined that waiver of the requirement for an audit was not prudent under these circumstances, and since such an audit could not be completed within the limited timeframe of the availability

of the funds, we find that the contracting officer's determination to cancel RFP-1141 was reasonable. FAR § 15.608(b)(1).

RFP-1282

Adrian alleges that the award of the contract to North Coast under RFP-1282 was improper because the agency: (1) lacked a sufficient justification for limiting competition under RFP-1282, since the "urgency" was the direct result of a lack of advance planning; and (2) failed to notify Adrian of any expedited delivery requirements; and 3) violated FAR § 15.804-2 by failing to require North Coast to submit certified cost and pricing data.^{7/}

While we agree with the protester that the agency's purported justification for the urgent need and corresponding limited competition was the result of a lack of advance planning in that the agency failed to coordinate its needs with the using activity, thus violating 10 U.S.C § 2304(f)(5)(A) (1988), we do not find that Adrian was prejudiced thereby since it was not foreclosed from the competition. We, likewise, do not find prejudice to Adrian to the extent that the agency may have informed North Coast that it desired an early delivery but did not also notify Adrian, since North Coast also offered a substantially lower price, and Adrian has not alleged that its price would have been lower had it been requested to deliver the transformers in half the time it had offered to do so initially. Prejudice is an element of a viable protest, and where no prejudice is shown or is otherwise evident, this Office will not disturb an award even if some technical deficiency in the award process arguably may have occurred. 51 Comp. Gen. 678 (1972); American Mutual Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65.

We further find that the Navy did not violate FAR § 15.804-2 in not requiring North Coast to submit certified cost and pricing data and a verifying audit, because under RFP-1282 there was adequate price competition negating the need for such data and audit analysis. Under FAR § 15.804-3(a) and (b) the contracting officer shall waive the submission of

^{7/} Adrian also alleges that the agency improperly gave North Coast advance notice of the solicitation and improperly permitted North Coast to submit a late proposal. There is no evidence in the record, however, which substantiates either of these allegations.

certified cost and pricing data where there is adequate price competition, which is defined as:

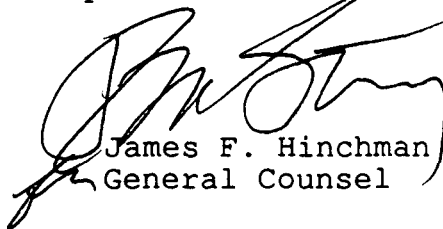
- "(i) Offers are solicited;
- (ii) Two or more responsible offerors that can satisfy the Government's requirements submit priced offers responsive to the solicitation's expressed requirements; and
- (iii) These offerors compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price."

Here, the agency requested and received offers from the only competitors who previously had competed to provide this product to the agency, and determined that North Coast's low offer was fair and reasonable based on adequate price competition. Under these circumstances, we find that the agency satisfied the FAR condition for waiving the requirement for the submission of certified cost or pricing data. See Henry H. Hackett & Sons, B-237181, Feb. 1, 1990, 90-1 CPD ¶ 136.

The protester also alleges that the conduct of the agency in the handling of both RFP-1141 and RFP-1282 demonstrate that it was biased against Adrian. Specifically, Adrian alleges that the agency's real motive for the cancellation of RFP-1141 was that it conducted secret negotiations with North Coast after Adrian's sole proposal had been received and realized that North Coast would submit an offer if given another opportunity. Adrian also alleges that the true motive behind the urgent oral solicitation was that the agency needed to obligate funds before the end of the fiscal year.

There must be very strong proof that an agency has a malicious and specific intent to injure a protester before we may find bad faith or bias. G.K.S. Inc., B-235208, 68 Comp. Gen. 584, supra. Adrian has offered no more than mere speculation as to the motives behind the agency's actions, actions which are subject to other reasonable interpretations, and this does not meet our standard for proving bad faith or bias.

The protest is denied.


James F. Hinchman
General Counsel