

Maeder
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Technical and Management Services Corporation

File: B-242836.3

Date: July 30, 1991

Pamela J. Mazza, Esq., Andrew P. Hallowell, Esq., and Philip M. Dearborn III, Esq., Piliero, Mazza & Pargament, for the protester.

Benjamin Tirabassi for Technical Evaluation Research Inc.; William M. Colon for Venutronix Corporation; Bob Waldron for Research Analysis and Maintenance, Inc.; and Malcolm G. Stewart for Stewart Associates Incorporated, interested parties.

Craig E. Hodge, Esq., and Capt. James McGroary, JAGC, Department of the Army, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly terminated contract for the convenience of the government and reopened negotiations where, shortly after award, the agency reasonably determined that the award had been improperly made because meaningful discussions had not been conducted, and proposals had not been evaluated in accordance with the solicitation evaluation scheme.

2. The reopening of negotiations after the disclosure of an offeror's price does not constitute an improper auction where the reopening was necessary to remedy an improper award.

DECISION

Technical and Management Services Corporation (TAMSCO) protests the termination of its contract for integrated logistics support awarded by the U.S. Army Communications-Electronic Command (CECOM) in Fort Monmouth, New Jersey, under request for proposals (RFP) No. DAAB07-90-R-B802 and the reopening of negotiations under that solicitation.

The protest is denied.

The initial RFP, issued on May 14, 1990, as a small business set-aside, provided for award based on "the best overall proposal which offers the best overall value to the [g]overnment." The RFP listed specific technical and management factors and provided that these technical and management factors were equal in importance and more important than price.

CECOM received nine proposals in response to the RFP; six proposals were included in the competitive range and the offerors were sent letters identifying items for negotiation (IFNs). All six offerors submitted best and final offers by the October 15 due date.

By letter dated October 24, the contracting officer notified all offerors that the apparent successful offeror was TAMSCO, with an evaluated price of \$23,060,181. Following the notification, four offerors challenged the small business size status of TAMSCO to the Small Business Administration (SBA). In December, the SBA held that TAMSCO was a small business concern and, therefore, eligible for award. Two offerors, Stewart Associates, Inc. and Research Analysis and Maintenance, Inc. (RAM), filed appeals of the size determination. Despite the pending appeals, the contracting officer awarded the contract to TAMSCO on January 18, 1991. On January 31, Stewart filed a protest with our Office arguing that the agency should not proceed with the award while the appeals of TAMSCO's size status were pending. We dismissed the Stewart protest on February 25 for failure to state a valid basis for protest.

RAM filed a protest with our Office on February 4, arguing that the award to TAMSCO was improper because the agency did not conduct adequate discussions and did not give appropriate weight to various evaluation factors in making the award. On reviewing the RAM protest, CECOM determined that the procurement had been improperly conducted and that the award was improper. Specifically, CECOM determined that the Source Selection Evaluation Board (SSEB) had improperly issued IFNs only for those factors where an offeror was less than acceptable. Therefore, a number of deficiencies were never discussed with the offerors, and the agency did not conduct meaningful discussions. Further, the SSEB rejected a technically acceptable offer from Venntronix Corporation based on price alone without advising Venntronix that the agency considered its price unrealistically low. The agency also determined that the SSEB did not follow the evaluation criteria listed in the solicitation since "past performance," a listed factor under management, was not evaluated, and other factors were rated in a manner which precluded offerors from receiving a score above "acceptable." Consequently, the

agency terminated TAMSCO's contract for convenience and reopened negotiations with the offerors in the competitive range.^{1/}

TAMSCO contends that the agency's decision to terminate its contract and reopen negotiations was improper because the agency unreasonably determined that prior discussions were inadequate. TAMSCO believes that the problems identified by the agency constitute "harmless error." Accordingly, TAMSCO asserts that the agency was not required to raise the matters in question during the conduct of discussions. In particular, TAMSCO argues that the agency was not required to discuss Venntrox's unreasonably low price since discussions are only required to address deficiencies and not to allow a competitor to become as or more competitive than its competitors.

TAMSCO also argues that the evaluation of the offerors' past performance was not flawed. TAMSCO says that since the agency apparently determined that evaluation of this factor was impossible and all offerors were rated acceptable, all offerors were treated equally. Similarly, TAMSCO argues that the agency's decision to evaluate the hiring and staffing factor so as not to include superior ratings complies with the RFP. TAMSCO concludes that since there was nothing arbitrary or unreasonable about the evaluation, termination was improper.

Finally, TAMSCO contends that reopening the competition after disclosure of TAMSCO's price will result in the use of an auction in violation of Federal Acquisition Regulation (FAR) § 15.610(d)(2)(iii).

Our Office generally does not review an agency's decision to terminate a contract for the convenience of the government, since that is a matter of contract administration which is not within our bid protest function. However, we will review such a termination, where, as here, it is based upon an agency determination that the initial contract award was improper. Norfolk Shipbuilding and Drydock Corp., B-219988.3, Dec. 16, 1985, 85-2 CPD ¶ 667.

FAR § 15.610(b), implementing 10 U.S.C. § 2305(a)(4)(13) (1988), requires that written and oral discussions be held with all responsible sources whose proposals are within the competitive range. Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd on recon., B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. For discussions to be meaningful,

^{1/} We dismissed RAM's protest as academic on March 13 after the agency notified our Office that it was "terminating the awardee's contract and resoliciting the procurement."

agencies must point out weaknesses, excesses, or deficiencies in a proposal unless doing so would result either in disclosure of one offeror's approach or in technical leveling. The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425.

Here, the agency properly concluded that the discussions had not been meaningful. As in Faxon, discussions cannot be meaningful if an offeror is not apprised that the agency considers its price to be unreasonable, and CECOM should have pointed out to Venntrox that its price was unrealistically low. The agency report also shows that where an offeror was rated acceptable under a given factor, there were numerous instances where deficiencies under this factor were not discussed with the offeror. Instead, superior elements in other factors were used to offset the deficiencies, as a result of which the offer remained technically acceptable. The agency's list of additional IFNs show that there were deficiencies in the proposals of all six offerors which were never discussed. If the agency had conducted such discussions, it could have led Venntrox and other offerors to areas of their proposals where they could have improved, thus increasing their possibility of receiving the award. Accordingly, the agency reasonably concluded that meaningful discussions were not conducted.

As to the evaluation of proposals, it is fundamental that agencies must evaluate offers in accordance with the evaluation factors set forth in the solicitation. Irwin & Leighton, Inc., B-241734, Feb. 25, 1991, 91-1 CPD ¶ 208; Mine Safety Appliances Co., 69 Comp. Gen. 562 (1990), 90-2 CPD ¶ 11. Here, the evaluation was not consistent with the evaluation criteria.

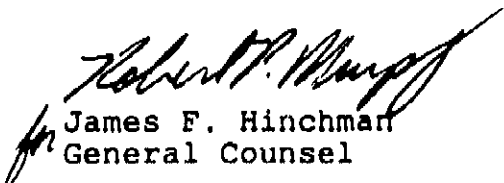
The solicitation indicated that the past performance factor would be evaluated as one of three management factors. The record shows that although the contractors were asked for information concerning past contracts, the data gathered from the contracting officers on these past contracts were ambiguous or irrelevant and could not be used. As a result, the agency simply rated each offeror as acceptable under past performance, rather than following the stated evaluation criteria. Additionally, under the hiring and staffing factor, the SSEB looked only at the quantity and educational level of the personnel offered. If a proposal provided the requested numbers of personnel with the appropriate degrees for each job category, it was given an acceptable rating. No consideration was given to proposals that provided more personnel or personnel with more advanced degrees. Since no evaluation was done on the past performance factor, and the evaluation of the hiring and staffing factor was flawed, CECOM reasonably concluded that the evaluation was not performed in accordance with the RFP criteria. In view of the failure to conduct

meaningful discussions and of the improper evaluation, CECOM reasonably determined that the award was improper and properly terminated TAMSCO's contract.

With regard to TAMSCO's contention that the termination of its contract and the reopening of discussions were improper because its price has been exposed, where, as here, termination and reopening of discussions are otherwise proper, prior disclosure of an offeror's price does not preclude reopening discussions. Republic Realty Servs., Inc., B-242629, May 8, 1991, 91-1 CPD ¶ ____; The Faxon Co., Inc., 67 Comp. Gen. 39, supra; Sperry Corp., 65 Comp. Gen. 715 (1986), 86-2 CPD ¶ 48.

TAMSCO requests reimbursement of all costs and attorneys' fees it has incurred as a result of CECOM's mishandling of this procurement, including costs incurred in pursuit of this protest. Our Regulations permit the recovery of costs only where a protest is found to have merit. 4 C.F.R. § 21.6(b) (1991). Since the termination for convenience and the reopening of discussions were proper, there is no legal basis for recovery of protest costs. Concord Analysis, Inc., B-239730.3, B-241009, Dec. 4, 1990, 90-2 CPD ¶ 452.

The protest and the claim for costs are denied.


for James F. Hinchman
General Counsel