Dr. George

145245

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Schreiner, Legge & Company

File: B-244680

Date: November 6, 1991

Ross W. Dembling, Esq., and Daniel S. Koch, Esq., Kurz, Koch & Doland, for the protester.
Benny R. Henson, National Credit Union Administration, for the agency.
Steven W. DeGeorge, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where contracting agency made awards based on initial proposals to other than the lowest overall cost offeror, who was technically acceptable.

DECISION

Schreiner, Legge & Company protests the award of several contracts under request for proposals (RFP) No. NCUA-91-R-0002, issued by the National Credit Union Administration (NCUA)[1] for audit services.

The protester contends that the agency improperly failed to consider price in determining the competitive range and in making the awards. The protester also argues that the

[1]NCUA is an independent agency within the executive branch, 12 U.S.C. § 1752a(a), and is thereby subject to our bid protest jurisdiction. See Computer Support Sys., Inc., 69 Comp. Gen. 644 (1990), 90-2 CPD ¶ 94. NCUA does not, however, conduct its acquisitions pursuant to the Federal Property and Administrative Services Act, 41 U.S.C. § 251 et seq. (1988), which the Federal Acquisition Regulation (FAR) implements. The agency conducts its acquisitions pursuant to separate statutory authority. See 12 U.S.C. § 1766(i)(2) (1988). NCUA's stated policy is that "the NCUA shall comply with the Federal Acquisition Regulation, and all other applicable requirements in procuring goods and services" with certain exceptions. We will therefore apply the applicable FAR provisions in deciding this protest. See Tolen Info. Servs., B-240979; B-240981, Dec. 21, 1990, 90-2 CPD ¶ 518.

evaluation of proposals was improper and that one of the awardees should have been excluded from the competition.

We sustain the protest on the ground that the agency made the awards based upon initial proposals to other than the lowest overall cost offerors.

The RFP, issued on March 28, 1991, sought proposals for independent third party audits of vendors providing information system products and services to credit unions operating under the authority of NCUA. The RFP contemplated the award of one or more fixed-price indefinite quantity contracts for a base and 2 option year periods.

The RFP stated that award would be made based upon the offer or offers deemed most advantageous to NCUA, price and other factors considered. In this regard, the RFP identified four technical evaluation factors with cumulative assigned weights of 75 points. The RFP further assigned a weight of 25 points to price and stated that total technical and price scores would be consolidated to determine overall scores for each of the offerors.

NCUA received 17 proposals in response to the solicitation. Each proposal was point scored under the technical evaluation factors of the RFP and ranked in accordance with the total scores assigned. Total scores ranged from 9 points for the lowest ranked offeror to 75 points for the highest ranked offeror. On the basis of this evaluation, NCUA awarded contracts to the top five offerors based upon their initial proposals. The technical evaluation point scores and prices for these offerors were as follows:

Coopers & Lybrand	75 points	$90,772
Price Waterhouse	72 points	$77,536
Crowe, Chizek & Co.	70 points	$72,500
DeLoitte & Touche	70 points	$71,080
McGladrey & Pullen	70 points	$87,000

The protester proposed a price of $65,000 and received 59 points in the technical evaluation.

From the record, it is apparent that NCUA did not consider price in making award to the top five technically rated offerors. Price scores were not assigned. The agency reports that it determined a "competitive range" based solely upon a cut-off of 70 points in the technical evaluation. Further, no discussions were held and no offeror was determined technically unacceptable.

The protester first argues that NCUA improperly failed to consider price in establishing the competitive range. While the protester is correct in questioning the agency's failure

to consider price, it is apparent from the record that since no discussions were held nor best and final offers (BAFO) requested, for practical purposes, no competitive range was established. Instead, NCUA made award on the basis of initial proposals to the five highest technically ranked offerors without consideration of price.

Under Federal Acquisition Regulation (FAR) § 15.610(a)(3), a contracting agency may make award on the basis of initial proposals where the competition or prior cost experience demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government.[2] Where, however, it appears that acceptance of an initial proposal will not result in the lowest overall cost to the government, the agency is not free to award on an initial proposal basis, but instead must conduct discussions in an attempt to obtain the lowest overall cost or otherwise determine the proposal most advantageous to the government. AMP, Inc., B-239287, Aug. 16, 1990, 90-2 CPD ¶ 131. Stated differently, an agency is precluded from making award on the basis of initial offers to any firm other than the one offering the lowest overall cost, if the low offeror is technically acceptable or susceptible of being made acceptable. Tolen Info. Servs., supra.

Here, the record shows that the protester offered a lower price than each of the firms awarded contracts on their initial proposals. Furthermore, while the contracting officer states in his protest report that "the protester's technical proposal had no reasonable chance of winning" based upon its score of 59, there is nothing in the evaluation record to indicate that NCUA found the protester technically unacceptable. Under these circumstances, we conclude that the awards were improper. Because we sustain the

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[2]After the awards were made in June 1991, the applicable FAR provisions at § 15.610 were changed to provide that for the Department of Defense, the Coast Guard and the National Aeronautics and Space Administration award may be made without discussions if the proper notice is contained in the solicitation and the contracting officer determines that discussions are not necessary. An award need not result in the lowest cost to the government. Thus, under the amended regulation, the awards may be proper even if made to other than the low offerors. Nevertheless, even if the procurement was conducted under the current regulation, the awards here would have been improper because they were made without consideration of price and FAR § 15.605 requires that price or cost be considered in every source selection. See Ball Technical Prods. Group, B-224394, Oct. 17, 1986, 86-2 CPD ¶ 468.

protest on this basis, we find it unnecessary to address the protester's other contentions.

Since the protest was not filed within 10 days of the awards, performance of the contracts was not suspended and the entire base year has been performed as well as part of the initial option year. We recommend that the remainder of the requirement be resolicited, and if after the evaluation of proposals in accordance with the applicable regulations NCUA determines that one or more awards should be made to firms other than the current awardees, we recommend that the contract or contracts be terminated and award made to the appropriate firm or firms. In addition, we find the protester entitled to recover its proposal preparation costs and the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).

The protest is sustained.

for Comptroller General
of the United States