B-244522.3

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hadson Defense Systems, Inc.--Reconsideration

File: B-244522.3

Date: September 24, 1992

Joseph J. Dyer, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.
M. Penny Ahearn, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency selection of firm-fixed-price contract type for reprocurement of electronic training devices was reasonable where majority of required work involved nondevelopmental hardware and agency could reasonably expect to be able to determine price reasonableness.

2. Protest of agency specification of 24-month delivery schedule for reprocurement of electronic training devices is denied where agency determined schedule is necessary to satisfy its minimum needs and schedule does not preclude obtaining maximum practicable competition.

DECISION

Hadson Defense Systems, Inc. requests reconsideration of our decision Hadson Defense Sys., Inc.; Research Dev. Labs., B-244522; B-244522.2, Oct. 24, 1991, 91-2 CPD ¶ 368, in which we denied in part and dismissed in part Hadson's protest against the terms of the Department of the Army's request for proposals (RFP) No. DAAB10-91-R-1035, for computer-controlled maintenance training devices for electronic warfare tactical jamming systems. Hadson argues that part of its protest relating to the contract type and delivery schedule, which we dismissed as untimely, was in fact timely filed.

On reconsideration, we reverse our decision dismissing these bases of protest, but deny them on the merits.

BACKGROUND

The RFP is a reprocurement of the requirement under a prior contract awarded to Hadson's predecessor, Ultrasystems Defense and Space, Inc., which the government terminated for default due to inadequate progress in contract completion. Prior to the issuance of the competitive procurement here, the Army had intended to negotiate a sole-source requirements contract with Unisys Corporation; it canceled that procurement, after a protest by Hadson, when it could not determine whether Unisys' proposal price was fair and reasonable.

TIMELINESS

In its protest of the terms of this RFP, Hadson argued that the provision for award of a firm-fixed-price contract and the stated delivery schedule were restrictive of competition. We dismissed these bases of protest as untimely on the belief that Hadson had not protested these aspects of the solicitation until after the closing date for receipt of initial proposals, which would have rendered the protest of these issues untimely under our Bid Protest Regulations, 4 C.F.R. 21.2(a)(1) (1992). In fact, however, the agency had extended the closing date by amendment and Hadson protested these alleged deficiencies in the solicitation prior to the amended closing date for receipt of initial proposals. Consequently, its protest in this regard was timely and we will therefore consider these issues on their merits. 4 C.F.R. § 21.12(a).

FIRM-FIXED-PRICE CONTRACT TYPE

Hadson objects to the use of a firm-fixed-price contract and argues that the contract effort instead should be undertaken on a cost reimbursement basis due to the developmental nature of the required work. Hadson argues that a fixed-price contract type hinders competition by firms other than Unisys, which has previously performed similar work for the government and therefore has a more reliable basis upon which to estimate costs and calculate a fixed price.

Generally, the selection of a contract type is in the first instance the responsibility of the contracting agency; our role is not to substitute our judgment for the contracting agency's, but instead to review its actions for compliance with applicable statutes and regulations. Spectrum Technologies, Inc., 69 Comp. Gen. 703 (1990), 90-2 CPD ¶ 196; Todd Pacific Shipyards Corp., B-242311, Mar. 29, 1991, 91-1 CPD ¶ 337. The Federal Acquisition Regulation (FAR) sets forth several factors a contracting officer should consider in selecting the contract type, including the type and complexity of contract requirements and the

availability of adequate price competition. FAR § 16.104. The FAR provides that a firm-fixed-price contract is suitable for acquiring supplies or services on the basis of reasonably definite specifications where the contracting officer can establish fair and reasonable prices, such as when there is adequate price competition, or when performance uncertainties can be identified, and reasonable estimates of their cost impact can be made. FAR § 16.202-2. Indeed, where the risks involved are minimal or can be predicted with an acceptable degree of certainty, FAR § 16.103(b) requires the use of firm-fixed-price contracts.

In the case of a reprocurement after default, as here, the statutes and regulations governing regular federal procurements are not strictly applicable. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198. To repurchase the same requirement on a defaulted contract, the contracting agency may use any terms and acquisition methods deemed appropriate for the repurchase as long as competition is obtained to the maximum extent practicable, and the repurchase is at as reasonable a price as practicable. FAR § 49.402-6; Aerosonic Corp., 68 Comp. Gen. 179 (1989), 89-1 CPD ¶ 45. We will review a reprocurement to determine whether the contracting agency proceeded reasonably under the circumstances. TSCO, Inc., supra; National Med. Staffing, Inc., B-239695, Sept. 14, 1990, 90-2 CPD ¶ 212.

Here, we find that the contracting officer reasonably based his selection of a firm-fixed-price contract on the criteria set forth in FAR § 16.104, and that there is no indication that this precluded competition to the maximum extent practicable. While it appears that the contract effort indeed involved some degree of pricing uncertainty, the agency determined that these uncertainties were not so great as to preclude a fixed-price contract type. Specifically, the contracting officer determined that the majority of the contract effort was not primarily research and development for which a cost reimbursement contract would have been appropriate, but instead involved primarily nondevelopmental hardware, encompassing existing technology. In this regard, the contracting officer reports that the contract effort does not require the contractor to create a prime system, but, rather, a system replicator for purposes of maintenance training. The agency determined that this was not the kind of highly developmental effort that might inject unacceptable uncertainties into contract pricing, but also noted that, to the extent that some developmental effort was involved, software design represents less than half of the total dollar value of the contract.

Hadson refutes neither the agency's explanation as to the nondevelopmental nature of most of the required work, nor the agency's position that the limited software design did

not involve complex performance uncertainties which would make it difficult for offerors to estimate costs in advance. Moreover, the fact that four technically acceptable proposals ultimately were received, and that no other offerors have claimed to be unable to develop a fixed price, tends to support the agency's position. Since there is nothing else in the record showing that the agency's conclusions are incorrect, and given the nature of this acquisition as a reprocurement, we have no basis to question the agency's judgment that the contract effort did not involve uncertainties so great as to preclude use of a fixed-price contract (which was the type used previously in the award to Hadson). Nor do we have any reason to find that a fixed-price contract would result in a competitive advantage for Unisys, beyond that possessed by the firm due to its prior contract experience.

The contracting officer also determined that fair and reasonable prices could be expected. We think it follows from the agency's determination that the effort contemplated under the contract is not essentially developmental in nature and that a fixed price reasonably can be estimated, that the prices received could be expected to be fair and reasonable. We do not agree with Hadson that the fact that the RFP requested certified cost or pricing data (on the SF 1411 "Contract Pricing Proposal Cover Sheet") demonstrates otherwise. Although the Truth in Negotiations Act, 10 U.S.C. § 2306a (1988), which mandates submission of cost data for negotiated contracts in excess of $100,000, exempts contracts awarded with "adequate price competition," see 10 U.S.C. § 2306a(b)(1)(A) and FAR § 15.804-3(b), agencies are not precluded from requesting the submission of such data even where it is not required. See generally Contract Servs., Inc., B-232689, Jan. 23, 1989, 89-1 CPD ¶ 54. The agency determined that fair and reasonable prices were likely to be received. That determination was not undermined by the agency's requesting data to provide an alternate means for evaluating prices in the event this likelihood did not occur. We conclude that the agency properly conducted this reprocurement on a firm-fixed-price basis.

DELIVERY SCHEDULE

Contracting officials determined that delivery of the training devices within 24 months was necessary to satisfy the agency's minimum needs. Hadson does not specifically dispute the agency's assessment of its needs, but instead argues that the 24-month delivery schedule is insufficient to permit competition by any company other than Unisys. In support of its position, the protester cites a statement in the agency's draft justification and approval (J&A) for the canceled sole-source procurement with Unisys that it would

take any company except Unisys a total of 30-36 months to meet the requirements.

We find no basis on which to object to the required delivery schedule. As we stated in our initial decision with respect to Hadson's protest of the proposal due date, we agree with the Army that the sole-source cancellation and the determination to proceed with a competitive procurement was inherently a recognition that the time schedules set out in the J&A were inaccurate and that other offerors could in fact compete within shorter schedules. In this regard, the Army's determination to cancel was based in part on the existence of the firms which protested the sole-source procurement to our Office, representing that they were prospective offerors.

Further, since the RFP did not preclude an offer of an alternate delivery schedule, we do not believe that competition was so restricted by the delivery schedule that Hadson could not have submitted an offer. Indeed, the contracting officer specifically notified offerors in writing that proposals for alternate delivery schedules could be submitted and would be considered if it was determined that the solicitation schedule could not be met within a reasonable degree of risk. Consequently, Hadson could have submitted an offer with the delayed delivery schedule it contends was necessary. See Pulse Elecs., Inc., B-243769, Aug. 2, 1991, 91-2 CPD ¶ 122. Moreover, the agency in fact received four technically acceptable proposals, offering the required or earlier delivery schedule. In our view, nothing in the record establishes that the delivery provisions of the solicitation exceeded the agency's needs or precluded obtaining maximum practicable competition.

ACCESS TO DATA

Finally, Hadson requests reconsideration of our dismissal of the firm's protest that the Army failed to provide offerors on the reprocurement with certain technical information provided to Unisys. We dismissed this basis of protest as academic, since Hadson already possessed a portion of the information complained of, known as SEOS data, which was developed by Unisys under a prior contract with the Army. Hadson obtained the data from the Army as government-furnished information under the firm's defaulted contract. As for the remainder of the information at issue, that is, the discussion questions and answers posed to Unisys during the canceled sole-source procurement, all additional information conveyed about the requirement was released to Hadson by the agency during the pendency of the protest.

In its reconsideration request, Hadson contends that our decision contained an error of fact in concluding that the Army did not furnish Unisys additional information not furnished to the other offerors. Hadson believes that there are other documents which were provided to Unisys, but not the remaining offerors. Hadson states that it was granted access to these documents in connection with its appeal of the legal propriety of the default termination of its contract before the Armed Services Board of Contract Appeals (ASBCA). However, according to Hadson, because the documents at issue are under an ASBCA protective order the firm is prevented from discussing them. Hadson nevertheless requests that we direct the Army to make the "requested documents" available.

We will not consider this matter on reconsideration. Hadson's protest filings neither identified nor requested specific documents other than the SEOS data and the discussion questions and answers posed to Unisys during the canceled sole-source procurement. Although Hadson notified our Office that it was attempting to obtain release of protected documents from the Army, it did not identify these documents or request disclosure. The fact that additional relevant documents may have been available under an ASBCA protective order did not prevent the protester from identifying and requesting these documents during the pendency of its protest before our Office. Hadson was obligated to identify and request during its initial protest any information under the agency's control which the firm believed would support its protest. Failure to do so undermines the goals of our bid protest forum to provide fair and equitable decisions based on consideration of both parties' arguments on a fully developed record and cannot justify reconsideration of our prior decision. See Raytheon Co.; et al.--Recon., B-242484.2; B-242484.3, Aug. 6, 1991, 91-2 CPD ¶ 131.

To the extent that Hadson continues to contend that there were additional discussion questions and answers posed to Unisys which conveyed additional information on the requirement other than those released by the agency, mere disagreement with our assessment does not provide a basis for us to reconsider our decision. 4 C.F.R. § 21.12(a); R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

Upon reconsideration, Hadson's protest concerning the contract type and delivery schedule is denied, and Hadson's request for reconsideration otherwise is denied.

James F. Hinchman
General Counsel