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

Decision

Matter of: Sierra Technologies, Inc.

File: B-251460; B-251460.2

Date: December 21, 1992

Thomas F. Daley, Esq., for the protester.
Josie C. Serracin, Esq., Department of Navy, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that agency breached an implied-in-fact contract to maintain a split award approach to procuring computer systems is dismissed since a contractor's rights under an existing contract are a matter of contract administration beyond the scope of our bid protest jurisdiction.

2. Argument that agency did not evaluate offers properly because it awarded a contract to the lowest-priced offeror fails to state a valid basis for protest where agency was holding a price competition; the solicitation reserved the right to make one award, split awards, or no award--depending on what was most advantageous for the government; and the low-priced offeror's price for 100 percent of the agency's needs was 35 percent (more than $20 million) less than the lowest overall price for split awards.

DECISION

Sierra Technologies, Inc. protests the award of a contract to Rockwell International Corporation under request for proposals (RFP) No. N00024-92-R-5223(S), issued by the Department of the Navy for the production of the Navy's Data Multiplex System (DMS). Sierra argues that the Navy breached an implied contract to continue dual sourcing of the DMS program, failed to follow the stated evaluation criteria in selecting Rockwell, and conducted a flawed evaluation because Rockwell was permitted to unfairly manipulate its pricing to ensure that it would be the low-priced offeror.

We dismiss the protests.

BACKGROUND

Since early 1987, the Navy has apparently engaged in discussions with Sierra about participating in DMS procurements--described by the Navy as "a complete ship's information transfer system"--as a second source for the DMS in addition to Rockwell. In its protest filing, Sierra details numerous meetings and written exchanges to this effect. To date, however, Sierra states that it has provided only one DMS to the Navy.

In the instant procurement, the Navy issued a draft RFP to Rockwell and Sierra on June 5, 1992. Upon receipt of the draft RFP, Sierra asked the Navy--by letters dated June 17 and June 22--to consider restructuring the RFP to avoid the possibility that Rockwell would be able to unfairly manipulate its pricing to assure that it would be the low-priced offeror. In Sierra's words, the draft RFP presented too much risk that Rockwell could engage in "gaming" the procurement.

On August 26, the Navy issued the solicitation with some restructuring of the pricing alternatives as suggested by Sierra. Nonetheless, paragraph M.1.a. of the RFP stated that the Navy would make award based on price, and--depending on which choice was most advantageous to the government--advised that it would either: (1) award 100 percent of its requirements to one source; (2) split the requirement and make two awards; or (3) make no award. In addition, paragraph M.1.f. of the RFP offered the following guidance on how the Navy would choose to make award:

> "In the event of a split award, the [g]overnment may be willing to incur an additional cost to maintain two sources if the amount of such additional cost is reasonable. However, if the additional cost associated with making two awards is excessive; if the proposed prices are not reasonable, consistent or balanced; or if only one [o]fferor is responsive to the requirements of the RFP; the [g]overnment reserves the right to make award to one [o]fferor or not to make award."

With respect to the possibility of split awards, the RFP requested prices from each offeror for 100 percent of the Navy's DMS requirement, and for each of four different split award alternatives.

On October 9, both Rockwell and Sierra submitted proposals. Upon review, the Navy determined that the lowest price resulted from award of all of the DMS units to Rockwell, and that splitting the award would result in paying an excessive

price premium. The Navy based this conclusion on the fact that the lowest-priced split award combination was more than 35 percent higher than Rockwell's price for 100 percent of the requirement. (In dollar terms, the lowest-priced combination exceeded Rockwell's "all-or nothing" price by more than $20 million.) As a result, on November 16, the Navy awarded a contract to Rockwell for 100 percent of the DMS requirement. This protest followed.

DISCUSSION

With respect to Sierra's claim that the Navy breached an implied contract to continue using dual sources in procuring the DMS, Sierra raises an issue we will not consider. Even if Sierra is correct in its assertion that the Navy has acted in a way that created an implied-in-fact contract to split its awards for the DMS, a contractor's rights under an existing contract are a matter of contract administration beyond the scope of our bid protest function. 4 C.F.R. § 21.3(m)(1) (1992); Atlantic Research Corp., B-247650, June 26, 1992, 92-1 CPD ¶ 543.

With respect to Sierra's claim that the Navy did not follow the stated evaluation criteria in the solicitation, Sierra has failed to state a basis for protest. In this regard, even though Sierra wraps its complaint in a challenge to the evaluation, Sierra's objection is that the agency chose to award only one contract, and chose to award that contract to the low-priced offeror.

Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds of the protest, 4 C.F.R. § 21.1(c)(4), and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(e). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Robert Wall Edge--Recon., 68 Comp. Gen. 352 (1989), 89-1 CPD ¶ 335.

Sierra's protest lacks a valid basis because Sierra concedes that section M of the RFP only stated that the Navy may be willing to award dual contracts, but did not promise to do so, and concedes that the Navy reserved the right to award to the lowest-priced offeror. In addition, Sierra does not dispute the Navy's conclusion that the premium for a dual award, rather than a single award to Rockwell, exceeded 35 percent. Since Sierra concedes that the Navy expressly reserved the right to take the actions it has taken, Sierra cannot now argue that the agency acted improperly, or that the contracting officer abused his discretion. Therefore, this contention is dismissed for lack of a valid basis. See 4 C.F.R. § 21.3(m).

In a supplemental protest, filed after the debriefing, Sierra repeats its arguments regarding the alleged implied-in-fact obligation of the Navy to continue splitting its awards for the DMS procurements. In our view, this assertion is again anchored in a complaint that the agency chose to award to the lowest-priced offeror and to avoid a dual award resulting in a $20 million premium. As stated above, we do not have jurisdiction over claims against agencies for breach of contract, and, in any event, Sierra is basically arguing that the Navy chose to do something that it expressly reserved the option to do in the solicitation.

Within Sierra's complaint that it was improper for the Navy to award to the low-priced offeror is the contention that the agency somehow acted unreasonably in determining that the premium for awarding more than one contract was excessive, and that the Navy failed to determine that Rockwell's offer met the evaluation requirement that prices be consistent and balanced. According to Sierra, the Navy should have prepared an advance position setting forth its views on what kind of price premium would be considered excessive and what kind of pricing approaches would be considered consistent and balanced.

In our view, neither of these complaints suggests that the Navy's determination was unreasonable. In the first instance, we are aware of no requirement that agencies compute in advance the level of prices they will not accept. The Navy's determination not to pay a premium in excess of $20 million on a $55 million procurement is not rendered unreasonable because the Navy did not compute in advance how much premium was too much. The same rule applies with respect to the agency's decision to accept Rockwell's proposed "all or nothing" price. Although Sierra does not clearly explain what about Rockwell's price Sierra believes is inconsistent or unbalanced, we note that it is routine for offerors to have a lower per unit price when they can provide a greater number of items. The fact that the Navy did not establish in advance what it would consider unbalanced does not make the agency's affirmative acceptance of Rockwell's price unreasonable.

Finally, Sierra's contention in its supplemental protest--that the Navy permitted Rockwell to structure its pricing in such a way that Rockwell's "all or nothing" offer for the DMS would be the low-priced offer--is untimely. Sierra questioned the fairness of the draft RFP in an exchange of letters between Sierra and the contracting officer prior to the issuance of the final solicitation. As a result, while preparing the final version of the RFP, the Navy accepted some of Sierra's recommendations while rejecting others. If Sierra believed further changes were necessary to increase the fairness of the competition, it should have raised those

issues then, not after award to Rockwell. By not raising these issues prior to submission of proposals and by waiting until after award to Rockwell, these arguments are now untimely. 4 C.F.R. § 21.2(a)(1).

The protests are dismissed.

Robert M. Strong
Associate General Counsel