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Comptroller General  
of the United States

Washington, D.C. 20548

REDACTED VERSION

# Decision

**Matter of:** Potomac Research, Inc.

**File:** B-250152.8; B-250152.11

**Date:** July 22, 1993

Kenneth S. Kramer, Esq., and Jordan S. Fried, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester. Thomas T. Basil, Esq., Department of the Navy, for the agency.

John Van Schaik, Esq., and Glenn Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Agency properly found protester's offer to be technically unacceptable because it posed an unacceptable performance risk to the government where protester offered [deleted].

2. An agency has no obligation to reopen negotiations so that an offeror may remedy defects introduced into a previously acceptable proposal by a best and final offer since the offeror assumes the risk that changes in its final offer might raise questions about its ability to meet the requirements of the solicitation.

## DECISION

Potomac Research, Inc. (PRI) protests the award of a contract to any other firm under request for proposals (RFP) No. N61339-92-R-0022, issued by the Department of the Navy for system engineering support services.

We deny the protest.

The RFP, which was issued as a small business set-aside, contemplated the award of a firm, fixed-price indefinite quantity contract under which the agency would negotiate

The decision issued on July 22, 1993, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

time-and-materials delivery orders during a base year and 4 option years. The RFP stated that award would be made to the offeror whose proposal represented the best value to the government. Offerors were to submit technical, price and management proposals; technical merit was considered slightly more important than price, which was slightly more important than management. To be considered for award, the RFP stated that a proposal was required to be acceptable in all three areas.

The RFP stated that the Navy would evaluate technical proposals based on an analysis of three subfactors, listed in descending order of importance: personnel qualifications, program management, and labor rates. Under the labor rates subfactor, the RFP cautioned that proposed rates would be considered as a technical evaluation item and that "an offer based on unreasonably low rates, or which propose uncompensated overtime for key technical positions, may be technically downgraded due to performance risk." The RFP also stated that an offeror proposing unrealistically low rates may be required to, among other things, (1) demonstrate that it understands the requirement for which those rates are proposed; (2) address its ability to provide the required caliber of labor and support; or (3) demonstrate its capability to absorb the cost differential between the rates proposed and the probable real cost needed to meet the agency's requirements. In addition, the RFP stated that the government fully expects to order the effort under low priced labor categories and that the contractor's performance would be carefully assessed to ensure that the appropriate caliber of support is provided.

The Navy received proposals from six firms, including PRI, Metters Industries, Inc., Enzian Technology, Inc., and Sherikon, Inc. Following its evaluation of the proposals, the Navy awarded a contract to Sherikon.

Enzian, whose proposal was found to be technically unacceptable, protested the award to Sherikon. Enzian argued that its proposal was improperly found to be technically unacceptable as a result of the agency's use of evaluation criteria which were not in the RFP. After evaluating Enzian's protest, the Navy advised all offerors that it had concluded that ambiguities existed in the RFP, and that it would be in the government's best interest to reopen the competition to all offerors, amend the RFP to clearly state its requirements, conduct discussions and receive best and final offers (BAFO). The Navy advised the offerors that the results of this process would determine whether Sherikon would remain the contractor or whether that firm's contract would be terminated and new contract awarded.

Sherikon protested the Navy's corrective action, arguing that there were no ambiguities in the RFP and, even if there were, Enzian was not prejudiced by them. We denied Sherikon's protest. Sherikon, Inc., B-250152.4, Feb. 22, 1993, 93-1 CPD ¶ 188.

The Navy conducted discussions with the six offerors concerning their proposals and requested BAFOs. In its BAFO, PRI proposed labor rates that were [deleted] specifically, PRI [deleted] of the 52 labor categories in each of the option years. For example, although its initial proposal included a burdened hourly rate of [deleted], PRI's BAFO proposed to provide the [deleted], described by the RFP as one of the "key personnel," [deleted]. In addition, for some option years, PRI's BAFO included a rate of [deleted] PRI's BAFO also offered [deleted] and, in fact, proposed [deleted] for all labor categories from the base year to the first option year and in some later option years.

After receipt of the BAFOs, the Navy asked PRI to verify that arithmetic errors had not been made in determining its BAFO rates. PRI confirmed that the rates submitted were the rates intended.

Although PRI's initial proposal had previously received a technical rating of "acceptable," the technical evaluators downgraded that rating to "marginal" as a result of the [deleted]. Ultimately, the source selection authority determined that PRI's BAFO was technically unacceptable based on the [deleted]. The record shows that the agency was concerned that, at the rates included in its BAFO, PRI would not be able to [deleted]. In addition, the contractor is to propose the labor categories and hours to be used under delivery orders issued under the contract and the agency was concerned that PRI would have an [deleted]. The agency determined that PRI's BAFO [deleted]. PRI's proposal was not considered further in the award decision.

Based on the BAFOs, the Navy determined that Metters' proposal represented the best value to the government and awarded a contract to that firm. That award resulted in protests to the Small Business Administration (SBA) arguing that Metters should not be considered a small business under this solicitation. In a June 10 decision, the SBA's Office of Hearings and Appeals determined that Metters, in fact, was other than a small business for purposes of this contract. The Navy terminated Metters' contract and decided that Sherikon's proposal again represented the best value to the government.

PRI protested on March 18 after the Navy announced the award to Metters. PRI argues that its proposal should have been considered technically acceptable and that the Navy failed

to obtain the best value to the government since PRI's total price was [deleted] compared to Metters' price of \$15,569,351. PRI argues that it was fully aware of the RFP requirements when it submitted its BAFO, that it is a financially stable and secure company capable of funding its offer as proposed and that, if it received the award, it intended to perform the contract at the fixed labor rates stated in its BAFO irrespective of the [deleted].

PRI argues that under a firm, fixed-price labor hour contract, the contractor is obligated to perform the contract on the terms offered and at the labor rates proposed. According to PRI, if the contractor understands its contractual obligations and is considered responsible, the fact that the contractor submitted below cost labor rates is a matter of business judgment and the contracting agency does not have grounds to reject a proposal based on below-cost labor rates. Thus, PRI argues that, in light of the [deleted] cost savings offered by PRI, and its acceptable pre-BAFO technical proposal, it was unreasonable for the Navy not to consider PRI's financial ability to perform the contract at the rates proposed. Alternatively, PRI argues that the Navy was required to reopen discussions regarding the risks perceived in its proposal and allow PRI to clarify its proposal.

We have recognized that an agency is not compelled to accept the low offer under an RFP, like the one here, where services are to be ordered and the labor mix set after contract award. Stanley Assocs., Inc., B-232361, Dec. 22, 1988, 83-2 CPD ¶ 617. In such procurements, an agency may properly determine that a proposed pricing structure creates unacceptable risk regarding the quality of performance and that the actual cost of performance would not be the lowest. Id.

Here, for many labor categories in its BAFO, PRI offered option-year rates which the agency considered to be [deleted]. Although PRI contends that the Navy failed to analyze whether PRI could successfully perform the contract at the proposed rates, the record indicates that the decision to find PRI's proposal technically unacceptable was based on exactly this type of analysis. Specifically, the Navy considered that, under this contract, the contractor must propose the labor categories and labor hours to be used in individual delivery orders and was concerned that PRI would develop delivery orders in a way that [deleted]. Further, in the absence of any explanation in PRI's proposal about [deleted], the agency was reasonably concerned that the labor rates were related to [deleted], and that this would result in risks to PRI's ability to attract and retain qualified competent personnel. The agency reasonably

considered such risks in deciding to reject PRI's offer. See Stanley Assocs., Inc., supra.

PRI also asserts that the agency was obligated to reopen discussions or to otherwise allow PRI to clarify its proposal with respect to its labor rates. We disagree. An agency is not obligated to reopen negotiations so that an offeror may remedy defects introduced into a previously acceptable offer by a BAFO. Ferranti Int'l Defense Sys., Inc., B-237555, Feb. 27, 1990, 90-1 CPD ¶ 239. While an agency may seek to clarify minor uncertainties in a proposal, where, as here, the information sought is essential to determining the acceptability of a proposal, a request for such information constitutes the reopening of discussions. Mannesmann Tally Corp., B-238790.4, Oct. 16, 1990, 90-2 CPD ¶ 293.

As indicated above, the RFP specifically advised that proposed labor rates would be considered in the technical evaluation. PRI assumed the risk that changes in its final offer might raise questions about its ability to perform and might result in a determination that its proposal was technically unacceptable. Consequently, the Navy was not required to reopen discussions to allow PRI to explain its reduced rates.

After the SBA decided on June 10 that Metters was not a small business for purposes of this contract, PRI filed an additional protest on June 30. In that protest, PRI challenges the award to Sherikon on the same grounds that it protested the award to Metters. PRI also argues that the Navy failed to provide PRI with a 5-day notice of the award to Sherikon and failed to follow other "procedures attendant to the award of a new contract."

As discussed above, the Navy reasonably determined that PRI's proposal was technically unacceptable. Accordingly, under the RFP, PRI's proposal could not be considered for award. In addition, the Navy was no more obligated to reopen discussions with PRI after terminating Metters' contract than it was after PRI submitted its BAFO. See Ferranti Int'l Defense Sys., Inc., supra.

Regarding PRI's assertion that the Navy failed to follow "procedures attendant to the award of a new contract," PRI is not an interested party to raise this allegation. Under our Bid Protest Regulations, a protester must have a direct economic interest which may be affected by the award of a contract or failure to award a contract, in order to qualify as an interested party eligible to protest a federal procurement. 4 C.F.R. §§ 21.0(a) and 21.1(a) (1993). A protester is not an interested party where it would not be

in line for award were its protest to be sustained. East West Research, Inc., B-244174, July 8, 1991, 91-2 CPD ¶ 34. Here, even if we were to determine that the Navy failed to follow appropriate procedures in the award to Sherikon, PRI would not be in line for award since its proposal was technically unacceptable. Under the circumstances, we will not consider PRI's allegation that the Navy failed to follow proper procedures in the award to Sherikon.

The protest is denied.

James F. Hinchman  
General Counsel