



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Stanford Telecommunications, Inc.

File: B-258622

Date: February 7, 1995

Thomas E. Chilcott, Esq., Odin, Feldman & Pittleman, for the protester.

Marc F. Efron, Esq., Crowell & Moring, for Harris Technical Services Corporation, an interested party.

William Medsger, Esq., and Gary Theodore, Esq., U.S. Army Materiel Command, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency was not obligated to disqualify awardee that had hired former government employee who had access to information concerning the (incumbent) protester's competition for and performance of its current contract, where awardee did not gain improper competitive advantage thereby, as there is no evidence that the individual provided any proprietary information to the awardee.

2. Protest against award to offeror with a lower-cost, lower-rated proposal is denied where agency reasonably determined that cost premium involved in awarding to higher-rated, higher-priced offeror was not justified.

DECISION

Stanford Telecommunications, Inc. protests the award of a contract to Harris Technical Services Corporation, under request for proposals (RFP) No. DAAB07-94-R-H019, issued by the U.S. Army Communications-Electronics Command (CECOM), U.S. Army Materiel Command (AMC), for network control support services in support of the Defense Satellite Communications System (DSCS).¹ Stanford challenges the cost/technical tradeoff and argues that Harris should have

¹The DSCS consists of ground segment earth stations that transmit and receive communications traffic from geosynchronous satellites and control facilities and equipment that coordinate and manage the network.

been disqualified based upon its hiring of a former agency employee.

We deny the protest.

BACKGROUND

The RFP, issued on December 28, 1993, contemplated award of a time-and-materials-type contract to furnish network control support services--program management, field service, installation/deinstallation, operations and maintenance, and training--in support of the DSCS for a base year with 3 option years. The solicitation set forth estimates of the required labor hours for 53 categories of labor; established minimum experience and educational requirements for each; and, as issued, required offerors to propose base and loaded rates for each. Award was to be made to the offeror whose proposal represented the best value to the government, as determined based upon four evaluation factors:

(1) technical, which was "slightly more important than" (2) past performance, which was "significantly more important than" (3) management, which was "slightly more important than" (4) cost. The technical evaluation factor included six subfactors: (1) depot support, which was "slightly more important than" (2) interim contractor support plan, which was "slightly more important than" each of the remaining "relatively equal" subfactors, including (3) system adaptation, (4) installation/deinstallation, (5) training, and (6) personnel.

AMC received four proposals, three of which were included in the competitive range for discussion purposes. At this juncture, AMC amended the RFP in response to a finding by the Defense Contract Audit Agency (DCAA) that the labor categories in the solicitation included labor which would otherwise be charged to indirect cost pools under offerors' approved cost accounting systems; the solicitation therefore improperly required offerors to treat as direct costs labor costs that should be treated as indirect costs. The amendment provided that:

"It is recognized that some labor categories listed in solicitation clause 'C-2, Level of Effort' may be charged as indirect expenses by some companies.

"If any of the categories in 'C-2, Level of Effort' are normally included in indirect labor charges, the offeror shall identify those as such and not provide direct labor rates for those categories.

"However, it is anticipated that the hours associated with the labor categories as listed in 'C-2, Level of Effort' may be required; therefore your indirect rates should reflect this level-of-effort."

Following discussions, AMC requested best and final offers (BAFO). Finding several remaining deficiencies in the BAFOs that were received, the agency requested second BAFOs.

Based upon Stanford's experience as a successful incumbent, its offer of the staff currently performing the contract, its proposal of a proven approach to performing the required work, and its overall ability to assure continuity of service, Stanford's proposal received an outstanding rating under each of the technical subfactors and also under the overall technical and management factors. In addition, Stanford received a low risk rating with respect to past performance.

Harris's proposal did not receive an outstanding rating under all six of the technical subfactors--earning only a good rating under the system adaptation, installation, and training subfactors--but the proposal did receive outstanding ratings under the two most important subfactors--depot support and interim contractor support--and under the personnel subfactor, as well as for the technical factor overall. Harris's proposal also received a good rating under the management factor (in contrast to Stanford's outstanding rating) and, like Stanford, a low risk rating with respect to past performance.

While Stanford's proposal was rated technically superior, Harris's price (\$12,240,874) was \$1,318,648 lower (approximately 10 percent) than Stanford's (\$13,559,522). In view of Harris's overall outstanding rating under the technical factor, its low risk past performance rating, and the fact that the management factor--where Stanford received a higher overall rating--was significantly less important than the technical and past performance factors, the source selection authority (SSA) concluded that Stanford's advantages with respect to some of the technical subfactors and under the management factor were offset by Harris's lower price. Award thus was made to Harris.

CONFLICT OF INTEREST

Stanford first argues that award to Harris should have been precluded by its hiring of a former government employee as a proposal consultant and program manager under the contract, since the individual had access to information concerning Stanford's performance of its current contract. The individual was CECOM's project manager for satellite

communications until June 30, 1993, 1 month prior to his retirement on August 1 and approximately 6 months prior to the issuance of the solicitation. In his position as the CECOM satellite communications project manager, this individual had access to information concerning Stanford's successful proposal for a 1992 contract for the operations control system for the DSCS and to cost, staffing, and performance data concerning three Stanford contracts in support of the system, including its current contract for network control support services. Stanford maintains that this individual gave Harris an unfair competitive advantage in the competition.

A contracting officer may protect the integrity of the procurement system by disqualifying an offeror from the competition where the firm may have obtained an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion. NKE Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture, Pan Am World Servs., Inc., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379. Responsibility for determining when exclusion of a firm is warranted rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63.

The agency reasonably determined that there was no improper competitive advantage here. First, there is no evidence Harris obtained any proprietary Stanford cost information from the former government employee when preparing its proposal. In a sworn affidavit submitted to our Office, the former government employee stated that:

"I had access to cost and pricing data submitted by a large number of [satellite communications] contractors The magnitude and detail of this information is such that I could not commit it to memory and made no attempt to do so. Since my retirement on August 1, 1993, I have not sought or been provided with any . . . procurement sensitive information of any kind. I had no recollection of any specific contract information furnished to or in possession of [the Project Manager-Satellite Communications] when I retired and have not sought or been provided with any such data since my retirement.

"I have no past or present recollection of any cost or pricing data furnished by [Stanford] under

its [network control support services] contract.

This individual also attested that he did not participate in the preparation of Harris's cost proposal, and his statement in this regard is supported by sworn affidavits submitted by the Harris employees responsible for preparation of its cost proposal.

Based on the nature and volume of information available to the former government employee, we think that, without referencing the actual documents that Stanford submitted to the agency, it is unrealistic to believe that the individual could accurately reproduce the cost and pricing data to which he had access. Since the individual has attested that he did not take any of Stanford's cost or pricing documents with him when he left government service, and there is nothing in the record that would lead us to question his statement (such as evidence that he made specific information available to Harris), there is no basis to conclude that Harris had access to sensitive Stanford cost information when preparing its proposal. See Textron Marine Sys., supra.

Stanford has furnished a sample of the contract performance reports it submitted to demonstrate the sensitive nature of the information involved here. However, the protester has made no showing that any information concerning Stanford's organizational structure or staffing which was apparent from the report was proprietary, and not publicly available or discernable by observation. Stanford has identified no other specific, non-cost information to which the former government employee had access and which was proprietary to Stanford. While the record shows that the former government employee did have input into Harris's technical and management proposals, there is no basis for concluding that this input consisted of anything other than statements of opinion as to the best way to perform the contemplated contract; this type of involvement in proposal preparation does not confer an improper competitive advantage. Textron Marine Sys., supra.

Although preparation of the RFP here was commenced while the former government employee was the CECOM satellite communications project manager, the individual has attested that he did not substantially participate in preparation of the solicitation. He further states that he does not recall "attending or being involved in any Governmental planning or strategy meetings or seeing any documentation," or "reviewing or signing any documents" relative to the final or draft RFP. Nothing in the record calls into question the former government employee's statement in this regard. Stanford also has cited no internal, procurement-sensitive

information concerning the agency's requirements, to which the former government employee may have had access, which was not disclosed in the solicitation or otherwise public and available to offerors (or at least to Stanford as the incumbent) and which would have conferred a competitive advantage on Harris. Textron Marine Sys., supra.

We conclude that, while Harris may have gained some business advantage by virtue of its employment of the former government employee, there is no evidence of any improper competitive advantage.

PRICE EVALUATION

Stanford maintains that cost proposals were not evaluated on an equal basis because, due to the amendment in response to the DCAA review, different offerors included different amounts of direct labor costs in their indirect costs. Specifically, Stanford complains that Harris unfairly included significantly more labor categories and hours in its indirect rates than Stanford did.

Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation, which are apparent prior to the closing date for receipt of proposals be filed prior to the time for closing. 4 C.F.R. § 21.2(a)(1) (1994). This rule includes challenges to alleged improprieties which did not exist in the initial solicitation but which are subsequently incorporated into the solicitation. In such cases, the protest must be filed not later than the next closing date for receipt of proposals following the incorporation. NASCO Aircraft Brake, Inc., B-237860, Mar. 26, 1990, 90-1 CPD ¶ 330.

The amendment at issue permitted offerors to propose in accordance with their accounting systems, without regard for the fact that, as a result, some offerors might be able to reduce their direct costs more than others, and might thereby gain an advantage in the cost evaluation. If Stanford believed this approach was improper, or that there should be an evaluation provision addressing the potential disparity among proposals, it was required to protest on this basis prior to the closing date for receipt of first BAFOs. As Stanford did not do so, this aspect of the protest is untimely and will not be considered.²

²Furthermore, we note that AMC has estimated, based on the number of hours transferred by Harris from direct to indirect cost treatment, that this transfer would account for, at most, only 35 percent of the price difference between Harris and Stanford.

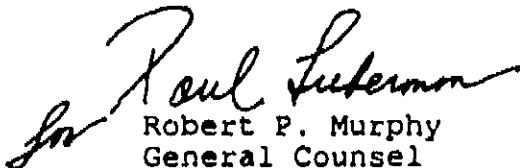
COST/TECHNICAL TRADEOFF

Stanford objects to the cost/technical tradeoff made by the agency on the basis that it did not fully take into account Stanford's evaluated superiority under the non-cost factors, and was based "almost entirely upon the cost factor."

Source selection officials in a negotiated procurement have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results; cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed by the test of rationality and consistency with the established evaluation factors. Family Realty, B-247772, July 6, 1992, 92-2 CPD ¶ 6. Even where cost or price is the least important evaluation factor, an agency may award to an offeror with a lower-cost, lower-scored proposal if it determines that the cost premium involved in awarding to a higher-rated, higher-priced offeror is not justified. Id.; Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321.

The tradeoff here was reasonable. As discussed above, the agency recognized that Stanford's proposal was somewhat more advantageous under the non-price factors, in part because of its record of successfully furnishing the required services under its incumbent contract. The SSA determined, however, that since Harris had received outstanding ratings under the two most important technical subfactors and an overall outstanding rating for the most important technical factor, as well as a low risk past performance rating, Stanford's advantage under the non-cost factors simply was not great enough to warrant award at Stanford's higher price. While cost was the least important evaluation factor, there is no basis for us to conclude that a \$1.3 million (10 percent) cost advantage could not reasonably be deemed by the agency to be significant; by the same token, in light of the overall high quality of Harris's proposal, there is no basis for questioning the agency's conclusion that Stanford's advantage under the non-cost factors was not as significant as Harris's cost advantage. Certainly, the agency was not precluded--as Stanford's argument suggests--from ultimately basing the award on the lowest cost merely because the cost factor was the least important. See Dayton T. Brown, Inc. supra.

The protest is denied.


Robert P. Murphy
General Counsel