Proc I

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

96626

FILE: B-189884 DATE: March 29, 1979

MATTER OF: Serv-Air, Inc.--Reconsideration [Request for]

DIGEST: NAU-00343 DLG-00354

1. Plain language of Truth in Negotiations Act, legislative history of act, regulatory implementation, and history of implementation all support application of adequate price competition exemption to requirement for submission of certified cost or pricing data to fixed-price incentive contracts.

2. Agency properly did not require proposed awardee to submit certified cost or pricing data since such data need not be submitted where price is based on adequate price competition./ Adequate price competition was achieved where RFP permitted award to other than low-priced offeror, price was substantial evaluation factor (30 percent), price evaluation did not have effect of eliminating price as evaluation factor, two proposals were in competitive range, and Government made award to best technical proposal for the dollar.

3. Request for conference is denied, since Bid Protest Procedures do not explicitly provide for conference on reconsiderations of decisions, and matter can be resolved without conference.

Serv-Air, Inc. (Serv-Air), has requested reconsideration of our decision in Serv-Air, Inc., 57 Comp. Gen. 827, 78-2 CPD 223, which denied its protest of the award of a contract for the operation and maintenance of Vance Air Force Base, Oklahoma (Vance), to Northrop Worldwide Aircraft Services, Inc. (Northrop). DLG-01312 CNG-00879

Original Decision and Grounds for Reconsideration

Serv-Air's grounds for protest were as follows:

1. The technical evaluation criteria were designed to give special weight to recent experience rather than the quality of services offered.

~~00796~~

2. The system of price evaluation is inherently defective because it penalizes offerors for cost-saving techniques, regardless of the soundness of the techniques, by subtracting points from proposals whose target cost falls outside a predetermined range from the Government estimate.

3. The application of the price evaluation formula "leveled widely divergent" price proposals, thus eliminating price as an evaluation factor, and rendering the solicitation noncompetitive as to price.

4. In the absence of adequate price competition, the Department of the Air Force (Air Force) was required to obtain certified cost or pricing data, which it did not do.

5. The Air Force failed to disclose in the RFP or during negotiations preferences for specific methods employed by the incumbent to accomplish certain tasks, thus making equal technical competition impossible.

6. Oral discusssions concerning both technical and price proposals should have been held, and, even if oral negotiations were not required, the written negotiations were so inadequate as to not constitute "meaningful discussions."

Serv-Air states that its request for reconsideration "is limited solely to the legal issue of whether the fixed price incentive contract awarded by the Air Force to * * * Northrop * * * was invalid because the Air Force did not obtain certified cost or pricing data in accordance with the Truth in Negotiations Act (10 U.S.C. § 2306(f) [1976])."

In our original decision, we held that the Air Force was not required to obtain certified cost or pricing data because adequate price competition was achieved in the procurement, and the Truth in Negotiations Act and Defense Acquisition Regulation (DAR) (then Armed Services Procurement Regulation (ASPR) § 3-807.3(b) (1976 ed.) do not require the data where adequate price competition is achieved.

Serv-Air had made two basic arguments concerning the lack of adequate price competition. First, Serv-Air argued that because the request for proposals (RFP) stated that "lowest price will not necessarily receive the award," the requirement of DAR § 3-807.1(b)(1)(a)(iii) (1976 ed.), that adequate price competition exists only if award is to be made to the offeror submitting the "lowest evaluated price," could not be satisfied. Serv-Air also argued that price was totally eliminated as an evaluation factor, even though it was to be weighted 30 percent, because "widely divergent" price proposals were leveled and scored so near the maximum that "differences between them were lost."

We stated, quoting Shapell Government Housing, Inc. and Goldrich and Kest, Inc., 55 Comp. Gen. 839, 848 (1976), 76-1 CPD 161, that "we believe the language 'lowest evaluated price' [italic supplied] should be defined to include all of the factors in the award evaluation." Therefore, adequate price competition can still exist where award will not be made to the offeror with the lowest price, so long as price is a substantial factor in the prescribed evaluation criteria and more than one offeror was in the competitive range.

Regarding Serv-Air's argument that price was eliminated as a evaluation factor because widely divergent proposals were leveled, we found that the greatest variation in any of the components of the two price proposals was approximately 5 percent, and that the proposals were therefore not widely divergent. We noted that the two price proposals were scored very closely, with Serv-Air receiving 270 points and Northrop receiving 276.6 points, out of a possible total of 300 points. While Serv-Air's proposal was slightly lower in price, Northrop received a higher rating for "cost realism" and was, therefore, rated slightly higher. We then stated that "[w]e see nothing improper in two closely priced proposals being scored closely in a price evaluation."

In conclusion, we found that the factors specified in DAR § 3-807.1(b)(1) were present here,

that there was adequate price competition, and that the Air Force properly did not obtain certified cost or pricing data from Northrop.

Price Evaluation Formula

While Serv-Air has limited the request for reconsideration to one issue, it has made numerous specific arguments. As in the original decision, Serv-Air again attacks the reasonableness and validity of the stated evaluation criteria and their application. Serv-Air contends that the only incentive in the price evaluation was to estimate the Air Force's predetermined estimate and come as close to that estimate as possible, and that estimate was based on prior cost experience with Northrop. Serv-Air also argues that the determination that Northrop's price was more favorable to the Government, even though it was higher than Serv-Air's, is "incomprehensible."

Serv-Air further contends that the procurement penalized cost-saving proposals, and that low offered price was an irrelevant factor in the price evaluation method. According to Serv-Air, the Air Force had no basis for assuring that the Northrop price was fair and reasonable. Serv-Air concludes that "[t]he price evaluation procedure used by the Air Force is so inimical to competitive procurement that it should not be allowed to stand."

As we stated in our original decision, all arguments and allegations concerning the propriety of the evaluation criteria and their application were untimely. We looked only at the narrow question of whether price was eliminated as an evaluation factor in this procurement to resolve the adequate price competition issue. Serv-Air has not specified any errors of law or fact or presented any new facts or arguments concerning the timeliness of these matters. Therefore, we affirm our original determination that we would not consider the propriety and application of the evaluation scheme.

Application of the Adequate Price Competition Exemption to Fixed-Price-Incentive Contracts

In the original protest, concerning the absence of adequate price competition, Serv-Air mentioned in

a footnote that "'[a]dequate price competition' does not normally exist where an incentive contract is involved. Televiso Electronics, Inc., B-159922, 46 Comp. Gen. 631, 645 (1967)." Serv-Air did not, however, argue or develop the point, but rather went on to argue that the factors comprising adequate price competition were not present for the reasons discussed in the first section of this decision. Consequently, we did not specifically address this argument.

In the request for reconsideration, Serv-Air has now fully developed the argument. Serv-Air contends that the provisions of the Truth in Negotiations Act and DAR § 3-807.3(b), which permit exemptions from the general requirement for certified cost or pricing data, cannot be applied where an incentive contract is used. Serv-Air relies primarily on 46 Comp. Gen., supra, and 53 Comp. Gen. 5 (1973). Serv-Air has quoted the following from 46 Comp. Gen., supra, at 644-5:

> "The legislative history of the statutory provision discloses that one of its primary purposes was to require full, complete, and accurate data and disclosure by both parties in pricing discussions of incentive contracts in particular, including fixed-price incentive contracts, and to require the contractor to certify to the cost figures in hand at the time of negotiation for target price. As stated in H. Rept. No. 1638, 87th Cong., 2d Sess., the provision does two things: 'It requires by law a full disclosure in negotiations and it requires a readjustment of target prices, before final settlement and cost sharing, so that the incentive profit over the normal profit will be the product of the contractor's action in performance rather than artificial pricing in negotiations for target price.'
>
> * * * * *

"While the first sentence of FPR 1-3.807.3(f) provides that cost or pricing data should not be requested when there is adequate price competition (see also ASPR 3-807.3(c) [now DAR § 3-807.3(a)], in the light of the legislative history of the statute, which serves as the basis for the data requirements set forth in both ASPR 3-807.3 and FPR 1-3.807-3, it is our opinion that FPR 1-3.807-3(f) could not have been invoked to dispense with the requirement for cost or pricing data once it was decided that an incentive-type contract was to be awarded. To apply such provision to justify failure to obtain such data in the case of an incentive contract such as involved here would be contrary to the intent of the statute * * *" (Emphasis added.)

The following is quoted by Serv-Air from 53 Comp. Gen., supra, at 8:

"'* * * award could not have been made prior to the submission of cost or pricing data * * * See 46 Comp. Gen. 631 (1967), wherein we held that a finding of adequate price competition could not serve as a basis to dispense with the requirement for cost or pricing data where award of a fixed-price-incentive contract was contemplated.' B-177847, 53 Comp. Gen. 5, 8 (1973) (Emphasis added)."

Our holding in 53 Comp. Gen., supra, appears to have been based solely on 46 Comp. Gen., supra, which, in turn, was based, in part, on an interpretation of the legislative history of the Truth in Negotiations Act. Despite the interpretation in the earlier decision, we feel it is unnecessary to resort to the legislative history of the act to resolve the question of whether the adequate price competition exemption applies to fixed-price-incentive (FPI) contracts. The clear language of the statute does

not exclude FPI contracts from the adequate price competition exemption and provides, in pertinent part, that:

> "(f) A prime contractor, or any subcontractor, shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current--
>
> (1) Prior to the award of any negotiated prime contract under this title where the price is expected to exceed $100,000 (underscoring supplied) * * *
>
> Provided, That the requirements of this subsection need not be applied to contracts where the price negotiated is based on adequate price competition. * * *"

Since 46 Comp. Gen., supra, did rely on legislative history, however, we have reexamined the legislative history of the act. We are unable to find support for the proposition that application of the adequate price competition exemption to FPI contracts is contrary to the intent of the act.

While abuses in incentive contracting did provide the original impetus behind the act, as asserted by Serv-Air, these abuses were primarily in the area of noncompetitive procurements. See, generally, Senate Report No. 1884, 87th Cong., 2d Sess., p. 3. The classic situation concerning the advocates of the act was where the Government and a large firm negotiated target costs on a one-to-one basis, with the firm knowing its true costs and the Government having no such knowledge. See, e.g., Roback, Truth in Negotiating: The Legislative Background of P.L. 87-653, 1 Pub. Cont. L. J. 3, 7-8 (1968). In such cases, where the pressures of competition were not present to ensure fair and reasonable prices, the Government needed protection.

The only portion of legislative history specifically cited in 46 Comp. Gen., supra, is H. Rept. No. 1628, 87th Cong., 2d Sess. The "provision" it refers to is H.R. 5532 § (g), the first version of the bill, which applied only to incentive contracts, and contained no exemptions from the requirement for certified data. It is our opinion that such legislative history does not support the view that the exemptions of the act do not apply to all contracts, including incentive contracts.

The Senate version of the bill, which was enacted, extended the certified cost or pricing requirements equally to all forms of negotiated contracts. The exemption for adequate price competiton was also added, and there is no indication that it was not to apply to all forms of contracts. Clearly, if Congress had intended to single out incentive contracts for special treatment, it could have done so, particularly considering the House version which did so single out incentive contracts with no exemptions. We can only conclude that it was the intent of Congress to treat all types of contracts equally, both for the requirement for submission of certified cost or pricing data and for the exemptions to that requirement.

The requirements discussed above have been implemented by DAR § 3-807.3. Even though the act applies only to the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, the Federal Procurement Regulations (FPR) have incorporated the requirements at FPR § 1-3.807-3. The present version of both DAR and FPR follows the statute in applying the requirement and exemptions equally to all types of negotiated contracts over $100,000. The histories of change in both ASPR and FPR indicate that a conscious decision was made to apply the requirements and exemptions equally to all forms of contracts.

The first version of ASPR § 3-807.3 implementing the act, issued in Defense Procurement Circular (DPC) #12, October 16, 1964, essentially required certified cost or pricing data without exemptions, when incentive contracts or anything other than a firm-fixed-price (FFP) contract was used, subject to waiver only in exceptional cases where the Secretary (or, in the case

of a contract with a foreign government or agency thereof, the head of a procuring activity) authorizes such waiver and states in writing his reason for such determination. The version of FPR § 1-3.807-3 in existence at that time was similar in substance.

On November 30, 1967 (DPC #57), the ASPR provision was revised to substantially its present form, treating all types of contracts equally and applying exemption to all. The provision provided that:

"3-807.3 Cost or Pricing Data.

"(a) The contracting officer shall require the contractor to submit, either actually or by specific identification in writing, cost or pricing data in accordance with 16-206 and to certify, by use of the certificate set forth in 3-807.4, that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete, and current prior to:

(i) the award of any negotiated contract expected to exceed $100,000 in amount;

(ii) the pricing of any contract modification expected to exceed $100,000 in amount to any formally advertised or negotiated contract whether or not cost or pricing data was required in connection with the initial pricing of the contract;

(iii) the award of any negotiated contract not expected to exceed $100,000 in amount or any contract modification not expected to exceed $100,000 in amount to any formally advertised or negotiated contract whether or not cost or pricing of the contract, provided the contracting officer

> considers that the circumstances warrant such action in accordance with (d) below;
>
> unless the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. The requirement under (i) and (ii) above may be waived in exceptional cases where the Secretary (or, in the case of a contract with a foreign government or agency thereof, the Head of a Procuring Activity) authorizes such waiver and states in writing his reasons for such determination."

The plain language of the provision, then, changed from treating all non-FFP contracts separately and not applying the exemptions to them to treating all types of contracts in the same manner. While the change in language alone is sufficient to support application of the exemptions to incentive contracts, the "history" of the change also adds support.

In referring to the proposed changes, a memorandum from the Office of the Assistant Secretary of Defense for Installations and Logistics, dated September 27, 1965, to the Chairman of the ASPR Committee states that:

> "The above changes would be consistent with the requirements of the statute and I recommend that they be adopted."

A January 20, 1966, memorandum from the ASPR staff to the Chairman of the ASPR Committee stated:

> "In addition to revised 3-807.3(a)(i) and (ii) being more consistent with the requirements of the statute, the changes permit more flexible application of the requirements on cost reimbursement type contracts."

A memorandum of August 25, 1966, from the United States Air Force ASPR Committee member to the Chairman of the ASPR Committee stated that:

> "We concur with the elimination of the mandatory requirement for cost or pricing data and a certificate on contracts under $100,000. Because this is one area where ASPR went beyond the law, it has been a constant source of friction with industry." (Emphasis supplied.)

By letter of September 15, 1966, to the Chairman of the ASPR Committee, our Office approved of these proposed changes in ASPR § 3-807.3(a).

It is clear that the ASPR Committee felt that § 3-807.3, as originally promulgated, had gone beyond the statute by requiring certified cost or pricing data for all non-FFP contracts, regardless of dollar amount, and by not permitting application of the statutory exemptions. The FPR was revised in 1969, and followed the ASPR revision, treating all types of contracts equally. 34 F.R. 2660, February 27, 1969. It seems clear that both ASPR and FPR were deliberately changed to permit application of exemptions, including adequate price competition, to all types of contracts, including incentive contracts.

Thus, both the clear language of the present regulations and the history of changes in them demonstrate that the adequate price competition exemption is applicable to all types of contracts, including incentive contracts.

Recently, we found that certified cost or pricing data was not required because adequate price competition was present where a cost-plus-fixed-fee contract was awarded. U.S. Nuclear, Inc., 57 Comp. Gen. 185 (1977), 77-2 CPD 511. Also, we found that adequate price competition existed and, therefore, certified cost or pricing data was not required and award could properly be made on the basis of initial proposals, where a cost-plus-award-fee contract was awarded. 52 Comp. Gen. 346 (1972). The earlier version of ASPR and FPR grouped these contract types with incentive

contracts and did not permit application of exemptions to them. With the changes in the regulations, we have already recognized that the exemptions apply to cost-type contracts, and we see no reason that they should not apply equally to incentive contracts. In concluding on this point, we observe distinguishing aspects to the cases relied on by Serv-Air. In 46 Comp. Gen., supra, unlike here, a prior version on FPR specifically excepting incentive contracts from exemption was applicable. In 53 Comp Gen, supra, the request for cost or pricing data was made in the conducting of negotiations to enhance competition rather than award to the protesting offeror on an initial proposal basis by invoking the adequate price competition exemption. In any event, to the extent that the above cases are in conflict with this decision, they are overruled.

Adequate Price Competition

Serv-Air objects to our interpretation of the requirements for adequate price competition, as specified in DAR § 3-807.1(b)(1), and our application of them in this case.

"Adequate price competition" is defined in DAR § 3-807.1 (b)(1) in the following manner:

> "(1) Adequate Price Competition. a. Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the purchaser's (e.g., the Government's) requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting price offers responsive to the expressed requirements of the solicitation. Whether there is price competition for a given procurement is a matter of judgment to be based on evaluation of whether each of the

> foregoing conditions (i) through (iv) is satisfied. Generally, in making this judgment, the smaller the number of offerors, the greater the need for close evaluation."

Serv-Air disagrees with our interpretation of "lowest evaluated price" as including all of the factors in the award evaluation as long as price is a substantial evaluation factor. Serv-Air reiterates its position in the original protest, that "lowest evaluated price" means that award must be made to the low-priced offeror. According to Serv-Air, Shapell Government Housing, Inc. and Goldrich and Kest, Inc., supra, does not support our interpretation, because the decision is distinguishable.

Serv-Air argues that in Shapell, while award was made to a higher-priced offeror, its offer was evaluated as the low cost offer based on evaluated considerations of quality, durability, maintainability and life cycle cost. Serv-Air contends that here the Air Force made no attempt to evaluate probable cost to the Government or to determine whether the Air Force was getting the best deal for the dollar.

Serv-Air argues that in applying the criteria to this procurement our decision (1) ignores how price was evaluated; (2) ignores the fact that offering the lowest price was not a factor in the price evaluation; and (3) makes the adequate price competition exemption depend solely on the formality of whether price is a stated "substantial" evaluation criterion. Serv-Air states that it clearly offered the lowest price to the Government.

According to Serv-Air, our decision makes the basis for exemption from the Truth in Negotiations Act the same as the basis for award of most negotiated contracts and thereby makes the act inapplicable to most negotiated procurements. Since DAR § 3-807.3(f) states that where adequate price competition exists "cost or pricing data shall not be requested," Serv-Air contends that our decision

makes the act mandatorily inapplicable except in two extreme circumstances: (1) only one proposal within a competitive range is received, or (2) the stated evaluation criteria make price an insubstantial evaluation factor.

Regarding Serv-Air's disagreement with our interpretation of lowest evaluated price and our reliance on Shapell, we feel that the distinctions pointed out by Serv-Air are only partially accurate and, in any event, do not preclude our interpretation in this case or in other circumstances. Serv-Air's assertion that the award in Shapell was made to the low cost offeror is in error. Award was made to a higher-priced, higher technically rated offeror. Award was made on the basis of lowest dollar per technical quality point ($/q.p.) ratio. The ratio was obtained by dividing an offeror's total technical score into its price. It is this concept of selecting the offeror proposing the best technical deal for the dollar that is embodied in the definition of lowest evaluated price as including all factors in the award evaluation. The competitive pressures of one or more additional offerors in the competitive range force offerors to "trade off" between cost and technical factors in order to offer the best possible proposal at a "fair and reasonable price."

Here, offerors knew that technical factors were going to be more important than price, but that price would be important. They also knew that a low price would receive more points, as long as it was reasonable. Therefore, they had the incentive to offer the best technical proposal at a fair and reasonable price. The result was that award was made to a substantially higher-rated technical proposal that cost only 5.5 percent more at most. If the price evaluation formula that Serv-Air claims is inimical to competition is discarded and a comparison is made between the proposals on a pure best technical proposal for the dollar basis, as in Shapell, the effectiveness of the competition here becomes even more clear. Assuming the worst circumstances for Northrop's proposal by using its ceiling price, and the best circumstances for Serv-Air's by using

its target price, Northrop's $/q.p. ratio is $27,381 and Serv-Air's is $30,201. Of course, the spread is likely to be even greater, since both circumstances are not likely to occur. It is our opinion that award was made on the basis of lowest evaluated price, as that term is defined in Shapell.

Regarding Serv-Air's assertion that our decision ignored how price was evaluated, we agree that it did not address the propriety of the evaluation scheme, since that issue was clearly untimely. We did, however, examine the price evaluation to a limited extent to determine if adequate price competition was achieved. Serv-Air's contention that the decision ignored the fact that lowest price was not an evaluation factor is incorrect. Low price was evaluated positively by the "assumption of risk" criteria. Additionally, low evaluated price, as defined above, was the basis for award.

While Serv-Air states that our decision makes the adequate price competition exemption depend solely on the formality of whether price is a stated "substantial" evaluation criterion, in fact the decision dealt in some detail with the issue of whether price had been eliminated as an evaluation factor even though it was a stated criterion. The determination of whether there is price competition for a procurement is a matter of judgment to be based on the evaluation of whether the conditions set forth in DAR are present. The determination is made after proposals are received but prior to award, so that the factual circumstances may be examined. 52 Comp. Gen. 346, supra. DAR § 3-807.1(b)(1).

Price must be a stated substantial evaluation factor and must also actually be a substantial factor in the evaluation. Serv-Air seems to be implying that 30 percent weighting is not a substantial evaluation factor. We feel that it is substantial, since we found that adequate price competition existed in 52 Comp. Gen. 346, supra, and cost was weighted only 20 percent in that case.

Regarding Serv-Air's contention that our decision makes the basis for the exemption the same as the basis for award of most negotiated contracts

and thus mandatorily inapplicable to most negotiated contracts, we feel that our decision merely recognizes that adequate price competition often exists in a negotiated environment, even though award is made to a higher-priced, higher technically rated proposal. Since Government procurement laws and regulations require maximum feasible competition, many procurements are competitive, and certified cost or pricing data would not be necessary in appropriate cases. Of course, as we stated above, that determination is a matter of judgment to be based on the application of the criteria stated in DAR § 3-807. 1(b)(1) to the facts of each procurement and the competitive environment. See 53 Comp. Gen., supra.

We note that, while DAR § 3-807.3(e) makes application of the exemption mandatory where adequate price competition has been determined to exist as Serv-Air contends, the jugemental nature of that determination introduces a considerable range of discretion into the application of the exemption.

Request for a Conference

Serv-Air requested a conference on this reconsideration because of the importance of the case. Our Bid Protest Procedures do not explicitly provide for conferences in these circumstances, 4 C.F.R. § 20.9 (1978). We believe a request for a conference should be granted only where the matter cannot be resolved without a conference. In our judgment, this is not such a case. See International Business Machines--Reconsideration, B-187720, August 9, 1977, 77-2 CPD 97; Dubie-Clark Company, Patterson Pump Division--Request for Reconsideration, B-189642, April 6, 1978, 78-1 CPD 274.

Conclusion

In view of the foregoing, our decision in Serv-Air, Inc., supra, is affirmed.

Deputy Comptroller General
of the United States