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DECISION

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

FILE: B-190967 DATE: August 7, 1978

MATTER OF: William Brill Associates, Inc.

DIGEST:

1. Protest alleging that agency wrongfully terminated sole-source negotiations is untimely under Bid Protest Procedures. Moreover, issue raised does not justify invoking exception to timeliness rules which permits consideration of untimely protest issues which are "significant" to procurement practices.

2. Agency employee's knowledge that one firm's former employee had been hired by competing offeror and that there was similarity between first firm's initial cost proposal and competitor's cost proposal does not establish that Government employee was aware of "misappropriation" of first firm's trade secrets or proprietary data or that he had some duty to inform first firm of what was contained in competitor's proposal.

3. Agency's evaluation of price without taking into account prices for options was proper where solicitation did not indicate that options would be evaluated.

4. Where agency evaluates proposals by numerically scoring proposals under each of four evaluation factors, it is not improper under circumstances of case for price to be scored on basis of entire "spread" of points available, so that total available points are awarded to lowest proposed price and less points, mathematically determined, are awarded to other proposed prices.

5. Where proposals are viewed as essentially equal technically, cost may become determinative factor for award notwithstanding greater weight assigned to technical factors.

William Brill Associates, Inc. (WBA), protests the award of a contract to the BDM Corporation (BDM) under request for proposals (RFP) No. 7-35814, issued by the National Bureau of Standards, Department of Commerce (NBS) on August 1, 1977. The procurement is for the collection, tabulation, and analysis of survey data on building security at public housing sites in Washington, D.C., Baltimore, Maryland and Los Angeles, California.

WBA alleges four basic deficiencies in the procurement:

(1) NBS's decision on June 23, 1977 to terminate sole-source negotiations with WBA for the work in question, and to instead issue a competitive RFP, was wrongful in that it was contrary to an inter-agency agreement entered into by NBS and the Department of Housing and Urban Development (HUD).

(2) The negotiation process was arbitrary and capricious because BDM's proposal was based on information proprietary to WBA and NBS was aware of that fact.

(3) NBS did not evaluate the "option" proposals called for by the RFP and prior to receipt of best and final offers improperly disclosed to BDM, but not WBA, that offers would be evaluated solely on the base level requirements.

(4) The method of scoring proposals used by NBS was improper and prejudicial to WBA because it distorted the relative price weights assigned to price and technical factors by the RFP.

The first issue, as WBA acknowledges, is untimely. The protest was filed on December 21, 1977; the sole-source negotiations with WBA were terminated on June 23, 1977. Our Bid Protest Procedures required WBA to file its protest within 10 working days from that date. See 4 C.F.R. 20.2(b)(2) (1977).

WBA argues, however, that this untimely aspect of its protest should be considered as raising a significant issue as provided for by 4 C.F.R. § 20.2(c). WBA asserts that the binding nature of the inter-agency agreements and the interaction of such agreements with procurement regulations are of such paramount importance that the issue warrants consideration notwithstanding that it was untimely raised.

Although 4 C.F.R. § 20.2(c) does permit consideration of untimely protests when issues significant to procurement practices or procedures are raised, the exception is limited to issues which are of widespread interest to the procurement community and is exercised sparingly so that the timeliness standards do not become meaningless. See, e.g., ABC Cleaning Service, Inc., B-190406, February 27, 1978, 78-1 CPD 158. WBA has not elaborated on its contention that this issue is of paramount importance, and we fail to see how WBA's contention that, as a beneficiary to the HUD-NBS agreement it had a right to a sole-source award, rises to the level necessary for invoking the significant issue exception. Consequently, we will not consider the issue.

WBA's second contention is based primarily on the actions of John Stroik, the NBS contracting officer's technical representative, and of Peter Ryan, a former WBA employee whose job was terminated for financial reasons after NBS's suspension of sole-source negotiations with WBA. Ryan left WBA's employ in January of 1977 and in April of 1977 was hired by BDM. WBA alleges that when Ryan went to work for BDM, he had confidential information concerning all aspects of WBA's proposed Work Plan, including cost figures, which was to have been the basis of the sole-source contract between NBS and WBA and which was the basis for WBA's competitive proposal. WBA further alleges that Stroik dealt with Ryan while Ryan was a WBA employee, and that when Stroik learned that Ryan had been employed by BDM and was submitting a proposal on that firm's behalf, Stroik knew that Ryan had "information in the nature of a trade secret" and that it was arbitrary, capricious and an abuse of discretion for Stroik to do nothing about it.

"In effect," says WBA, "Stroik's behavior served to promote Ryan's wrongdoing" and "deprived WBA of the fair and honest procedures and evaluation to which it was entitled."

NBS concedes that Stroik knew that Ryan had changed employers, but denies that Stroik's actions were improper or that Stroik had any reason to believe that BDM, through Ryan, was utilizing WBA's "trade secrets." BDM also denies that any of WBA's data was used in developing its own proposal. Moreover, BDM contends that Ryan was not privy to any budgetary data during his tenure with WBA and therefore could not have provided WBA's cost information.

In support of its position that Stroik's inaction amounts to a failure by NBS to take corrective action in order to protect the integrity of the procurement process, WBA cites The Franklin Institute, 55 Comp. Gen. 280 (1975), 75-2 CPD 194. In that case, the agency's project officer, in the company of an employee of an offeror (Franklin), visited the facility of a competitor. The project officer did not properly identify his companion, and during the meeting the competitor's cost and technical data were discussed. In sustaining the agency's decision to cancel the RFP and disqualify Franklin from eligibility for award of any task relating to the disclosed information, we said:

> "We agree that Franklin's employee should have been identified at the beginning of the visit. Whatever the motive or cause of the failure to do so, and even assuming the failure was caused in part by [the agency's] officer, any information obtained as a result, even if not immediately related to the contents of an existing solicitation, should not be allowed to accrue to Franklin's possible competitive advantage under a revised solicitation." 55 Comp. Gen. 280, supra, at 283.

WBA argues that Stroik's failure to inform it of Ryan's employment by BDM (and by way of inference, Ryan's misappropriation of proprietary information) is equivalent to the actions of the project officer in Franklin who "watched in silence while one competitor unwittingly disclosed proprietary information to another." We disagree. WBA has produced no proof that Stroik knew of any misappropriation of proprietary data by Ryan or even that such misappropriation occurred. Although WBA argues that Stroik must have known since he was aware of Ryan's change in employment and since BDM's cost proposal was similar to WBA's initial cost figures, we do not believe that is sufficient to reasonably establish that Stroik was actually on notice of possible wrongdoing by Ryan or that he had some duty to inform WBA of anything in the BDM proposal. Thus, unlike the situation in Franklin where the agency project officer clearly knew of and may have contributed to the disclosure of one firm's proprietary information to a competitor under circumstances unfair to that firm, we have little more than allegations and surmises regarding what Ryan did and what Stroik knew about it. We cannot find Government wrongdoing under these circumstances.

Moreover, we point out that if Ryan and/or BDM did improperly utilize WBA's proprietary data, that would be a private matter between those parties which is not for adjudication by this Office and which would provide no basis for our interfering with an on-going procurement. ERA Industries, Inc., B-187406, May 3, 1977, 77-1 CPD 300; Dillon Lumber Co., Inc., B-188631, April 8, 1977, 77-1 CPD 249, Celesco Industries, Inc., B-186597, August 30, 1976, 76-2 CPD 203.

The third alleged deficiency concerns NBS's failure to evaluate "option" prices. The RFP called for price proposals on each of three different levels of effort. In addition, the RFP contained the following provision:

> "B. Prices for Additional Survey Units
> If the Government requires the Contractor to perform additional survey units * * *, prices for such units shall be as follows:
> * * *"

Offerors were to insert prices for each of two kinds of surveys for Los Angeles and for Washington/Baltimore.

WBA argues that NBS's failure to evaluate the survey unit prices submitted by the offerors, as well as its failure to indicate in the RFP that the prices would not be evaluated, rendered the evaluation process arbitrary and capricious. WBA contends that had it known there would be no evaluation of the survey unit prices, it might well have altered its base proposal price. WBA asserts that its position is supported by Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD 219.

In Amram Nowak, the RFP did not provide for evaluation of options; nevertheless, the agency evaluated them and awarded a contract to the offeror whose combined price for the base and option requirements was low. We held that the award was improper because the RFP did not provide for evaluation of the option price. We noted that, "If the offerors knew that the proposals were to be evaluated on a combined-price basis, it may be that their price proposals would have been adjusted to accommodate for this method of evaluation." Amram Nowak, supra, at 451.

WBA's reliance on the cited case is misplaced. The case merely follows a long line of cases which hold that option prices generally should only be evaluated in certain limited circumstances and that it is improper for an agency to consider option prices in determining the low bidder or offeror where the solicitation does not explicitly provide for evaluation of options. See, e.g., Mobilease Corporation, 54 Comp. Gen. 242 (1974), 74-2 CPD 185; 52 Comp. Gen. 614 (1973); 41 Comp. Gen. 203 (1961). In other words, the absence from a solicitation of a provision for evaluating option prices precludes such an evaluation and is sufficient to alert offerors that option prices are not to be considered in the evaluation. See 52 Comp. Gen., supra, at 619. Accordingly, NBS was neither required to evaluate the additional survey unit prices nor required to so state in the RFP.

It follows that even if NBS disclosed to BDM (but not to WBA) during negotiations that the offers would be evaluated solely on the base prices--and the record does not establish that this alleged disclosure did in fact occur--NBS committed no impropriety since such a disclosure would merely have been consistent with the terms of the RFP.

WBA's final allegation is that the method of evaluation used by NBS was improper because price was evaluated on a "curve" while technical criteria were evaluated against objective standards. WBA contends that this resulted in cost systematically receiving greater weight than the 25 percent indicated in the RFP, while the technical aspects were systematically given less weight than indicated in the RFP. It asserts that this was prejudicial since WBA was the highest rated offeror technically.

NBS evaluated cost proposals by assigning the maximum of 25 points to the low offeror. Every other offeror received a point score for price equal to the lowest proposed price, divided by its own, higher, proposed price, multiplied by 25. Technical point scores, for which a maximum of 75 points were available, were not so "curved"; they represented a composite of the scores assigned by each of the four technical evaluators.

Under this scoring approach, BDM received the full 25 points for its price proposal of $78,325 while WBA received 21.4 points for its proposal of $91,605. WBA, however, received the high technical score of 61.5 while BDM received a technical score of 58.0.

WBA acknowledges that a similar scoring system was upheld in 53 Comp. Gen. 253 (1973), but attempts to distinguish the case on the ground that the RFP in that instance described the method of scoring to be used. We view that as immaterial. Any reasonable scoring system, including the one utilized in this case, may be used, regardless of whether it is set forth in the RFP, so long as its use does not produce a result that is misleading or inconsistent with

the stated evaluation factors. Francis & Jackson, Associates, 57 Comp. Gen. 244 (1978), 78-1 CPD 79. We see no such difficulty with the evaluation in this case, where the scoring merely reflected the important judgments of the technical evaluators and the mathematical determination of the relative difference among the proposed prices. As in Francis & Jackson, the proposals in this case were relatively close technically, and that price happened to be the critical determinant may be attributed to the closeness of the technical scores. In other words, it was not the method of point scoring that resulted in the selection of BDM for award but rather the successful offeror's superiority in terms of price, which could not be overcome by the higher technical score given the WBA proposal. In this regard, we point out that the technical evaluation narrative recites the view that the technical proposals were essentially equal and that award should be made on the basis of lowest cost. An award on that basis is not inconsistent with the evaluation criteria, since where proposals, despite a numerical difference in point scores, are regarded as essentially equal technically, price or cost logically may become the determinative factor instead of the more heavily weighted technical criteria. See Telecommunications Management Corp., 57 Comp. Gen. 251 (1978), 78-1 CPD 80 and cases cited therein.

The protest is denied.

R.F. Keller

Deputy Comptroller General
of the United States