



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Prospective Computer Analysts, Inc.

File: B-275262.2

Date: February 24, 1997

Kenneth D. Brody, Esq., McMahon, David & Brody, for the protester.
John R. Tolle, Esq., and Monica Gray, Esq., Barton, Mountain & Tolle, for Computer Systems Development Corporation, an intervenor.
Theresa Chesnut, Esq., and Peter D. Butt, Esq., Department of the Navy, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Navy may properly reopen negotiations after receiving best and final offers where the Navy reasonably decided that further discussions are needed to resolve whether offerors intend to pay minimum wage rates required by the Service Contract Act.

DECISION

Prospective Computer Analysts, Inc. (PCA) protests the Navy's decision to reopen negotiations with firms whose proposals were determined to be in the competitive range under request for proposals (RFP) No. N00244-96-R-5142 for engineering and technical support services. The protester contends that: (1) the Navy does not have a valid reason for reopening discussions and soliciting a second round of best and final offers (BAFO); (2) Navy officials improperly revealed PCA's proprietary data to a competing offeror, Computer Systems Development Corporation (CSDC) and, therefore, soliciting a second BAFO will result in a prohibited auction; and (3) CSDC should be considered ineligible for contract award because it received and was allowed to review a copy of the RFP before it was issued.

We deny the protest.

Issued on April 10, 1996, by the Fleet and Industrial Supply Center (FISC) as a total small business set-aside, the RFP requested proposals for providing product development and engineering and technical support services for various Navy systems, including various aircraft, air combat electronic platform support equipment, common support equipment, and aircraft carrier launch and recovery

site equipment. Among other things, the contractor will be required to perform engineering investigations, modification of hardware and software, preparation of technical directives, assembly of change kits, development of support equipment and air launch and recovery engineering, maintenance, configuration management, revision of technical documentation, and site activation and deactivation at various locations worldwide.

The RFP envisioned a time and materials, indefinite delivery, indefinite quantity contract for a 1-year base period and included options for four additional 1-year periods; offers were to include fixed hourly rates for a number of labor categories, and services would be provided at those rates upon issuance of delivery orders. The RFP required offerors to submit separate cost and technical proposals and stated that the contract would be awarded to the offeror whose proposal was determined to be most advantageous to the government after evaluation of cost and technical factors. The RFP stated that the technical factors combined were more important than cost. Because the procurement was for services, it was subject to the Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. §§ 351-358 (1994), and the RFP advised that offerors must pay non-exempt employees not less than the minimum wages and fringe benefits set forth in the Department of Labor (DOL) area wage determination for the San Diego area which was incorporated into the RFP. The RFP also provided that the cost proposals would be evaluated for cost realism and advised that an offeror's proposed cost might be adjusted for evaluation purposes, based on the results of the cost realism evaluation.

Three offerors, including PCA and CSDC, submitted initial offers by the June 28 closing date. After initial proposals were evaluated, only the proposals of PCA and CSDC were considered to be in the competitive range. In performing the cost realism analysis, the contracting officer noted that both PCA's and CSDC's initial proposals included hourly rates for several labor categories that were less than the SCA rates. During discussions, the agency expressed concern that the hourly rates proposed by each offeror for certain labor categories were substantially less than the pay rates specified in the wage determination. The agency asked each offeror to either confirm that the relevant labor category was subject to the SCA or to explain why the relevant labor categories were exempt from the SCA and to explain how it would retain qualified employees at the proposed rates, and requested BAFOs.

Both PCA and CSDC submitted BAFOs addressing the pay rate issue. In its BAFO, CSDC increased its hourly rates for [deleted] labor categories and claimed that the other [deleted] categories were exempt from the SCA. In its BAFO, PCA did not claim that any of the [deleted] labor categories were exempt from the SCA but continued to propose hourly rates that were less than the wage determination rates [deleted]; PCA also explained why it was able to offer hourly rates that were less than the wage determination rates for these labor categories. PCA's total proposed cost was \$[deleted] and CSDC's total proposed cost was \$[deleted]. In October

1996, the contracting officer notified CSDC that PCA had been selected for the proposed contract award.

Subsequently, CSDC filed protests with both the Navy and our Office alleging that the Navy's discussions with it were misleading, encouraging it to propose higher labor rates and resulting in the selection of PCA for contract award. After investigating CSDC's protest allegation, the Navy determined that CSDC had not been misled during discussions. Since the labor rates issue had been raised with both offerors during discussions, the Navy also reexamined PCA's BAFO response to the labor rates discussion question. The Navy determined that PCA's BAFO did not adequately address the matter of compliance with the SCA labor rates. In fact, the Navy determined that PCA's BAFO indicated that PCA [deleted]. The contracting officer, therefore, concluded that it would be in the government's best interest to reopen negotiations to ensure that both competitive range offerors understood the applicability of the SCA wage rates, that the eventual awardee would pay the mandated minimum wages, and that the contract would be awarded at a fair and reasonable price.¹ PCA was notified of the decision to reopen discussions on November 12, and filed this protest shortly thereafter.

The protester contends that it is not reasonable for the Navy to reopen discussions after receiving BAFOs and selecting PCA for award. In support, PCA cites Federal Acquisition Regulation (FAR) § 15.611(c) (FAC 90-31), which prohibits a contracting officer from reopening discussions after BAFOs have been received unless it is clearly in the government's interest to do so. The protester contends that it is clear from PCA's initial proposal and BAFO that PCA is not taking exception to application of the SCA to this procurement [deleted]. Thus, PCA asserts that there is no legitimate government interest in reopening discussions.

Contracting officials have the discretion to reopen negotiations after the receipt of BAFOs where such action is necessary to ensure a fair and impartial competition. BNF Technologies, Inc., B-254953.4, Dec. 22, 1994, 94-2 CPD ¶ 258. Moreover, contracting officials may properly reopen negotiations after receipt of BAFOs where it is clear that information available at that time is inadequate to reasonably justify contractor selection and award based upon the BAFOs received. FAR 15.611(c). Here, we conclude that the Navy has a reasonable basis for reopening discussions and requesting a second set of BAFOs because its selection decision was made without resolving the concern regarding the payment of SCA rates.

The Navy's cost analysis of PCA's initial proposal showed that PCA was proposing unburdened hourly rates for [deleted] labor categories ([deleted]) that were [deleted] the DOL wage determination. For example, [deleted]. Even though PCA

¹We dismissed CSDC's protest as academic when the Navy notified our Office that it was reopening negotiations.

was advised during discussions that the Navy was concerned that PCA's proposed hourly rates for these labor categories were [deleted] the DOL wage determination rates, PCA's BAFO response did not allay the Navy's concern and, in fact, PCA [deleted] for all [deleted] labor categories. The Navy thus concluded that it needed to reopen discussions to resolve its concerns regarding PCA's cost proposal with respect to these labor categories.

While PCA explained in its BAFO why its unburdened hourly rates were [deleted] the wage determination rates, the contracting officer, with the advice of Navy counsel, determined that PCA's explanation, coupled with [deleted] was an unsatisfactory response to the SCA issue. In its BAFO, PCA stated that it intended to perform [deleted]. We note, however, that PCA's BAFO did not [deleted]. We also note that the BAFO did not state [deleted].

PCA further explained in its BAFO that it would give employees in these five labor categories [deleted]. PCA stated in its BAFO that: "[deleted]." The contracting officer reports that he viewed PCA's explanation as a further indication that PCA [deleted] the minimum wages set forth in the wage determination. The contracting officer contacted an investigator in DOL's Wage and Hour Division who confirmed the contracting officer's belief that a contractor was required to pay its SCA employees [deleted] compensation at the minimum wage rates [deleted].²

We believe the Navy had several reasons to conclude that PCA [deleted]. The reasons include: (1) PCA's initial unburdened labor rates were [deleted] than the SCA minimum wage rates; (2) PCA's response to being advised of the Navy's concern that [deleted] its proposed hourly rates in every relevant labor category in its BAFO; (3) PCA expressly [deleted]; and (4) cognizant DOL employees twice confirmed that [deleted].³ Under these circumstances, the Navy could reasonably determine that the government's interests require further discussions to ensure that

²The record shows that, subsequent to PCA's filing this protest, Navy counsel contacted yet another employee of DOL's Wage and Hour Division and was told that "[deleted]."

³We recognize that, where an offer does not show any intent to violate the SCA in a fixed-price contract such as this, the contractor is required to pay its employees the applicable SCA wages out of whatever hourly price it has proposed to the government, and that proposed rates that are less than the required SCA minimum rates may simply constitute a below-cost offer. See Milcom Sys. Corp., B-255448.2, May 3, 1994, 94-1 CPD ¶ 339. Here, however, PCA's BAFO did indicate that PCA [deleted] SCA-required minimum wage rates.

the selected contractor will pay its covered employees SCA-required wages. See National Technologies Assocs., Inc.; JWK Int'l. Corp., B-229831.2; B-229831.3, May 13, 1988, 88-1 CPD ¶ 453.⁴

The protester alleges that, after initially selecting PCA for award of the contract, the Navy revealed certain PCA proprietary data, including names of proposed subcontractors and pricing information, to CSDC. Specifically, PCA states that, after PCA was selected, Navy employees displayed a banner congratulating PCA on its selection and identifying PCA's proposed subcontractors. The Navy acknowledges that FISC employees did, in fact, display a banner congratulating PCA and its subcontractors within the FISC office complex. However, CSDC's San Diego site manager stated that no employee of CSDC ever saw the banner or learned the names of PCA's proposed subcontractors from it. Since there is no evidence that the banner was seen by anyone from CSDC, the Navy's employees' actions apparently caused no competitive prejudice to PCA.

PCA also asserts that Navy personnel may have engaged in improper discussions with CSDC in which the Navy told CSDC that it would have been selected for award if it had not raised its prices in its BAFO in response to the SCA discussion question. PCA alleges that such improper discussions effectively informed CSDC that its initial proposed prices were [deleted], thus giving CSDC knowledge about PCA's proposed prices and an unfair advantage in preparing its second BAFO. PCA contends that reopening discussions and soliciting second BAFOs will result in an improper auction because the Navy has indicated to CSDC its standing relative to PCA's proposed price. The Navy denies that such information was ever provided to CSDC. In fact, the contracting officer avers that he was very careful not to disclose offerors' prices or technical rankings in his notification to CSDC that PCA had been selected for award and in his subsequent conversation with CSDC. The contracting officer also states that the only discussion of pricing that transpired between himself and CSDC after PCA was selected for award concerned whether CSDC had been led to raise its prices by the agency's previous discussion regarding payment of minimum SCA wages to employees.

Prohibited auction techniques include: (1) indicating to an offeror a price it must meet to obtain further consideration, (2) advising an offeror of its relative standing, and (3) furnishing information about other offerors' prices. FAR § 15.610(e)(2). The only support PCA provided for the allegation that someone from FISC must

⁴Since, as noted above, CSDC responded to the SCA wage rate discussion question by [deleted] proposed labor rates while PCA [deleted] the reopening of discussions will also give the Navy an opportunity to clarify the SCA's applicability and to ensure that both offerors are competing on the same basis. Unified Indus. Inc., B-237868, Apr. 2, 1990, 90-1 CPD ¶ 346, aff'd RGI, Inc.-- Request for Recon., B-237868.2, Aug. 13, 1990, 90-2 CPD ¶ 120.

have given CSDC some idea of PCA's BAFO price is derived from CSDC's previous protest to our Office concerning this same procurement. In that protest, CSDC asserted that the Navy's discussions with it concerning wage rates led it to increase its price to a level that was too high to be considered for award; CSDC also asserted "upon information and belief" that its prices would have been lower than PCA's if it had not increased its labor rates in response to the discussion of SCA wage rates. However, in view of the contracting officer's express denial of having provided any information about PCA's prices to CSDC, it appears that CSDC's previous protest was based solely upon CSDC's speculation that its prices would have been lower than PCA's had it not raised its labor rates after discussions, rather than upon any pricing information provided to it by the Navy. Other than this reference to pricing in CSDC's previous protest, there is nothing in the record showing that contracting officials engaged in any prohibited auction practices or otherwise provided CSDC with information about PCA's offer.

The protester also contends that CSDC's San Diego site manager improperly obtained an advance copy of the RFP from a Navy contracting officer's technical representative (COTR) and was given an opportunity to review it in the presence of the COTR prior to the formal issuance of the RFP. The only evidence offered in support of this assertion is the declaration of a PCA employee who states that he had a conversation with the CSDC San Diego site manager in the summer or fall of 1995 during which the site manager told him that the Navy COTR had pointed to his desk and stated that the RFP was in it. Our Bid Protest Regulations require that a protest be filed within 10 days after the basis for protest is known. Bid Protest Regulations, § 21.2(a)(2), 61 Fed Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(2)). As PCA knew this basis of protest in the fall or summer of 1995 but waited until November 15, 1996--more than a year later--to file its protest, the allegation is untimely and will not be considered. We note, however, that both the Navy COTR and the CSDC San Diego site manager deny that a copy of the RFP was given to the CSDC employee at any time before the RFP was formally issued.

The protest is denied.

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