



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Clearwater Instrumentation, Inc.

File: B-286454.2

Date: September 12, 2001

Jay P. Urwitz, Esq., and Barry J. Hurewitz, Esq., Hale and Dorr, for the protester.
Stephen S. Kaye, Esq., and Rebecca A. Ford, Esq., Bryan Cave, for MetOcean Data Systems Limited, an intervenor.
Talbot J. Nicholas II, Esq., Department of Transportation, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency took corrective action in response to an earlier protest by amending the solicitation and reopening discussions, the prior disclosure of protester's prices and the request for final proposal revisions did not create an improper auction.

DECISION

Clearwater Instrumentation, Inc. protests the award of a contract to MetOcean Data Systems Limited under request for proposals (RFP) No. DTCG40-00-R-50012, issued by the Department of Transportation, United States Coast Guard, for self-locating datum marker buoys, which are designed to be deployed from aircraft and are oceanographic drifters that provide near real-time surface current data during search and rescue missions. Clearwater challenges the award to MetOcean, which submitted a technically equal, lower-priced proposal.

We deny the protest.

BACKGROUND

Prior Protest

The RFP, issued on May 19, 2000, contemplated the award of a fixed-price requirements contract. The RFP stated that the award would be made to the responsible offeror whose proposal was determined most advantageous to the government, considering technical evaluation factors (which included, in descending

order of importance, technical description; quality factors; facilities/equipment; key personnel; corporate experience; and projected workload), past performance, and price. The technical and past performance evaluation factors were more important than price. The RFP price schedule included contract line item No. (CLIN) B.0.11 for one separately priced “approval drawing package in accordance with specification P-420-0349, paragraph 3.8.3.” RFP at 3. These drawings were required to show complete manufacturing and engineering design data, and were to become the property of the Coast Guard. RFP at 31.

On September 22, the agency awarded a contract to Clearwater, which submitted a technically equal, lower-priced proposal. On September 27, the agency modified Clearwater’s contract by deleting the requirement corresponding to CLIN B.0.11, after basically concluding that the drawings would provide no useful information for future acquisitions by the Coast Guard of more technologically advanced buoys. MetOcean subsequently protested the award to Clearwater, arguing, among other things, that it was prejudiced because it was not afforded an opportunity to revise its price in light of the agency’s decision to eliminate the CLIN B.0.11 requirement.

The General Accounting Office (GAO) attorney handling the MetOcean protest conducted an “outcome prediction” alternative dispute resolution (ADR) conference with the parties. See Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture—Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 2 n.1 (description of “outcome prediction” ADR). During this conference, the GAO attorney expressed concern with the agency’s conduct of the procurement. Specifically, after reviewing the record, including the parties’ arguments, the GAO attorney found that MetOcean appeared to have been prejudiced by the agency’s failure to give that firm an opportunity to consider how the decision not to procure the drawing package corresponding to CLIN B.0.11 would affect its price. As a result of the ADR conference, the agency decided to terminate for convenience Clearwater’s contract, to amend the RFP to delete the CLIN B.0.11 requirement, and to reopen discussions with MetOcean and Clearwater. GAO dismissed MetOcean’s protest as academic based on the corrective action. MetOcean Data Sys. Ltd., B-286454, Jan. 4, 2001.

Current Protest

On March 8, 2001, the agency issued amendment No. 6, which specifically deleted from the RFP price schedule CLIN B.0.11, as described above. The amended RFP stated that overall cost to the government would become the determining factor for award as proposals became more equal based on non-price factors.

In addition, by letters dated March 8, the agency advised MetOcean and Clearwater that it was reopening discussions. (By this point, MetOcean and Clearwater were aware of each other’s proposed unit prices. MetOcean received Clearwater’s unit prices in the debriefing letter (dated September 29, 2000) provided by the agency after the initial award to Clearwater. Clearwater saw MetOcean’s total prices for the relevant line items, from which unit prices could be calculated, in the agency’s

administrative report responding to MetOcean's initial protest.) In these letters, the agency pointed out to both firms the areas in their technical and price proposals that needed to be addressed in their final proposal revisions in order for the firms to be eligible for award.

With respect to price, Clearwater was told that "[n]o issues to be addressed. However, [the firm was being] given the opportunity to revise [its] pricing when [it] submit[s] [its] final proposal revision." Agency Report (AR), Tab 19, Discussion Letter from Contracting Officer to Clearwater 2 (Mar. 8, 2001). MetOcean was notified that its prices were considered unbalanced and too high for CLINs B.0.2 (first article test buoy live) and B.0.3 (first article test buoy dummy) based on the prices of other proposals received for the same items and the fact that the price proposed for CLIN B.0.3 (an item without electronic components) was higher than the cost of the production buoys. The agency advised MetOcean that its proposal could be rejected if it did not correct the unbalanced pricing and that "[it was being] given the opportunity to reduce [its prices] for [the above-referenced] items [in its] final proposal revision." AR, Tab 20, Discussion Letter from Contracting Officer to MetOcean 2 (Mar. 8, 2001). At the time discussions were reopened, and as relevant here, MetOcean and Clearwater had priced these two CLINs, on a unit price basis, as follows:

	MetOcean	Clearwater
CLIN B.0.2	\$10,155	\$2,640
CLIN B.0.3	\$1,995	\$1,494

AR, Tab 6, MetOcean Debriefing Letter 1 (Sept. 29, 2000).

MetOcean and Clearwater submitted final proposal revisions, including technical and price revisions, by the March 29 closing time. For CLINs B.0.2 and B.0.3, MetOcean and Clearwater submitted the following revised unit prices:

	MetOcean	Clearwater
CLIN B.0.2	\$2,900	\$2,365
CLIN B.0.3	\$1,844	\$1,219

AR, Tab 31, Clearwater Debriefing Letter 1 (July 5, 2001).

MetOcean's total proposed price of \$1,385,556 was approximately 5 percent lower than Clearwater's total proposed price of \$1,460,531. AR, Tab 28, Addendum to Price Negotiation Memorandum, at 7. This difference in price between the two offerors was primarily the result of MetOcean's proposing a lower price for the production

units.¹ The final proposal revisions of MetOcean and Clearwater were evaluated as follows:

	MetOcean	Clearwater
Technical (200 maximum)	195.4	184.4
Past Performance (100 maximum)	93	97
Price (50 maximum)	46	43
TOTAL	334.4	324.4

Id. at 4, 6, 9.

The contracting officer, who served as the source selection authority, determined that the proposals of MetOcean and Clearwater were essentially technically equal, with each firm offering similar approaches, proposing a good product, and demonstrating a clear understanding of the technical requirements. Under these circumstances, the contracting officer selected MetOcean's technically equal, lower-priced proposal for award. AR, Tab 27, Source Selection Decision, at 1-3.

ISSUES AND ANALYSES

Improper Auction

Clearwater argues that the reopened competition amounted to an improper auction since its prices, particularly for CLINs B.0.2 and B.0.3, were revealed to MetOcean following the initial award. In Clearwater's view, the only reasonable explanation for MetOcean's dramatic price reductions, which secured the award for that firm, was that MetOcean knew the likely range of Clearwater's lower prices. Protester's Comments at 4.

Since the Federal Acquisition Regulation (FAR) § 15.306(e)(3) does not prohibit auctions, and where, as here, corrective action taken by the agency--the reopening of the competition--was not improper, the prior disclosure of proposal information, including prices, did not preclude the corrective action, and the request for revised price proposals did not constitute an improper auction. RS Info. Sys., Inc., B-287185.2, B-287185.3, May 16, 2001, 2001 CPD ¶ 98 at 4.² In these circumstances,

¹ For three production CLINs, MetOcean's unit prices were \$1,854 each and Clearwater's unit prices were \$1,994 each. Clearwater does not challenge MetOcean's prices for the production units.

² We note that when the competition was reopened, MetOcean and Clearwater were competing on a level playing field since each firm had knowledge of the other's relevant unit prices, as discussed above.

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Clearwater has failed to demonstrate a violation of law or regulation by the agency in reopening this competition.

Price Evaluation

Clearwater complains that the agency failed to assess the reasonableness of MetOcean's lower price. Protester's Comments at 5-10. However, Clearwater's complaint is not supported by the record.³

The record shows that in evaluating the reasonableness of the proposed prices, the agency compared the prices proposed by MetOcean and Clearwater to each other (and to the lowest-priced, minimally acceptable proposal submitted by a third offeror) and to the government estimate. AR, Tab 28, Addendum to Price Negotiation Memorandum, at 7-8. (All three firms submitted prices significantly less than the government estimate, which was based on prices for prototypes.)

The price evaluation approach used by the agency was consistent with FAR § 15.404-1(a)(1), (b)(2), which lists various price analysis techniques (e.g., comparison of proposed prices received in response to the solicitation and comparison of proposed prices with the independent government estimate) that an agency may use, singly or in combination with other techniques, to ensure that a final price is fair and reasonable. Contrary to Clearwater's suggestion, there is no requirement that an agency use all of the price analysis techniques listed in the FAR to determine that an offeror's price, such as MetOcean's, was reasonable. In fact, FAR § 15.404-1(b)(2)(i) provides that "[n]ormally, adequate price competition establishes price reasonableness." Here, considering that the prices proposed by the three competitors were relatively consistent and in line with each other, we have no

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In addition, to the extent Clearwater argues that there was no reasonable basis to conduct new technical evaluations as part of the agency's corrective action, this argument, raised after the new selection decision was made, is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2001). In any event, we point out that Clearwater benefited from the new technical evaluation as its revised technical score was higher than its initial technical score.

³ Clearwater also complains that MetOcean "bought in." This matter, however, constitutes a challenge to the submission of a below-cost or low profit proposal. These types of proposals are not illegal and provide no basis for challenging an award of a fixed-price contract to a responsible contractor, like MetOcean, since fixed-price contracts are not subject to adjustment during contract performance, barring unforeseen circumstances. SatoTravel, B-287655, July 5, 2001, 2001 CPD ¶ ____ at 4-5 n.3. Here, in the absence of unforeseen circumstances, MetOcean, not the agency, will bear all financial risks, including a low profit margin.

basis to disagree with the agency's conclusion that the prices proposed by MetOcean and Clearwater were reasonable and that MetOcean's proposal would result in the lowest price to the government. AR, Tab 28, Addendum to Price Negotiation Memorandum, at 8-9.⁴

Integrity of Unit Prices

Clearwater complains that MetOcean's pricing scheme, particularly its dramatic price reduction for CLIN B.0.2 as reflected in its final proposal revision, violated the clause at FAR § 52.215-14, captioned "Integrity of Unit Prices," which was included in the RFP. (This clause requires that offerors distribute costs within contracts on a basis that ensures that unit prices are in proportion to actual costs and prohibits methods of distributing costs to line items that distort unit prices. Astrosystems, Inc., B-260399.2, July 11, 1995, 95-2 CPD ¶ 18 at 8 n.1.) Clearwater maintains that MetOcean reduced its price for CLIN B.0.2 solely in response to the agency's removal in amendment No. 6 of CLIN B.0.11, the drawing package, which Clearwater characterizes as an "unrelated" item, and based on the disclosure of Clearwater's prices after it was initially awarded the contract. Protester's Comments at 11-12.⁵

⁴ The record further shows that the agency considered the technical risks associated with the proposals submitted by MetOcean and Clearwater. With respect to MetOcean, this firm also had a contract with the Navy; the agency recognized that if performance under the Navy contract were expedited, such action could affect MetOcean's performance of the Coast Guard contract. Id. at 5. With respect to Clearwater, the agency considered that this firm's quality assurance program did not appear to be institutionalized; that this firm did not discuss subcontractor facilities; and that this firm did not provide adequate details of projected workload. Id. While acknowledging these risks, the agency nevertheless concluded that from a technical perspective, these matters would not impede performance of the contract by either MetOcean or Clearwater.

⁵ In its initial protest, Clearwater argued that MetOcean's prices were unbalanced, citing FAR § 15.404-1(g). In its administrative report, the agency addressed this matter. In its comments on the agency report, Clearwater did not offer any meaningful response to the agency's position. (For example, Clearwater did not allege that prices for particular line items in MetOcean's proposal were significantly overstated or understated, and it did not show that the award to MetOcean would result in the agency paying unreasonably high prices to MetOcean for contract performance. See South Atlantic Constr. Co., LLC, B-286592.2, Apr. 13, 2001, 2001 CPD ¶ 63 at 3-5.) Accordingly, we deem this ground for protest to be abandoned. See Heimann Sys. Co., B-238882, June 1, 1990, 90-1 CPD ¶ 520 at 4 n.2.

To prevail in a protest of an alleged violation of the referenced FAR provision, the protester must establish both that the violation exists and that the protester was prejudiced by the improper pricing methods. Astrosystems, Inc., supra. Here, Clearwater's argument amounts, in part, to a restatement of its improper auction argument, which was addressed above. In addition, Clearwater has not articulated any meaningful basis to question the reasonableness of the agency's determination that the award to MetOcean will result in the lowest price to the government. Under these circumstances, where Clearwater has failed to make the required showings, we have no basis to question the integrity of MetOcean's unit prices.

CONCLUSION

We conclude that consistent with the terms of the RFP, which provided that overall cost to the government would become the determining factor for award as proposals became more equal based on non-price factors, the agency reasonably selected MetOcean's technically equal, lower-priced proposal for award.

The protest is denied.

Anthony H. Gamboa
General Counsel