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United States General Accounting Office
Washington, DC 20548

Comptroller General
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Decision

Matter of: RS Information Systems, Inc.

File: B-287185.2; B-287185.3

Date: May 16, 2001

Mary Beth Bosco, Esq., Norah D. Molnar, Esq., and T. Michael Guiffre, Esq., Patton Boggs, for the protester.

Kenneth J. Ingram, Esq., and Michael A. Stover, Esq., Whiteford, Taylor & Preston, for STG, Inc., an intervenor.

Carol A. Cowgill, Esq., Environmental Protection Agency, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where flaws in original cost evaluation require agency to reopen competition, prior disclosure of awardee's contract price and request for revised cost proposals do not create an improper auction.
2. Allegation that agency misled protester by advising it that its original evaluated cost was lowest among all offerors, is denied where agency's detailed cost discussions provided protester with all information necessary to prepare competitive offer; protester's decision not to submit lower cost proposal reflects its own business judgment and was not the result of misleading advice from the agency.

DECISION

RS Information Systems, Inc. (RSIS) protests the award of a contract to STG, Inc. under request for proposals (RFP) No. PR-HQ-99-16699, a competitive section 8(a) set-aside, issued by the Environmental Protection Agency (EPA) for telecommunications support services. RSIS challenges several aspects of the procurement.

We deny the protest.

BACKGROUND

EPA issued this solicitation in 1999 for telecommunications support services for EPA's headquarters in Washington, D.C., its 10 regional offices, and numerous laboratory and field sites. Work under the contract was to be accomplished pursuant to delivery orders covering six functional areas: (1) telecommunication installation, operations, and maintenance; (2) computer services/software; (3) service center operation; (4) advisory/assistance services; (5) design services; and (6) turn-key projects. The RFP contemplated the award of a level-of-effort (LOE), cost-plus-award-fee contract for a base year, with 4 option years.

The RFP did not prescribe labor categories or labor mix; instead, offerors were required to propose the combination of labor categories they would use to provide cost effective services. Proposals also were to include a narrative detailing the offeror's strategy for performing the functional areas and to demonstrate an understanding of the work and appropriate labor mix. RFP § L.11.4.2. To assist offerors, the RFP included historical estimates of the LOE and percentages for each of the areas and "plug" costs for three of the areas.

Proposals were to be evaluated for corporate experience on a pass/fail basis, and under four technical evaluation factors on a best value basis: past performance (20 of 100 available points); technical proposal (40 points); key personnel/oral presentations (25 points); and start-up plan (15 points). RFP § M.4. With regard to the cost evaluation, the RFP provided that EPA would perform a cost realism analysis, with unrealistic cost proposals evaluated in a risk assessment. RFP §§ M.2, M.5. Overall, technical factors were considered more important than cost factors. Award was to be made to the offeror whose proposal provided the greatest overall value to the government. RFP § M.3.

Four offerors, including RSIS and STG, submitted proposals by the November 29, 1999 closing time. After evaluating the technical proposals and oral presentations, the technical evaluation panel (TEP) concluded that none of the four had any weaknesses or deficiencies. In its cost evaluation, the agency adjusted some of the offerors' proposed costs upward to arrive at a most probable cost. Because the top three technical proposals, including those of RSIS and STG, were very close in score, and RSIS's proposal offered the lowest proposed and evaluated cost, EPA made award to RSIS without discussions.

Based on cost questions from an unsuccessful offeror, and EPA's belated discovery that RSIS's proposal did not include needed optional quantities of hours, the contracting officer reviewed the entire cost evaluation. This review disclosed a number of flaws in the assumptions made by the offerors in proposing the optional

LOE quantities and costs, and in EPA's use of plug numbers.¹ Accordingly, the agency terminated RSIS's contract for convenience (as of February 2001) and provided the firm a debriefing comparable to those the other offerors had received following the award to RSIS. EPA then amended the RFP to specify the number of hours in each functional area and to require each offeror to use the plug dollar amounts in areas 4 through 6. The agency established a competitive range that included all offerors, and conducted discussions with them to address identified weaknesses and deficiencies in their cost proposals. Because the offerors' revised proposals showed confusion about the plug amounts, EPA again amended the RFP to clarify the amounts.

EPA obtained final proposal revisions from each offeror in December 2000. The agency reevaluated the proposals and adjusted their costs as necessary. The cost realism evaluation included review of the initial realism analysis of indirect rates (which had been prepared with input from the Defense Contract Audit Agency), a comparison of direct labor rates, consideration of the TEP's review of the offerors' understanding, and a comparison of STG's costs with those of RSIS and the previous incumbent. The final evaluation results were as follows:

Offeror	Technical Score	Evaluated Cost
RSIS	80.71	\$77.9 million
STG	79.66	\$70.3 million
[deleted]	77.97	\$72.5 million
Offeror 4	74.03	\$75.7 million

In making his award recommendation, the contracting officer found that the three highest rated technical proposals, submitted by RSIS, STG, and [deleted], were "equally strong." Source Selection Document at 6. The contracting officer concluded that STG's proposal was the most advantageous to the government because it offered the lowest proposed and evaluated total cost plus award fee. The source selection authority approved the contracting officer's recommendation and made award to STG. After a debriefing, RSIS filed this protest.

ALLEGED IMPROPER AUCTION

RSIS argues that the reopened competition amounted to an improper auction, since RSIS's price had been revealed to the other offerors following the initial award. In RSIS's view, because the technical proposals were so close, the other offerors were able to use the award information as a target to "underbid" the protester.

¹ Among the problems with the offerors' cost proposals were: failure to include an award fee; failure to propose costs for the entire requirement; failure to propose optional incremental hours; failure to allocate other direct costs to subcontractors; and failure to use the required plug amounts in three functional areas.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Federal Sec. Sys., Inc., B-281745.2, Apr. 29, 1999, 99-1 CPD ¶ 86 at 4. Where, as here, corrective action proposed by the agency is not improper, the prior disclosure of information in an offeror's proposal does not preclude the corrective action, and the request for revised cost proposals does not constitute an improper auction. Patriot Contract Servs., LLC, et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4. This is because the possibility that the contract may not have been awarded based on a true determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction; the statutory requirements for competition take priority over any possible regulatory constraints on auction techniques. Federal Sec. Sys., Inc., supra.² While, until 1997, the Federal Acquisition Regulation (FAR) generally prohibited "auction techniques," the current provision regarding limitations on the disclosure of offerors' prices during discussions no longer includes language regarding the prevention of auctions. FAR § 15.306(e)(3).

RSIS'S DEBRIEFING

RSIS asserts that, after reopening the competition, EPA misled it during its debriefing. Specifically, EPA told the protester that its proposed and evaluated costs were the lowest of all offerors when, in fact, the agency had reason to believe that RSIS's costs should have been evaluated as the highest of all offerors. RSIS claims that, had it not been misled, "it might have employed an entirely different bidding strategy in the recompeted procurement." RSIS Comments at 3.

RSIS's argument is without merit. First, while RSIS contends that it "might" have changed its bidding strategy, it does not explain how it was misled or how it would have changed its strategy. Its general assertion is not sufficient to establish competitive prejudice.³ Moreover, to the extent RSIS means that it would have

² In a related argument, RSIS asserts that the auction effects were aggravated by the agency's promising, but failing, to perform a proper cost realism evaluation to ensure that no offeror unrealistically lowered its price based on RSIS's award price. However, RSIS points to nothing specific to support this claim. Rather, it simply challenges the methodology of the analysis, with no suggestion of how the result would be different if the analysis were changed. It is plain from the record that the difference in cost proposals is primarily attributable to the more aggressive cost strategy employed by STG--[deleted]--rather than to unrealistic proposed costs. Had RSIS used a similar strategy, its overall cost would have been close to STG's.

³ Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial

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proposed a lower cost, we are not persuaded. Since RSIS was aware that this was a competitive procurement, it is not clear to us why its belief—correct or not—that its original contract price was the lowest received would have led it to increase its proposed price more than it otherwise would have; it seems to us that RSIS at all times had every incentive to keep its proposed cost as low as possible. Further, as noted, RSIS received the same evaluation information as the other offerors, (including the TEP report on its proposal, its technical score, and its evaluated cost), as well as detailed cost discussions. We fail to see why this information was not sufficient to put RSIS on notice that its original price was flawed, and to enable it to submit the lowest possible revised cost proposal reflecting its approach to performing the work.

COST REALISM ANALYSIS

RSIS asserts that the agency failed to perform a proper cost realism analysis in its review of STG's revised costs under the reopened competition.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(a) (1994), and our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (2001), a protester must be an “interested party” before we will consider its protest. A protester is not an interested party if it would not be in line for award if its protest were sustained. Avondale Technical Servs., Inc., B-243330, July 18, 1991, 91-2 CPD ¶ 72 at 2.

Here, while the protester received the highest technical score, the agency specifically determined that RSIS's, STG's, and [deleted] proposals were equally strong, Source Selection Document at 6, and based the award decision solely on evaluated cost. RSIS's evaluated cost was the highest (it has not challenged the adjustments the agency made based on its cost evaluation). [deleted] cost was next highest, lower than RSIS's. RSIS has not challenged [deleted] cost or technical evaluation. Thus, even if we found that the cost realism evaluation of STG's proposal was flawed, and that selection of its proposal was improper, [deleted], not RSIS, would be next in line for award. Accordingly, RSIS lacks the requisite direct and substantial interest with regard to the award to be considered an interested party to protest the evaluation. Id. We therefore will not consider this aspect of the protest.

MODIFICATION OF STG'S CONTRACT

Finally, RSIS asserts that the agency “made fundamental changes to the contract immediately after the award to STG.” RSIS Comments at 1. Specifically, RSIS argues that the agency improperly modified the contract to allow STG to eliminate the

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chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc., v. Christopher, 102 F. 3d 1577, 1581 (Fed. Cir. 1996).

Washington, D.C.-based nationwide manager (a key personnel position) and to transfer his responsibilities to the on-site/field operations manager based at Research Triangle Park, North Carolina. RSIS maintains that it should be allowed to compete based on the agency's "new requirements." Protester's Comments at 2.

Once a contract is awarded, we generally will not review modifications to that contract because such matters are related to contract administration and are beyond the scope of our bid protest function. 4 C.F.R. § 21.5(a); MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7. An exception to this rule is where it is alleged that the work encompassed by a contract modification should have been the subject of a separate procurement, id., or an amendment to the solicitation. NV Servs., B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64 at 18. In determining whether a modification triggers the competition requirement in CICA, we look to whether there is a material difference between the modified contract and the contract originally awarded. Sprint Comms. Co., B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60 at 6.

Here, we find no material difference in the awarded contract and the contract as modified. EPA explains that the modification arose in response to the initial delivery orders under STG's contract, which resulted in the short-term migration of a portion of EPA's customer base. In this regard, several EPA customers (six field sites and one headquarters office) opted to acquire their telecommunication services under a General Services Administration (GSA) Federal Supply Schedule contract held by RSIS. The agency reports that these EPA offices had chosen not to use the STG contract and would realize a cost savings through use of RSIS's GSA contract. Agency Supplemental Report at 2. Based on the effect of the lost work, the agency agreed with STG's request to consolidate the nationwide manager's responsibilities with those of two other management positions in another location. The change affects one personnel position and resulted in a total cost savings of approximately [deleted]. Since this represents only a small percentage of the total contract amount (\$70 million), and does not involve any significant change in the work under the contract, the change was unobjectionable.⁴

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ RSIS asserts that a permanent change in key personnel based on a short-term change in the level of effort is unreasonable. However, since the modification did not materially change STG's contract, it is a matter of contract administration, which we will not review. MCI Telecomms. Corp., *supra*.