

DECISION

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

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FILE: B-208540.2

DATE: January 24, 1983

MATTER OF: Macro Systems, Inc.

DIGEST:

1. Agency acted properly in amending evaluation criteria and reopening contract competition following receipt of "best and final offers" when bid protest, which was subsequently withdrawn, pointed out ambiguity in evaluation criteria. Fact that bid protest may have been untimely under GAO procedure is not relevant.
2. When an offeror's identity and price have been disclosed in announcing an award subsequently determined to be improper, the importance of correcting the improper award through further negotiation overrides the competitive advantage possibly bestowed on another offeror by the disclosure.

Macro Systems, Inc. (Macro), protests the award of a contract by the Department of Labor (DOL) to CSR, Inc. (CSR), under request for proposals (RFP) No. ONP 82-3. The solicitation was for "technical and accounting skills necessary to closeout expired contracts and grants in the national and regional offices" of DOL. Macro contends that the solicitation competition was improperly reopened after Macro had been selected as the contractor, that changes by DOL in the evaluation criteria during the negotiations resulted in an ambiguity and an unfair advantage for CSR, and that Macro was prejudiced by the improper release of information regarding its proposal by DOL.

We deny the protest.

DOL issued the RFP on April 5, 1982, with a closing date of April 30, 1982. DOL requested proposals on a cost-reimbursement basis. Part "I," section "D," of the solicitation materials, "Evaluation Factors for Award," included the statement, "Your technical proposal, which will be the most important factor in the award of a contract, should be specific and complete." However, the same section also included the statement, "The Government shall make an

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award to the lowest cost offeror who remains within the technical competitive range at the conclusion of negotiations."

Eighteen firms responded to the solicitation, and four were determined to be in the "competitive range," including Macro and CSR. After submission of "best and final" offers, Macro had the fourth best evaluated technical rating at 80.4, but also had the lowest cost at \$605,916. CSR had the best evaluated technical rating at 97.7, but had the highest cost at \$846,705.

On August 6, 1982, CSR filed a protest in this Office. The grounds of the protest included an alleged ambiguity between the two evaluation criteria discussed above and violation of FPR § 1-3.805 (1964 ed., amend. 153) concerning proper evaluation criteria in negotiated procurements. On August 18, 1982, DOL notified Macro that it was the "low cost offeror" and was selected as the contract awardee. Nonetheless, on August 27, 1982, when Macro representatives arrived at the DOL offices for execution of the contract, they were told that, in view of the pendency of the CSR bid protest, no award would be made.

DOL apparently determined that CSR's protest had merit, and on September 8, 1982, sent the offerors within the "competitive range" a mailgram which amended the evaluation criteria by deleting the statement, "The Government shall make an award to the lowest cost offeror who remains within the technical range at the conclusion of negotiations." The mailgram specifically pointed out that an award would be made in accordance with the amended evaluation criteria and in compliance with paragraph 10 of the "Solicitation Instructions and Conditions" (SF 33A), "The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered." In addition, the mailgram announced that negotiations would be reopened and extended to September 20, 1982. Thereupon followed the instant protest by Macro on September 10, 1982. On September 13, 1982, CSR withdrew its protest.

The revised best and finals resulted in CSR receiving a technical score of 98.7 with a cost of \$728,955 and Macro scored 81.3 with a cost proposal of \$679,631. Award was made to CSR on September 29, 1982.

Macro contends that DOL improperly reopened the contract competition in response to the CSR protest. Macro argues that DOL has incorrectly adopted the position that FPR § 1-3.805 precludes the use of estimated cost as the determining factor in cost-reimbursement-type procurements. However, although the September 8 mailgram is unclear, the DOL protest report indicates that the competition was reopened in view of the ambiguity of the evaluation criteria, not because of a perceived violation of FPR § 1-3.805. Reopening of competition is appropriate when an ambiguity in the solicitation is apparent or the Government is otherwise in danger of contracting for other than its actual requirements. Harris Corporation, B-204827, March 23, 1982, 82-1 CPD 274; Signatron, Inc., B-181782, December 26, 1974, 74-2 CPD 386. It is a fundamental principle of Federal procurement law that solicitations must be drafted to inform all offerors in clear and unambiguous terms what is required of them in order that they can compete on an equal basis. Dynalectron Corporation, B-198679, August 11, 1981, 81-2 CPD 115. In the instant case, the differing evaluation criteria created obvious ambiguity. The failure to clearly indicate the relative importance of cost and technical factors was contrary to the longstanding view of the GAO that sound procurement policy requires that offerors be advised of the relative importance of evaluation factors. 52 Comp. Gen. 161, 163-64 (1972).

Macro points out that the CSR protest was untimely under GAO Bid Protest Procedures. However, when a contracting agency recognizes the validity of a protest and proposes to take appropriate corrective action, it is unnecessary for the GAO to consider whether the protest complied with Bid Protest Procedures. International Business Machines Corporation, B-197188, October 21, 1980, 80-2 CPD 302. In the case at hand, DOL did not have to disregard the content of CSR's protest because it may have been untimely under our Procedures.

Macro further complains that, following the September 8 mailgram and the reopening of negotiations, DOL repeatedly changed the evaluation criteria in an attempt to "steer" the contract award to CSR. Macro contends that the amendment of the evaluation criteria by the September 8 mailgram resulted in criteria under which "cost and technical factors [were] to be viewed as essentially equal in weight." According to Macro, subsequent oral representations by the contracting

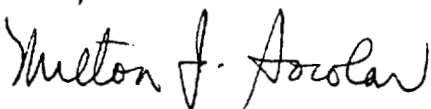
officer created confusion regarding the weight to be given cost factors in the evaluation. Finally, Macro contends that the contracting officer, in a letter to Macro dated September 29, 1982, after the date for best and final offers, maintained for the first time that the technical proposal was relatively more important than price in making the award decision. Macro argues that this belated "change" in the evaluation criteria was improper.

The record does not support Macro's factual allegations. Contrary to Macro's assertion, the September 8 mailgram did not change the evaluation criteria to make cost and technical factors of approximately equal value. The September 8 mailgram corrected an ambiguity in the solicitation by deleting the solicitation provision regarding award to the "lowest cost offeror," but retaining the provision that the technical proposal was "the most important factor in the award of a contract." The September 8 mailgram resulted in evaluation criteria which unambiguously indicated that, although both cost and technical factors would be considered in making an award, the technical proposal would be relatively more important than price. Subsequent oral and written representations by the contracting officer served to restate these criteria, not to change them.

Finally, Macro argues that the disclosure of information regarding its proposal by DOL prior to the September 8 mailgram prejudiced Macro and precluded reopening of negotiations. Prior to September 8, Macro had been announced as the offeror selected for award, indicating publicly that Macro offered the lowest evaluated cost within the competitive range. Macro further contends that "leaks" at DOL provided CSR with detailed information regarding Macro's technical rating. Although we agree with Macro that the disclosure of this information created an unfortunate situation, we cannot agree that an appropriate remedy is to require DOL to award the contract to Macro. In previous similar cases, we have held that when an offeror's identity and price have been disclosed in announcing an award subsequently determined to be improper, the importance of correcting the improper award through further negotiation overrides the competitive advantage possibly bestowed on another offeror by the disclosure. Harris Corporation, B-204827, March 23, 1982, 82-1 CPD 274. Counsel for Macro cites several of our previous decisions in support of the

principle that, when proposals are improperly disclosed, the procuring agency should make an award, if possible, without further discussion. However, our decisions so holding have involved awards which were otherwise proper, apart from the impropriety of the price disclosure. Honeywell Information Systems, Inc., 56 Comp. Gen. 505, 512 (1977), 77-1 CPD 256. In the instant case, as discussed above, the award itself would have been improper for reasons not related to the disclosure of the proprietary information.

We deny the protest.

for 
Comptroller General
of the United States