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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: GTSI Corporation

File: B-286979

Date: March 22, 2001

Kevin P. Connelly, Esq., Joseph J. Dyer, Esq., and Robert F. Pezzimenti, Esq., Seyfarth Shaw, for the protester.
David R. Hazelton, Esq., and C. Thomas Powell, Esq., Latham & Watkins, and Andrew E. Shipley, Esq., Northrop Grumman Corporation, for Federal Data Corporation; and Michael A. Hordell, Esq., and Laura L. Hoffman, Esq., Kilpatrick Stockton, for PRC, Inc., intervenors.
Vera Meza, Esq., Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest by an awardee of an agency's stated intent to take corrective action in accordance with an agency-level protest decision holding that the awardee's contract violated the terms of the solicitation and should be set aside, is not premature, even though the agency has not yet announced whether it will simply terminate the awardee's contract (leaving another offeror as the only awardee) or reopen the competition among the awardee and the remaining unselected offerors, because the awardee faces harm under either of the corrective action options available.

2. The submission of a below-cost or low profit offer is not illegal and provides no basis for challenging an award of a fixed-rate contract to a responsible contractor.

3. Agency-level protest decision sustaining an offeror's challenge to an award may not form the basis for agency corrective action where the agency protest decision erroneously concludes that (1) the awardee's offer of $0.00 for certain contract line items (CLIN) violated the terms of the solicitation, and (2) accepting the awardee's $0.00 prices, while advising another offeror during discussions that it could not enter the acronym "NSP" (not separately priced) for certain other CLINs, gave the awardee an impermissible competitive advantage.

DECISION

GTSI Corporation protests a decision by the Department of the Army that GTSI's indefinite-delivery/indefinite-quantity (ID/IQ) task order contract for servers, workstations, accessories, and support was awarded improperly. Specifically, GTSI challenges the Army's decision, rendered in response to an agency-level protest to the Army Materiel Command (AMC), that GTSI's proposal violated the terms of the solicitation, and that the violation provided GTSI with an impermissible competitive advantage over other offerors.

We sustain the protest.

BACKGROUND

GTSI's contract was awarded pursuant to request for proposals (RFP) No. DAAB07-00-R-H254, issued by the Army's Communications-Electronics Command (CECOM), for commercial-off-the-shelf servers, workstations, operating systems, compilers, software applications, peripherals, local and wide area networking, engineering and support services, managed environment support, maintenance, system upgrades, training, leasing, documentation, and consumables to meet world-wide requirements of the U.S. government. Source Selection Decision at 1. The solicitation anticipated award of a fixed-price ID/IQ task order contract, or contracts, to the offeror, or offerors, whose proposal was determined to be the most beneficial to the government, as assessed under five evaluation factors (which are not relevant to this dispute). RFP § M at 1. Potential offerors were also advised that the resulting contract(s) would be in place for a base period of 24 months, followed by up to three 1-year options. Source Selection Decision, supra. Ordering from the contract(s) was to be permitted by any federal agency, including foreign military sales customers. Id.

Four provisions in section L of the RFP provide pricing guidance relevant to this dispute. These provisions state that:

> (1) Offerors must propose on all required CLIN/SLINs[1] and satisfy all of the requirements of this solicitation, RFP § L at 2;
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> (2) All CLINs/SLINs shall be priced and shall be separately orderable, Id. at 42;
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> (3) Pricing for any CLIN/SLIN must stand alone, and not be dependent upon the authorization of any other CLIN/SLIN, Id. at 46; and

[1]The acronym SLIN used in these quotes is a reference to a sub-line item, which is a further breakdown of a CLIN (contract line item).

> (4) Labor categories shall be priced using fully loaded fixed labor rates for the life of the contract, exclusive of overtime, to be used for the term of the contract under task orders requiring hourly, daily, weekly, monthly and yearly work, as set forth in the Schedule. Id.

At the conclusion of the competition, CECOM made awards to GTSI and IBM-Global Services Federal for estimated prices of $857.2 million and $617.6 million, respectively. Agency Report, Memorandum of Law, at 8. During debriefings on the award decisions, the two unsuccessful offerors, Federal Data Corporation (FDC) and PRC, Inc., learned for the first time that GTSI entered "$0.00" for certain CLINs that required hourly, daily, weekly, monthly, and yearly rates for a program manager. After their debriefings, both FDC and PRC filed an agency-level protest to AMC. Among other issues, FDC argued that GTSI's pricing approach for the project manager CLINs violated the solicitation's requirement that all labor rates be fully-burdened.[2]

In sustaining FDC's challenge to GTSI's pricing approach, the AMC decision noted that during discussions, CECOM sent several deficiency letters to FDC to advise it that its entry of "NSP" (an acronym for "not separately priced") for certain hardware CLINs was not permitted. Though not explained in the decision, the record shows that these deficiency letters advised FDC that its approach violated the RFP's requirement that all CLINs be "separately orderable." Agency Report, Tab 9. As a result, FDC provided prices for those CLINs in its revised proposal. AMC Decision at 6. The AMC Decision also noted that no such letter was sent to GTSI with regard to its entry of $0.00 for the 15 CLINs for program manager services. Id.

Based on these facts, the AMC decision reasons that GTSI was granted "pricing flexibility not allowed to other offerors" and that this flexibility provided the company "a significant competitive advantage." Id. at 7. The decision concludes that GTSI's award should be set aside because "[t]his inconsistent application of the RFP ground rules violated the express terms of the solicitation and provided GTSI with an impermissible competitive advantage over the protesters."[3] Id. To remedy this competitive advantage, the decision directs CECOM to take "appropriate corrective action." Id. at 12. Specifically, the decision advises that:

> [s]hould the agency elect to continue to pursue multiple awards under this solicitation, we recommend that it reopen the competition to allow

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[2]We note that PRC also challenged GTSI's entry of $0.00 for these CLINs, arguing that GTSI's approach rendered its proposal unbalanced. The AMC decision expressly did not reach PRC's contention. AMC Protest Decision, Dec. 4, 2000, at 7.

[3]The remainder of the two protests was denied.

> for proposal revisions from GTSI, PRC, and FDC in accordance with the ground rules contained in the solicitation.

Id. Upon receipt of the agency-level decision, GTSI filed this protest with our Office.

DISCUSSION

GTSI argues that the AMC decision erred as a matter of law, because GTSI's entry of $0.00 for 15 program manager CLINs violates no statute, regulation, or provision of the solicitation. In addition, GTSI argues that there was no inconsistency in CECOM's decision to accept GTSI's $0.00 pricing for the program manager CLINs, while advising FDC that the solicitation did not permit the use of "NSP" for certain hardware CLINs.

In response, the Army argues that GTSI's protest is premature and should be dismissed. The Army also argues that the AMC protest decision properly concluded that GTSI's pricing approach violated the terms of the solicitation, was ambiguous, and gave GTSI an impermissible competitive advantage. FDC and PRC, the successful protesters before AMC, have intervened in support of the Army's position.

With respect to its assertion that this protest is premature, the Army argues that GTSI's award has not been terminated, and CECOM has not yet announced its intended corrective action. On the other hand, the Army also takes the position that CECOM has been directed to take corrective action, and that, despite the delay to date, CECOM has no discretion about whether to do so. As set forth below, we think the issues raised by GTSI's protest should not be dismissed as premature.

Our reading of the AMC decision is that the Army's protest authority has concluded that GTSI's pricing approach cannot be accepted under the terms of this solicitation. AMC Decision at 7 (the protest is sustained because "[t]his inconsistent application of the RFP ground rules violated the express terms of the solicitation . . . ."). To remedy this situation, the recommendation portion of the decision, quoted above, grants CECOM the discretion to decide whether to continue to pursue multiple awards. Should CECOM decide to abandon its intent to make multiple awards, GTSI's contract will be terminated on the basis that it was improperly awarded, leaving only IBM as the awardee. Should CECOM continue its pursuit of multiple awards, the competition will be reopened among GTSI, FDC, and PRC, which might also result in the loss of GTSI's award (although we recognize that other possibilities are reselection of only GTSI after the reopened competition, or reselection of GTSI along with one or both of the other offerors).

Thus, the AMC decision puts GTSI on notice that its contract will either be terminated, or recompeted. In addition, because of the conclusions in the decision, if the competition is reopened GTSI is on notice that it will not be allowed to use "$0.00" for the program manager CLINs, and that it will have to reprice its proposal

in an environment where the other offerors have been given access to GTSI's prices during their debriefings. Since GTSI views the AMC decision as legally incorrect, and since the company faces harm from the application of this allegedly incorrect decision under either of the options available to CECOM, its challenge here is not premature.

Turning to the merits of this dispute, the Army's report to our Office argues that GTSI's pricing approach violated the terms of the solicitation, was ambiguous, and gave GTSI an impermissible competitive advantage. We disagree. As explained in detail below, we reach this conclusion based on our review of the holding in the AMC decision that GTSI's pricing approach violates the solicitation's requirement that labor categories be "priced using fully loaded fixed labor rates." RFP § L at 46. We also conclude that none of the other solicitation provisions applicable to this dispute is violated by GTSI's approach, nor does the Army's acceptance of the approach provide GTSI with an impermissible competitive advantage. Finally, we conclude that none of the other reasons set forth by the Army in its report support its decision to set aside GTSI's award (via either termination or reopening).

The foundation of our approach to this analysis is our long-standing premise that a below-cost bid or offer is permissible in a fixed-price environment. Even in cases, like here, where an offeror proposes labor rates that are below cost, we have held that the submission of a below-cost or a low-profit offer is not illegal and provides no basis for challenging an award of a firm, fixed-rate contract to a responsible contractor, since fixed-rate contracts are not subject to adjustment during performance, barring unforeseen circumstances. ORI, Inc., B-215775, Mar. 4, 1985, 85-1 CPD ¶ 266 at 4. In addition, we have applied this principle in cases like this one where the solicitation expressly requires that the labor rates be fully-burdened. See, e.g., Pulau Elecs. Corp., B-280048.4 et al., May 19, 1999, 99-2 CPD ¶ 99 at 11 (where, in a protest sustained on other grounds, we denied a challenge to an agency's acceptance of an offeror's discounted prices for fixed-price orders despite an RFP requirement that the labor rates used in computing prices be fully-burdened).

Similarly here, we conclude that there is nothing about the solicitation's requirement that labor categories be priced using fully-loaded labor rates that bars a price of $0.00 for a particular CLIN.[4] In our view, provisions like this one in a fixed-price

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[4]In applying this principle to the instant dispute, we recognize that there is a continuum of possibilities between a price of $0.00 and a price that is slightly less than full cost. None of the parties here (nor our Office) has identified any case or principle suggesting that there is a point in this continuum below which an offeror's "below-cost" price becomes so low that it must be rejected as a matter of law. Instead, we have held that such matters involve bidder or offeror responsibility, and we have recognized that these judgments are largely matters of discretion. Pacific Fabrication, B-219837.2, Aug. 30, 1985, 85-2 CPD ¶ 263 at 2.

environment serve not as an absolute bar to below-cost pricing, but rather as an up-front admonition to potential offerors to be sure to include all applicable costs in the price of each CLIN in their proposal because the agency will not entertain claims for those costs after award. See ORI, Inc., supra.

We turn next to the other requirements of section L that provide guidance to offerors about pricing their proposals. These guidelines, quoted above and summarized here, state that: (1) offerors must propose to perform all required CLINs, (2) all CLINs must be priced, and must be separately orderable, and (3) pricing for any CLIN must stand alone, and not be dependent upon the authorization of any other CLIN. RFP § L at 2, 42, 46. In our view, GTSI's pricing approach violates none of these requirements.

As a preliminary matter, we note that most of our guidance in this area has arisen in the context of sealed bid procurements. In that context, we have held that bidders who will perform a portion of the work without charge must make some kind of entry at the appropriate place on the bid schedule to establish without doubt their affirmative intent to be bound to perform the work covered by the CLIN. AUL Instruments, Inc., B-220228, Sept. 27, 1985, 85-2 CPD ¶ 351 at 2. In a negotiated procurement, as in the context of sealed bids, GTSI's entry of $0.00 for the program manager CLINs, as a legal matter, signaled its awareness of the requirement, and its agreement to be bound to perform it, thus satisfying the RFP's requirement that offerors propose to perform all required CLINs. Integrated Protection Sys., Inc., B-229985, Jan. 29, 1988, 88-1 CPD ¶ 92 at 2.

Next, the GTSI approach includes a price for the CLIN, albeit $0.00, and takes no issue with the requirement that the CLIN be separately orderable. See id. (protester expressly argued that $0.00 is not a price, and its contention was denied). Nor does GTSI's entry of $0.00 suggest that the CLIN is dependent on the agency's authorization of any other CLIN. Thus, GTSI's pricing is in no way inconsistent with the RFP's requirements that all CLINs be priced, separately orderable, and not dependent on ordering any other CLIN.

We recognize that an offeror's use of "NSP" pricing may cast doubt on the offeror's commitment to provide the CLIN in question separately and independent of orders of other CLINs. Federal Sys. Group, Inc., B-261781, Sept. 28, 1995, 95-2 CPD ¶ 155 at 4. While NSP pricing generally is considered synonymous with an entry of $0.00 for purposes of establishing a bidder's intent to be bound, AUL Instruments, Inc., supra, these entries do not have an equivalent meaning with regard to whether they are inconsistent with a solicitation provision requiring that CLINs be separately orderable. On the contrary, while an entry of NSP, by its terms, means that the item in question is "not separately priced" and therefore suggests that it may not be orderable separate from other CLINs, an entry of $0.00 does not raise any such question about the offeror's intent to provide the CLIN without a separate purchase of another CLIN.

With respect to the second conclusion of the AMC decision--that GTSI was given an impermissible competitive advantage when it was permitted to enter $0.00 for program manager CLINs, while FDC was not permitted to enter "NSP" for certain hardware CLINs--we again disagree. As discussed above, GTSI's pricing strategy did not violate the terms of the solicitation, or any of the applicable caselaw. Thus, GTSI did only that which it was allowed to do. In addition, we think the agency appropriately advised FDC, during discussions, that its entry of "NSP" for certain hardware CLINs would violate the solicitation's requirement that all CLINs be separately priced, and separately orderable. Put simply, an offer for a given CLIN that is "not separately priced," by definition, runs afoul of this requirement. Federal Sys. Group, Inc., supra. Although the conclusion that accepting GTSI's $0.00 pricing strategy while simultaneously advising FDC of problems with its "NSP" strategy, seems initially counterintuitive, our view on reflection is that CECOM acted properly on both fronts. See Computer Data Sys., Inc., B-223921, Dec. 9, 1986, 86-2 CPD ¶ 659 at 5-6, recon. denied, B-223921.2, Jan. 7, 1987, 87-1 CPD ¶ 22 (upholding an agency's rejection of a proposal that used "NSP" in a procurement where zero pricing was expressly permitted). Thus, we find that the AMC decision, in both its conclusions, was legally wrong.

In addition to the AMC decision, the Army's report to our Office in response to this protest raises two other arguments that it contends support its decision to overturn GTSI's contract award. Both arguments involve matters not considered by the AMC protest decision (nor by the underlying procuring command). One is that the GTSI offer was ambiguous; the other is that the offer raises the specter of performance risk, as considered by our Office in The Orkand Corp; Department of the Navy--Recon., B-224466.2, B-224466.3, Jan. 23, 1987, 87-1 CPD ¶ 88 (reversing SMC Info. Sys., B-224466, Oct. 31, 1986, 86-2 CPD ¶ 505). Agency Memorandum of Law at 11-13.

With respect to whether the GTSI proposal was ambiguous, there is no evidence in this record of any such concern. As indicated above, the contracting command made written findings about GTSI's pricing approach, set forth below, which make no mention of any concern about ambiguity, and which conclude that GTSI has agreed to provide program manager services as required. In addition, there is nothing in the AMC decision suggesting that the Army's protest authority had such concerns. Rather, the first instance in the record of any concern about ambiguity is found in the Memorandum of Law prepared by the agency attorney.

While we think the agency attorney may properly argue ambiguity as a legal matter, this argument, in essence, merely revisits the contention that GTSI's $0.00 offer for program manager CLINs will not be separately orderable without ordering other equipment and services. As indicated above, our review of the applicable caselaw, and GTSI's proposal leads us to conclude that GTSI's $0.00 prices were not ambiguous. GTSI's proposal, on its face, commits the company to provide program

manager services, prices those services at $0.00, and does not tie purchase of the services to purchase of any other goods or services in the contract.[5] See Integrated Protection Sys., Inc., supra (holding that zero is a price, and that there is nothing improper about accepting a price of zero).

Similarly, the agency's Memorandum of Law raises for the first time a concern that GTSI may minimize the use of program manager hours in performing task orders under this contract. Thus, the agency argues that concerns about performance risk, as faced by our Office in Orkand, support its conclusion that GTSI's award should be overturned. Again, we disagree.

Our decision in Orkand reversed a prior decision, SMC Info. Sys., supra, where we sustained a protest challenging the Navy's rejection of a bid that used "NSP" for the labor categories of program manager and group manager. In the initial decision, we held that using "NSP" was equal to bidding $0.00, the bid established SMC's intent to be bound, and there was no basis to reject the bid. SMC, supra at 4. On reconsideration, we reversed SMC based upon the Navy's documented concerns that acceptance of the bid would subject the government to unacceptable cost and performance risks. Orkand--Recon., supra, at 2-4.

The record here contains conclusions diametrically opposite those expressed by the Navy in SMC and Orkand. Specifically, as set forth in response to the AMC protest, the CECOM selection authority stated that he accepted GTSI's pricing approach after reviewing the company's June 14 proposal submission, which explained the company's approach to pricing these CLINs. Source Selection Authority and Source Selection Evaluation Board Chairman's Statement at 13. Based on this review, the selection authority made findings of possible risk associated with accepting GTSI's

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[5]In addition, we note for the record that during the course of this protest GTSI reaffirmed its intent to provide program manager services for $0.00, even if the services are ordered separately. Declaration of GTSI's Vice President for Business Development and Technical Solutions, Jan. 30, 2001, at 1-2. In this Declaration, GTSI acknowledged that it anticipates that, in most instances, procuring agencies will not buy program manager services from an awardee that is not also providing hardware. On the other hand, the company explained that it would welcome separate orders of program manager services, despite its price of $0.00, because it would put a GTSI employee on a site where the company previously had no access, and would probably increase long-term sales. We further note that this is a commercial procurement and that GTSI explains that its commercial practice is not to charge separately for its program managers, but to recover these costs in its overhead. GTSI's explanation that this approach is consistent with its commercial practice, and its reaffirmation of its willingness to provide program managers separately, if asked, further reinforce the agency's initial interpretation, and our view, that GTSI's offer for these services stands alone.

decision to price program management at $0.00. In these findings, at 15, the selection authority determined that there was no unacceptable risk to the government in the approach because:

> (a) GTSI's letter dated 14 June 2000 has assured the Government that Program Management hours will be included as required in individual delivery orders and that they will utilize individuals with the requisite qualifications as stated in the RFP.
>
> (b) The 14 June 2000 letter also stated that costs for the Program Management hours are included in the overhead charges (which was verified by the 13% increase in all other labor rates at the time of the submission of the $0.00 Program Management rate).
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> (c) The Program Manager provided will meet the RFP requirements in the Performance Specification paragraph 11.1.
>
> (d) The award was priced reasonably (in light of the comparison of GTSI's overall price to the competition) and posed no unacceptable risk to the Government.

Given these express determinations in the record by the selection authority, we have no basis to accept an argument made in the agency report to our Office based on unsubstantiated (and in fact, flatly refuted) concerns that a risk of poor performance justifies overturning GTSI's award. See ITT Fed. Servs. Int'l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 5-6; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 14-15.

RECOMMENDATION

Since we conclude that the AMC protest decision was legally wrong, and since the Army has shown no other valid basis for overturning GTSI's award, we recommend that the agency abandon its intent to take corrective action in accordance with the AMC protest decision. Since CECOM has not yet terminated GTSI's contract, or reopened the procurement, we recommend that the agency leave the contract in place, and permit GTSI to compete with the other awardee, IBM, for future task order awards under the contract. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.8(d)(1) (2000). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel