Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: Techno-Sciences, Inc.

File: B-277260.2

Date: March 25, 1998

Minh N. Vu, Esq., Latham & Watkins, for the protester.
Mark Langstein, Esq., and Amy L. Freeman, Esq., Department of Commerce, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Market survey undertaken in response to recommendation for corrective action contained in prior decision, which sustained a protest because the agency failed to properly determine whether a section 8(a) contract was awarded at a fair market price, is not a reasonable method of making this determination because the 8(a) contractor is not performing all of the requirements that the respondents to the survey were requested to price.

DECISION

Techno-Sciences, Inc. protests a market survey undertaken by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce to implement corrective action recommended in our decision in Techno-Sciences, Inc., B-277260, Sept. 22, 1997, 97-2 CPD ¶ 115. That decision sustained Techno-Sciences's protest of the award of a contract to Research and Professional Services, Inc. (RPS) negotiated through the Small Business Administration's (SBA) section 8(a) set-aside program under request for proposals (RFP) No. 50-DDNE-7-90034, for software development, testing, and maintenance to support the United States Mission Control Center (USMCC).

We sustain the protest.

BACKGROUND

As detailed in our prior decision, the USMCC is the United States's component of the International Cospas-Sarsat satellite-based search and rescue system that uses satellites to detect and locate emergency beacons emitted by ships, aircraft, or individuals. Techno-Sciences has been a NOAA contractor for software services

supporting the USMCC since 1990 and owns the proprietary software that supports the on-line functions of the USMCC. After unsuccessfully attempting to purchase the software from, and renegotiate the contract with, Techno-Sciences, NOAA determined not to exercise Techno-Sciences's contract option commencing May 10, 1996.

On November 11, 1996, NOAA issued a requisition for a contractor to code and test nonproprietary software to operate the on-line functions of the USMCC, which would replace Techno-Sciences's proprietary software.[1] NOAA offered the requirement to the SBA to be performed under the section 8(a) program and identified RPS as the recommended contractor for this requirement. The contract was to have a 12-month base period and three 12-month options at a total estimated value of $500,000.[2] On November 26, the SBA nominated RPS as the 8(a) contractor.

On March 14, 1997, following negotiations with RPS, and after determining its cost was reasonable, NOAA awarded a cost-plus-fixed-fee 8(a) contract to RPS at a total estimated cost of $829,256, reflecting a base estimated cost of $323,650 and estimated costs for the option years of $160,517, $168,472, and $176,617, respectively. The basic contract price simply reflects the costs of four computer programmers who would code and test the developed replacement software. Section C.4 of the RPS contract statement of work (SOW) described the USMCC on-line functions included in the contract and section C.5.a stated that the contractor would code modules following Program Design Specifications (PDS) provided by the government.[3]

Meanwhile, at the International Cospas-Sarsat manufacturers meeting on October 24, 1996, Techno-Sciences introduced its fourth generation mission control center (MCC) software purportedly satisfying all of the current Cospas-Sarsat requirements at an advertised price of $100,000. In November 1996, Techno-Sciences informed NOAA of its interest in participating in a competition for its USMCC software development and maintenance requirement. On April 8, 1997,

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[1]Science Systems and Applications, Inc. (SSAI) is the contractor responsible for the software for the off-line functions of the USMCC.

[2]There was no contemporaneous documentation reflecting the agency's methodology for arriving at this original fair market price estimate; however, during the protest the agency argued that the estimate was understated based upon RPS's proposed costs.

[3]The government was to provide the PDS within 90 days of award. The record shows that the government has only provided draft portions of the PDS to RPS, and does not know when the PDS will be completed. Hearing Transcript (Tr.) at 125-26.

Techno-Sciences presented NOAA with an unsolicited offer to provide its fourth generation software at a price of $100,000.

Techno-Sciences protested that RPS's award price exceeded the fair market price for the software in violation of Federal Acquisition Regulation (FAR) § 19.806(b); that the agency did not conduct a proper market survey as required by applicable regulations; and that the agency did not consider Techno-Sciences's offered $100,000 fixed price for its fourth generation MCC software, which assertedly meets the agency's requirements.

We agreed and found that FAR § 19.807(b), which requires the contracting officer to "use cost or price analysis and consider the commercial prices for similar products and services" in estimating the fair market price of an 8(a) contract, obligated the agency to undertake a current investigation of the marketplace in order to determine commercial prices for possible nonproprietary solutions to its software needs. Although NOAA asserted that Techno-Sciences's software could not meet the minimum needs of NOAA, we found that other than its general disagreement, the agency had not offered evidence demonstrating the unacceptability of Techno-Sciences's software or of Techno-Sciences's offer to supply nonproprietary software to meet the USMCC requirements, as amplified by NOAA in its agency report, for approximately $140,000, which was substantially less than the 8(a) award price. Thus, we concluded that the agency had not reasonably determined that the RPS award was at a fair market price.

We recommended that the agency review its fair market price estimate, specifically considering Techno-Sciences's MCC software, including enhancements and annual upgrade prices. If it was determined that the RPS contract costs exceeded a fair market price for a similar product and service meeting the agency's needs, we recommended that NOAA terminate RPS's contract, withdraw the 8(a) set aside, and fulfill its requirements under an unrestricted procurement.

To implement our recommendation, NOAA commenced a market survey on November 6, 1997, by issuing a request for information (RFI) to various industry sources, including Techno-Sciences, requesting the prices of the MCC nonproprietary software product as modified to satisfy NOAA's requirements, documentation detailing the design, data, and file structures of the software, and a hard copy of the source code of the software. Responders were advised that the proposed MCC software must satisfy the requirements contained in sections 1 through 10 of the attached "Fourth Generation United States Mission Control Center (FG USMCC), Functional Requirements Analysis (FRA), dated October 17, 1997, Version 1.0." Among the requirements in the FRA were that the software perform local user terminal (LUT) pass scheduling in section 5 and search and rescue (SAR) mapping in section 6. Responses were due by November 24.

Techno-Sciences filed an agency-level protest against the market survey on November 20. Techno-Sciences protested that sections 1 through 10 of the FRA were not a valid basis on which to conduct the market survey because the FRA was not a part of the RPS contract. Techno-Sciences asserted that the FRA contained requirements in addition to those specified in section C.4 of the RPS contract SOW, and that several of the requirements in sections 1 through 10 related to off-line functions of the USMCC, which were beyond the scope of the RPS contract that only covered the software's on-line functions. Techno-Sciences also noted that NOAA never referenced or produced the FRA during the course of the original protest, notwithstanding that the requirements to be satisfied by the RPS contract were a specific issue of that protest. Finally, Techno-Sciences argued that the requests for documentation detailing the design, data, and file structures of the software, and a hard copy of the source code of the software were unreasonable in the context of a market survey. Techno-Sciences responded to the market survey on November 24, but only in accordance with the requirements expressly listed in the RPS contract SOW.

NOAA denied Techno-Sciences's agency-level protest on December 3. The contracting officer advised that "whether providing the FRA would have benefitted the resolution of the previous protest, the fact that NOAA did not is irrelevant . . . [since] (1) the FRA existed prior to award of the contract and (2) RPS is coding software to specifications based upon the FRA." In this regard, she explained that the FRA is the requirements document from which the specifications in the PDS were derived, and that this document was not required to be included in RPS's contract. Further, she explained that the description of functions contained in section C.4 of the SOW was not a comprehensive list of specific USMCC requirements, and that section C.5.a specifically stated that the contractor would be developing the software in accordance with a PDS provided by the government. NOAA advised that sections 1 through 10 of the FRA did not contain any "off-line" functions,[4] and that the agency needed the source code and related documentation to ensure that it can determine whether its requirements are met and to evaluate the maintainability of the software. NOAA extended the due date for responses to the market survey to December 8.

On December 5, Techno-Sciences requested that NOAA provide it with a copy of the PDS in order to determine what, if any, enhancements to Techno-Sciences's MCC software were necessary to meet the agency's requirements. Techno-Sciences continued to argue that the FRA was not an appropriate document to use for the market survey and complained that the FRA was unclear regarding the agency's

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[4]We understand the off-line functions here to be those not integral to the existing MCC.

software requirements, inasmuch as it was not possible to determine which requirements were to be newly developed and which requirements were not.[5]

On December 9, the contracting officer advised Techno-Sciences that, although the PDS was not needed to respond to the market survey because the PDS contained the details of implementing the requirements in sections 1 through 10 of the FRA, the PDS would nevertheless be provided, but that Techno-Sciences should respond to the survey utilizing the requirements contained in the FRA.[6] She also stated the following:

> Every statement in Sections 1-10 of the FRA which contains the word "shall" is a mandatory requirement of the survey. [Techno-Sciences] should analyze the FRA requirements against its commercial software solution to determine whether it will or will not satisfy these requirements and provide an estimate of the cost for any modifications to satisfy these requirements.

Rather than submitting an amended response, Techno-Sciences filed this protest on December 15 challenging the market survey. Techno-Sciences makes essentially the same objections to the market survey that it did in its agency-level protest, that is, that the FRA is not an appropriate document upon which NOAA may conduct the market survey because there is no evidence that the agency considered the requirements in the FRA in estimating the costs of RPS's contract and because the FRA includes requirements not being satisfied by RPS under its contract.[7] Techno-Sciences argues that all of the agency's actions reflect the agency's bad faith toward Techno-Sciences and have been designed to eliminate Techno-Sciences from the USMCC program.

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[5]Techno-Sciences also made the following offer that was rejected by the agency:

> Assuming the PDS fairly represents the [RPS] contract statement of work (and without having seen the PDS), [Techno-Sciences] will agree to give NOAA unlimited ownership rights to its [FG MCC] and to do any enhancements required by the PDS for a total not to exceed 80 [percent] of the RPS contract price.

[6]NOAA provided Techno-Sciences a copy of the PDS, which was incomplete and in draft form on December 12, and granted Techno-Sciences's request to submit an amended response to the market survey.

[7]Techno-Sciences alleges that certain of the requirements in the FRA are being met by NOAA's contractor, SSAI, which performs maintenance and support of the off-line functions of the USMCC.

PRELIMINARY ISSUES

NOAA first contends that Techno-Sciences's protest allegation that the market survey inappropriately considers requirements beyond the scope of the RPS contract is untimely. NOAA argues that Techno-Sciences's should have been aware that the work under the RPS contract would exceed the SOW because the agency "consistently took the position that the items specifically listed in the RPS contract [SOW] did not represent the full scope of the RPS effort" in the prior protest, such that Techno-Sciences should have realized that there was additional documentation of what was really included in that contract that it should have diligently pursued at that time.

The agency's request for dismissal of the protest as untimely is meritless. In this regard, although the developing FRA was relevant to the issues of the prior protest, the agency did not mention or refer to this document or specifically produce any concrete evidence that the requirements of the software were other than as reflected in the SOW in the RPS contract. Because NOAA possessed the FRA, but failed to produce it or otherwise divulge its contents until the market survey, there is no basis to find that Techno-Sciences's arguments related to this information are untimely.[8] In any event, the protest concerns the propriety of the market survey undertaken by NOAA to implement the corrective action recommended in our prior decision, such that Techno-Sciences's protest, filed within 10 days of receipt of its denial of its timely agency-level protest of the nature of the market survey, is timely. 4 C.F.R. § 21.2(a)(2), (3) (1997).

NOAA next argues that Techno-Sciences's protest should be dismissed because Techno-Sciences is not an interested party under our Regulations. An interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract, which the protester is required to demonstrate. 4 C.F.R. §§ 21.0(a), 21.1(a). NOAA argues that the requirement to consider commercial prices in connection with FAR § 19.807 only requires that the agency consider the commercial prices of commercial items as defined under FAR § 2.101. NOAA argues that there is no evidence that Techno-Sciences's nonproprietary MCC software is a commercial item because the protester has not shown that the software has been sold or offered for sale to the general public. NOAA therefore argues that Techno-Sciences is not an interested party since it would not have been a qualified respondent to the survey.

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[8]There is no evidence that Techno-Sciences was otherwise cognizant of the contents of the FRA prior to its receipt of the RFI. The fact that the FRA was on NOAA's local area network to which Techno-Sciences had access does not put that firm on notice of its contents.

We disagree. Even assuming that Techno-Sciences's product is not a commercial item, there is nothing in the FAR that suggests that the term "commercial price" used in FAR § 19.807(b) is limited to the prices for commercial items. Since the purpose behind estimating fair market price is to ensure that the government is not paying 8(a) contractors more than the fair market value of goods and services, it would be inconsistent with the purpose of the regulation to only compare the 8(a) contract price to prices of commercial items. Thus, we find that Techno-Sciences, which develops and sells commercial MCC software that it sells worldwide, is an interested party because it may have the opportunity to compete for the agency's requirements if it is determined that the RPS award was not made at a fair market price.

PROTEST ISSUES

To comply with the recommendation in our September 22, 1997, decision, NOAA was only required to provide Techno-Sciences with the information necessary for it to provide a price based upon the same work used to estimate the price of RPS's contract. The agency's decision to issue an RFI to any interested vendor was not unreasonable. However, requesting responses based upon a statement of requirements that is materially different from the RPS contract was not a reasonable method to determine whether RPS's contract is at a fair market price.

We granted the protester's request for a hearing since the record did not clearly reflect that the FRA contained the same requirements for the MCC software as those contained in the RPS contract, which cast doubt on the propriety of utilizing the market survey as a basis to determine whether the RPS award was at a fair market price. On the day before the hearing, the agency advised that the primary witness, NOAA's contracting officer's technical representative, who was responsible for deciding to acquire the MCC software from RPS, drafting the RPS contract SOW, estimating the fair market price for the RPS contract, and using the FRA as the basis for the market survey, Tr. at 106-07, 143, 150, 177-79, would be unable to attend because he had health problems caused by the nature of the allegations raised in this protest. The medical documentation submitted after the hearing reports that this individual was suffering from job related stress that would require him to take leave for 3 weeks. Our Office offered the agency the opportunity to produce this witness at a later date, but the agency declined to do so.

Testimony was obtained from the NOAA systems analyst who worked with the contracting officer's technical representative. He testified that the FRA in draft form was in existence in September 1996; that it was reissued in October 1996; that it was revised and reissued in July 1997; and that following further review and revision it was reissued in October 1997. Tr. at 14-15, 21-26. He testified that the FRA underwent several changes to the requirements, after negotiation and award of the RPS contract; although he claimed these changes were minor in the context of the total FRA requirements, he also admitted that many of the changes involved

critical aspects of the software and in some instances FRA requirements were deleted.[9] Tr. at 26-28, 32, 60-70. He also testified that the requirements in the FRA for LUT pass scheduling and SAR mapping were not being developed by RPS under its contract, since the agency intended to use existing software. Tr. at 38-39, 41, 107-08. He could not say for certain whether other already coded aspects called for in the FRA, such as the automated output communication capability produced by SSAI as part of a work-around to the current USMCC software, would be re-used as part of the upgraded fourth generation USMCC, such that the code need not be written by RPS. Tr. at 100.

The protester argues that, since the FRA has been significantly modified from the time the RPS contract was awarded, the FRA cannot fairly be used as the basis for the market survey to ascertain whether the RPS award price was at a fair market price. We disagree.

The details of implementing our protest recommendations for corrective action are generally within the sound discretion and judgment of the contracting agency. QuanTech, Inc., B-265869.2, Mar. 20, 1996, 96-1 CPD ¶ 160 at 2. Given this flexibility, we agree with NOAA that the FRA need not match the exact requirements contemplated to be performed under the RPS contract as of the time of contract award because NOAA's USMCC requirements have understandably evolved. The market survey could be based on NOAA's current requirements that are to be satisfied under the RPS contracts, see BNF Techs., Inc., B-254953.4, Dec. 22, 1994, 94-2 CPD ¶ 258 at 3-5, as long as the revised requirements document is the same baseline on which the fairness of RPS's contract price is judged. That is, if the agency is going to obtain commercial prices based on the updated FRA, which includes various changes made since contract award, it must also reassess RPS's contract price in view of the changed requirements.[10] Similarly, to compare prices to the current RPS contract price estimate, the commercial prices must be based upon the same material requirements as those in the RPS contract.

As noted, the systems analyst testified that some of these FRA requirements, i.e., LUT pass scheduling and SAR mapping, are not being met under RPS's contract. Yet, our review of the record shows that the LUT pass scheduling and SAR mapping requirements of sections 5 and 6 are mandatory; each requirement and the various elements of these requirements is preceded by the word "shall." As the contracting

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[9]These changes were primarily made to the alert processing requirements, which is the heart of the USMCC on-line system, and were adaptive, legislative, and user driven changes, many of which required additional coding. Tr. at 34-35, 60-68.

[10]We also note that NOAA's failure to provide the PDS within 90 days as contemplated by the contract may also affect RPS's contract price by extending the level of effort for a longer period.

officer unequivocally advised Techno-Sciences, this made these requirements "mandatory" to respondents to the survey. Also, the systems analyst admitted that respondents to the survey would not have known that their software did not have to perform LUT pass scheduling or SAR mapping. Tr. at 107-10. Our review of the nature of the LUT pass scheduling and SAR mapping requirements indicates that they are material to the MCC software development project, particularly given the overall scope and value of the RPS contract work.

Moreover, the systems analyst stated that there may be other FRA requirements that will not be satisfied under the RPS contract and that the contracting officer's technical representative or SSAI employees may be aware of such discrepancies. Tr. at 100, 109-10. Although not critical to our decision, because the agency did not produce, as requested, the contracting officer's technical representative or other witness with knowledge of these matters, we assume that other requirements mandated by the FRA, with which respondents were required to comply, are inconsistent with the work required under the RPS contract.[11] 4 C.F.R. § 21.7(f); see Guardian Techs. Int'l, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 9-11.

NOAA nevertheless argues that no MCC manufacturer would have been prejudiced by not knowing what specific requirements were being met under RPS's contract, since all current manufacturers of MCC software have systems that currently perform SAR mapping and because Techno-Sciences should have known from its prior experience that software was already available for LUT pass scheduling. Tr. at 38-42, 108. NOAA argues that it was clear from the market survey that if a commercial MCC system already performed a required function, the respondent could simply note that fact and would not need to provide an estimate of the cost for the enhancement. Id. NOAA also references the statement in the FRA, "the applications software for the FG USMCC shall require new development, but where possible, algorithms used currently by the USMCC shall be used," which it argues put Techno-Sciences on notice that some of the FRA requirements could be satisfied by software already developed by the government.

From our review of the RFI and FRA, we cannot determine how a respondent would be able to submit a price ignoring FRA requirements that are not required to be coded because current NOAA software will be used for this purpose. In this regard, the FRA provided no guidance as to which algorithms or other FRA requirements may not be required,[12] Tr at 107-10, and when the contracting officer

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[11]We also note that the FRA was not mentioned during the course of the previous protest, despite its obvious relevance.

[12]NOAA also argues that there is no practical way in which NOAA could have published a list of algorithms that would have been useful to all manufacturers,

(continued...)

was asked for guidance by Techno-Sciences, she stated that all "shall" statements are mandatory requirements of the survey. Thus, the FRA and the implementing instructions from the agency were at best confusing as to which FRA requirements had to be satisfied.

More fundamentally, the agency's essential argument, that respondents should ascertain for themselves what FRA requirements will actually be satisfied under the RPS contract, ignores the reason for the survey--to determine whether the RPS contract price was reasonable. In order for such an analysis to have validity, it must be made on a common baseline. Specifically, if the survey requests prices for work beyond that required of RPS, we do not understand how the results of the survey will fairly show whether the contract price is reasonable.

Techno-Sciences protests that the RFI's request that respondents provide the source code and related documentation goes beyond the purpose of the market survey because it is not necessary to evaluate Techno-Sciences's price for providing software that meets the agency's requirements. While the agency claims that it needs this information to determine whether commercial software could meet all of the requirements of the USMCC and to evaluate the potential costs of maintaining a particular respondent's software, Techno-Sciences asserts that there are alternatives short of providing this highly sensitive documentation that would satisfy the agency's requirements. Techno-Sciences also argues that although the agency now states that it is willing to negotiate a non-disclosure agreement with Techno-Sciences regarding this information, this protection may be insufficient given the agency's bad faith conduct in attempting to exclude Techno-Sciences from its program. Finally, Techno-Sciences notes, and the record confirms, that the agency has been unsuccessfully trying to obtain this information from Techno-Sciences at a cost.

The agency has not provided a cogent explanation why it needs all of the requested highly sensitive information, given that it is only being provided to assess whether the RPS award price is reasonable, and it may be that some lesser amount of information may be sufficient to satisfy the purposes of the agency's request--for example, a product demonstration or some more summary description of the

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[12](...continued)
since this would have been contingent upon a manufacturer's specific software design. This argument ignores the fact that the survey should, in accordance with the recommendation contained in our prior decision, have been primarily to evaluate Techno-Sciences's price for a customized version of its fourth generation MCC software as well as other sources' MCC software. From this record, we think that there is a reasonable possibility that Techno-Sciences's software uses the same or similar algorithms that may have already been developed to support the USMCC, since Techno-Sciences's software currently operates the USMCC on-line functions.

offered software may be sufficient for the purposes of a market survey. See generally Aspen Sys. Corp., B-272213.2, Oct. 22, 1996, 96-2 CPD ¶ 153 at 2-3 (agency reasonably found that a market survey should not require detailed proposals from small businesses to determine whether to set aside a procurement for small business). Nevertheless, on this record, given the agency's willingness to enter into a non-disclosure agreement, we cannot conclude that the agency does not, in fact, require the information for the purposes stated. Moreover, we cannot say that the agency will not honor a non-disclosure agreement or that the agency has acted in bad faith. However, since we otherwise sustain this protest, the agency will have the opportunity to reassess whether the requested information is actually required.

RECOMMENDATION

We recommend that the agency review its fair market price estimate, considering Techno-Sciences's MCC software, including enhancements and annual upgrade prices. In so doing, the agency should fairly describe for Techno-Sciences the material requirements upon which RPS's comparison contract price is based. In this regard, if the agency wants to update its statement of requirements to reflect its currently existing requirements for the software, the impact of the cost of the existing requirements on the RPS contract price must also be determined.[13] If it is determined that the RPS contract cost exceeds a fair market price, then NOAA should terminate RPS's contract, withdraw the 8(a) set aside, and fulfill this requirement under an unrestricted procurement. We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contacting agency within 60 days of receiving this decision.

The protest is sustained.

Comptroller General
of the United States

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[13]As noted, the agency's pricing of the RPS contract was simply based on using four computer programmers with no other analysis of the effort needed to develop the replacement software. There are software engineering methodologies and models that currently are used in the industry that allow for an independent party to separately validate the derivation of software development and coding costs. See Medicare Transaction System--Success Depends Upon Correcting Critical Managerial and Technical Weaknesses (GAO/AIMD-97-78, May 1997) at 51-53.