



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

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E-176985

April 20, 1973

Fried, Frank, Harris, Shriver &
Kampelman
Suite 1000, The Watergate 600
600 New Hampshire Avenue, NW.
Washington, D.C. 20037

Attention: Joel R. Feidelman, Esquire

Gentlemen:

We refer to your letter dated December 18, 1972, and prior correspondence, concerning your protest on behalf of Sanders Associates, Incorporated, against the award of a cost-plus-incentive fee (CPIF) contract to APL Service Corporation under request for proposals No. DAAEO7-72-R-0280, issued by the Army Electronics Command, Fort Monmouth, New Jersey.

The RFP was issued on February 29, 1972, for the design, fabrication, installation, system integration and testing of three each Receiving Systems, Radio, AN/USQ-(), Engineering Development Models, Engineer Test/Service Test (ET/ST) type, plus repair parts, technical data and ancillary items, including an option for a training program.

Section D of the RFP contained the following statement of the criteria for proposal evaluation and their relative importance:

D.1 BASIS FOR AWARD

Any award to be made will be based on the best over-all proposal with appropriate consideration given to Technical Proposal, Past Performance/Management, and Cost Consideration in that order of importance.

Of the 3 factors set forth above, Technical Proposal, by far, is the most important factor and bears greater weight than the other 2 factors combined.

Of the last 2 factors, Past Performance/Management bears the greater weight.

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To receive consideration for award, a rating of no less than "acceptable" must be achieved in each of the 3 factors.

In addition to a detailed listing and description of the factors and subfactors of the technical proposal criteria, and a description of the past performance/management criteria, the RFP provided the following, with respect to cost consideration:

c. Cost Consideration:

(1) Cost Proposal: In evaluating the quoter's proposed cost, the Government's concern is to determine the prospective contractor's understanding of the project and their ability to organize and perform the proposed contract.

(2) Cost Realism: As part of proposal evaluation and in order to minimize potential or built-in cost growth, the Government intends to evaluate the realism of quoter's proposed costs in terms of the quoter's proposed approach. Proposals may be penalized to the degree that the proposed costs are unrealistically low. To assist the Government in evaluating this area, quoters are required to furnish the following information - a brief but comprehensive statement concerning the estimating procedures utilized in preparing this offer to specifically include a description of the organization for estimating.

(3) Rent-Free Use of Government Production and Research Property, ASPR 13-502 and 13-503: (ASPR 3-501(b) D (vi)). Any competitive advantage which may arise from the rent-free use of Government Production and Research Property shall be eliminated by adding to each offer/quotation for which such use is requested an evaluation factor equal to the rent allowable to this contract which otherwise would have been charged for such use as computed in accordance with ASPR 13-404.

The solicitation established April 14, 1972, as the closing date for receipt of offerors' proposals. Five timely proposals were received by the procuring activity, including submissions from Sanders and AEL. One of the proposals was found not to fall within the competitive range. On April 24, 1972, the four remaining proposals were submitted for evaluation by a technical team comprised of approximately 30 experienced engineers. Cost proposals were withheld from the technical team until after May 30, 1972. Technical clarifications were requested from the offerors on May 15 and 16, 1972, and technical addenda were received from

all four proposers on May 19, 1972. Each proposal was numerically scored under the technical criteria listed in section D of the RFP. In regard to the seven evaluation factors under the technical proposal portion, Sanders and AEL achieved identical scores under "Material." However, Sanders was considered superior to AEL as to each of the remaining six factors, with the difference in score between Sanders and AEL ranging from approximately 1 to 8 points. When the scores of the seven factors and subfactors were weighed and averaged, Sanders' score under the technical area exceeded AEL's by approximately 20 points, where the maximum attainable point count was 320. The technical evaluation team concluded that Sanders had submitted the best proposal from a technical standpoint, also recognizing that AEL had submitted a good proposal. The evaluation team determined that the other two proposals were unacceptable considering the technical scores they had attained. A recommendation was made on May 26, 1972, by the technical evaluation team that an award be made to either Sanders or AEL. The contracting officer, however, made a determination that all four proposals were either acceptable or susceptible of being made acceptable. Pursuant to this determination, technical discussions and cost negotiations were conducted with each of the four offerors during the period of June 5, 1972, through June 12, 1972. These discussions did not result in any revisions to the technical scoring.

The "Past Performance/Management" and "Cost Consideration" areas were not numerically scored, although respectively they were approximately one-fourth and one-fifth as important as the "Technical Area." AEL and Sanders were deemed acceptable in the "Past Performance/Management" area. The cost proposals of both AEL and Sanders are reported to be realistic, reflecting an adequate understanding of the Government requirements, and both were therefore considered satisfactory in this area. The procuring activity concluded that any cost realism variance was not sufficient to permit discrimination between the two offerors on this point.

All four remaining offerors were advised on June 14, 1972, that their best and final offers were to be received by June 16, 1972. The best and final offers submitted on that date did not change the technical scoring.

Upon consideration of the evaluation results, the contracting officer selected the proposal of Sanders as representing the greatest value to the Government since it achieved the highest technical merit rating, had a satisfactory record of past performance, and was judged to be satisfactory in the cost consideration evaluation.

The contracting officer's recommendation for an award to Sanders was submitted to the Fort Monmouth Procurement Board of Awards for review on June 21, 1972. On June 26, 1972, the Board of Awards unanimously disapproved the proposed award because it was felt that the differences revealed by the technical evaluation were not significant enough to warrant awarding the contract for a higher cost figure when considered with the satisfactory ratings achieved by both AEL and Sanders in the past performance/management and cost consideration evaluation categories. Subsequently, a Department of Defense funding problem developed resulting in the procurement being placed in a "hold" status until August 25, 1972.

A Source Selection Review Board appointed by the Director, Procurement and Production, USAFCON, performed a review of the selection on September 6 and 7, 1972, and concluded that the Sanders' technical proposal was not significantly superior. In view thereof, and since both offerors were rated acceptable in the past performance/management and cost areas, it was concluded that award should be made to AEL because its target price was \$2,384,836 less than Sanders. AEL received an award on September 12, 1972.

Basically, it is your contention that award to AEL was contrary to the applicable RFP evaluation criteria and Armed Services Procurement Regulation. You point out that under the stated evaluation formulas, technical, past performance/management, and cost should have received evaluated weights of 51, 25, and 24 percent, respectively, and that upon application of such weights Sanders' proposal would clearly receive the highest overall score. With regard to the technical proposals, you state that Sanders received a "superior" rating and AEL was rated as "marginally acceptable," for a better than 8 percent advantage.

You also say that it can be inferred from portions of the administrative report furnished you that Sanders received or should have received a higher rating for the second most important factor, past performance/management. In this connection, you express doubt that AEL could match Sanders' record with respect to the small percentage of overruns on a large dollar volume of contracts, and state further that there is no other company with Sanders' experience and expertise in developing the equipment involved here.

With respect to cost considerations, the least important of the evaluation criteria, it is your position that the record indicates that Sanders outscored AEL under a proper application of that factor as spelled out in the RFP. In this connection, you assert that cost

considerations were not concerned with the quantum of costs, but rather with the realism of the proposed costs insofar as indicating the offeror's understanding of the project and its ability to prevent cost overruns. You point out that Sanders' experience and record of performance in this field leave no room for doubt as to its higher rating in understanding the project and as to its cost realism. Furthermore, you refer to portions of the administrative report as indicating the contracting officer's conclusion that Sanders' proposed costs were more realistic than AEL's. You also quote the following sentence from the LCO's cost analysts' report on the Sanders' cost proposal:

The cost proposal of Sanders Associates is realistic considering material is adequate and properly priced, the man hours proposed are very close to all Government estimates, the man hours are properly priced, the overhead rates are proper and the fee is reasonable.

Based upon the foregoing, you contend that there is no way that AEL could have received an overall rating as high as Sanders and, therefore, the award was improperly made to AEL. You contend that award was erroneously based upon the fact that AEL's proposed costs were more than \$2 million lower than Sanders' proposed costs, contrary to the express terms of the RFP, ASPR, sound procurement policy and decisions of our Office. In other words, it is your contention that while the RFP provided that costs would be evaluated on the basis of realism in relation to offeror understanding of the project and ability to meet the target costs, they were in fact evaluated on the basis of which offeror proposed the least "number of dollars." You also point out that whereas Sanders proposed a target fee of 8 percent, a share ratio for underruns of 80/20, with a maximum fee of 15 percent, and a share ratio for overruns of 80/20 up to a zero fee, 95/5 up to a negative fee of \$80,000, AEL's contract contains a target fee of 8.5 percent, a share ratio for underruns of 50/50, a share ratio for overruns of 85/15, and no negative fee. Furthermore, you argue that the cost evaluation criteria were in accord with ASPR provisions which recognize that in cost-reimbursement type contracts estimated costs and proposed fees should not be considered controlling (ASPR 3-305.2) and that in research and development contracts award should be made to the organization having the highest competence (ASPR 4-106). In this connection, you have cited several decisions of our Office in which we have recognized and approved such principles.

Finally, you contend that the contracting officer abdicated his responsibility to exercise his independent judgment in selecting the

contractor, contrary to ASPR 3-801.2, and accepted the decision of the Source Selection Advisory Council, even though the technical and cost evaluation committees who actually evaluated the proposals recommended award to Sanders.

With regard to the latter contention, the applicable regulation sets forth the contracting officer's responsibility with respect to entering into contracts and as to price negotiations. While the regulation states that determination of the suitability of the contract price rests with the contracting officer, it recognizes that he may seek the assistance of various specialists or "higher authority" in resolving matters related to effective contracting. Delegation of authority No. 3-71, signed by the Commanding General, USAFCONI, on January 5, 1972, limits the authority of contracting officers to sign contracts without approval of higher authority to those not in excess of \$100,000. Army Procurement Procedure (APP) 1-450.1 requires that where limitations are imposed by the cognizant head of procuring activity, the contracting officer shall ensure that proposed awards shall be reviewed by Board of Awards in accordance with APP 1-403.52. Furthermore, section 1-403.52(a) of the Army Procurement Procedure requires Board of Awards review of all contracts of \$10,000 or more, with certain exceptions not here relevant, and requires that the Board advise the contracting officer of its findings and recommendations based upon its review of the inputs from members of the contracting officer's team. From the record in this case, it is clear that the contracting officer followed the required procedure and agreed with the recommendations of the review authorities.

In connection with its review of the evaluation, the Source Selection Review Board reports in a memorandum dated September 8, 1972, that in view of the overwhelming importance of the technical proposal, it was necessary to go into the evaluation in considerable depth. The Board concluded that the grading of the various subfactors of the technical proposals was generally consistent with the back-up information and score applied. However, the Board felt that there were insufficient discriminators in connection with the technical approach. Therefore, the evaluations conducted were reviewed and members of the evaluation team were interviewed.

A memorandum prepared by a member of the Board in connection with your protest states it was evident to the Board that the CEFLY LANCER program is not dependent on a major technological breakthrough. Instead, it is stated that the program requires systems integration of several standard subsystems which were either Government furnished or contractor procured requiring limited development for installation on the aircraft. It is pointed out that the technical problems for the contractor are to

integrate the individual subsystems already developed into a unified system; develop necessary interface subsystems; design the installation on the aircraft, including the particular problems of antenna installation; and calibrate and check-out the complete system. Although there is a technical interface with the ground control contractor, there are definitive specifications for this interface, thereby alleviating any undue risk. Further, it is indicated that fundamental to the technical success of the program are the Position Location, Data Link, and Intercept capability of the system. It is reported that analysis of the composite scores revealed that the most significant technical aspects such as Position Location and Data Link were masked by so many other factors that the Board could not depend on the raw numerical total scores as truly indicative of the technical merit of the proposals. It is reported that the Board concluded that the point scores for technical merit rating could only be used as a guide. Therefore, the Board felt it necessary to go deeper into the technical evaluation since the absolute values or differences in technical merit scores could not be used as the discriminating factor to distinguish between the technical proposals.

With regard to Position Location, both proposals were reported to be good. Sanders received a higher point score (23.4 compared to 21.7 out of 27.5 points) because its proposal was somewhat more specific. However, the Board did not consider the difference in score to be significant in this area.

With regard to the Data Link, the engineering specialist, notwithstanding the difference in point score (13.4 for Sanders and 11.9 for AEL out of 15.3), stated that there was no standout choice, both being completely acceptable.

With regard to general design, it is reported that engineering testimony before the Board disclosed that there was no substantial difference between AEL and Sanders, although Sanders received a score of 3.0 compared to 2.9 for AEL out of a 4.0 point maximum. An engineer concerned with evaluation of mechanical aspects of general design reported that neither Sanders nor AEL stood out against the other in this area. Thus, the Board concluded that the point spread did not support any substantial technical difference between the two proposals.

The Board then examined the area of past performance/management, and concluded that both Sanders and AEL were acceptable in this area. The Board also considered the area of cost consideration, first in connection with the cost proposal, and second, in connection with cost realism. When rated against the independent Government cost estimate for each proposer it was determined that Sanders was about 10 percent over the Government cost estimate and AEL was about 10 percent under the estimate.

The Board examined the possibility of overruns, from the standpoint of potential Government exposure, and determined that even with a 28 percent overrun on the part of AEL, that cost to the Government would still be less than Sanders performing without an overrun. The Board concluded that both Sanders and AEL were acceptable in the area of cost consideration. In conclusion, the Source Selection Review Board was not convinced that the Sanders proposal was superior to the extent that it warranted the expenditure of the extra funds indicated by the Sanders proposal over the AEL proposal. The Board therefore concluded that the award should be made to AEL as the low offeror with a completely acceptable technical proposal.

In 50 Comp. Gen. 246 (1970), our Office considered a case involving a negotiated procurement for research and development services to be performed on a cost-plus-a-fixed fee basis. There an award was made to the offeror (TI) which had proposed the lower estimated cost, even though a competitor (SRL) received a higher technical merit rating. The contracting activity specifically determined that the differences in the technical proposals, which were regarded as insignificant, did not justify paying a price differential. In indicating that the determinative element in the decision was the considered judgment of the procuring agency concerning the significance of the differences in the technical proposals, we stated:

In response to SRL's allegation that the lower cost estimate submitted in the technically inferior TI proposal was considered as controlling, we are advised that the technical differences in the two proposals did not warrant the incurrence of additional costs that would have been occasioned by accepting SRL's proposal. In fact, the technical evaluation team considered the difference in point scores to be insignificant. * * *

* * * We view the award to TI as evidencing a determination that the cost premium in making an award to SRL, based on its slight technical superiority over TI, would not be justified in light of the acceptable level of effort and accomplishment expected of TI at a lower cost. The concepts expressed in ASPR 3-805.2 and 4-106.5(a) that price is not the controlling factor in the award of cost-reimbursement and research and development contracts relate, in our view, to situations wherein the favored offeror is significantly superior in technical ability and resources over lower priced, less qualified offerors. * * * 50 Comp. Gen. at 248-49.

We believe the situation in the instant case is analogous to that in the above quoted decision. The "Past Performance/Management" proposals

of AEL and Sanders were regarded as acceptable. The "Cost Consideration" proposals of each was also regarded as acceptable. Further, the procuring agency found that with regard to the "Technical" area, no significant superiority distinguished the two proposals.

You contend, however, that the prospect of a \$2 million cost saving is illusory, since such "savings" would be realized only if AEL were able to perform at its estimated costs. Since a cost-reimbursement contract was to be used, we agree that the cost of performance could not be known until after performance was completed. It appears from the record, however, that the Army did not merely accept the proposed estimated costs but prepared an independent cost estimate for evaluation purposes. The Army therefore assessed the realism of all costs proposed by both Sanders and AEL. In these circumstances, we believe that it is proper to give weight to a comparison of proposed costs and independently estimated costs. 50 Comp. Gen. 390, 410 (1970).

In support of your contention that the award was improperly determined on the basis of the quantum of dollars, which was not an evaluation criterion, you cite 52 Comp. Gen. 161, B-176223 (September 25, 1972). The case involved two fixed-price-incentive contracts in which "price" was not made a specific factor in the section of the RFP listing the specific evaluation factors and in which the relative importance of price was not spelled out in the solicitations, but was incorporated as an evaluation factor through Standard Form 33A, paragraph 10(a). We stated:

* * * Nothing in the ASPR provision requires the elimination of price as a listed evaluation factor. What is required is the listing of all factors other than price which are to be considered in the evaluation of proposals. While the RFP's indicated that price would be considered, since price was not listed in section "D" of the RFP's, offerors were not informed of its relative importance vis-a-vis the evaluation factors which were listed. This failure to show the relative importance of price is contrary to the longstanding view of our Office that intelligent competition requires, as a matter of sound procurement policy, that offerors be advised of the evaluation factors to be used and the relative importance of those factors. 49 Comp. Gen. 229 (1969). We believe that each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. Competition is hardly served if offerors are not given any idea of the relative values of technical excellence and price. We believe a complaint is justified if in such circumstances

a materially superior offer is rejected in favor of one offering a lower price. However, that is not the case here. It is our understanding that the Air Force found little difference in the technical quality of the offers at issue. Consequently, an award selection based on price difference cannot be regarded as prejudicial to Serv-Air and the failure of the RFP's to indicate the relative weight of price as an evaluation factor cannot affect the validity of the proposed awards. (Underlining supplied.)

In the instant case, "price" as such was not included in the evaluation criteria. However, "Cost Proposal" and "Cost Realism" were so listed and the relative weight of "Cost Consideration" was stated. It is clear that these factors will determine the ultimate "price" or "cost" to the Government and offerors were apprised of their importance and weight. Furthermore, the record indicates that AEL's cost proposal was considered from the standpoint of realism and considered acceptable. In this connection, we note that the Cost Analysis and Cost Realism Statement of AEL's proposal, dated June 24 and supplemented September 6, 1972, states:

The cost proposal of AEL is realistic considering material is adequate and properly priced, the man hours proposed are very close to all Government estimates, the man hours are properly priced, the overhead rates are proper and the fee is reasonable.

You have referred to Government Solicitation No. DAAEO7-73-Q-0170 as evidencing the method the Government would use to indicate if and when estimated costs and proposed fee are to be factors in the award evaluation. Specifically, solicitation No. -0170 contains a parallel section "D.3 c. Cost Consideration" to that found in the subject RFP. In addition, in clause D.3 c. of solicitation No. 0170, the following statement was added:

Consideration must be given to the estimated cost of the contract performance and the proposed fee in the evaluation for award.

Therefore, you argue that the absence of a similar statement in the instant solicitation should be interpreted to mean that estimated costs and proposed fee would not be considered. We cannot agree. We believe that a statement such as the one quoted above is appropriate in order to emphasize the importance of cost in the evaluation of proposals.

However, we do not believe that the absence of such a statement in the solicitation may be interpreted to mean that price would receive no consideration in the award selection.

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In this regard, we note that under the last listed factor under "Cost Consideration", namely, "Rent-Free Use of Government Production and Research Property, ASFR 13-502 and 13-503", it is provided that any competitive advantage which may arise from the rent-free use of Government production and research property shall be eliminated by adding an evaluation factor. This indicates, of course, that price was to be considered a factor in the evaluation.

In regard to your contention that Sanders was required by the Government negotiators to propose a less advantageous fee arrangement than AFL, the contracting officer states that the terms were the subject of negotiation and "not something imposed" by the Government. Further he states that he attempted to negotiate the terms he regarded most appropriate for each proposal.

In summary, we find that although Sanders received a higher point score in the initial evaluation of technical proposals and the contracting officer initially recommended award to Sanders, Army procedures required that the award selection be reviewed at a higher level within the Army. As a result of this review it was determined that the point spread between Sanders and AFL did not give a precise picture of the relative merits of the technical proposals and that in fact the proposals were substantially equal in technical merit. On the other hand, it was determined, based on the Army's analysis of the cost proposals of the two firms, that AFL's proposal was significantly more advantageous from a cost standpoint. It was the considered judgment of the reviewing evaluators, after weighing both technical and cost factors, that an award to AFL would be in the best interests of the Government.

We do not find that the Army's judgment was unreasonably exercised. An evaluation of the type conducted here must be sufficiently flexible to permit reasonable decisions by the Government evaluators as to which proposal best meets the needs of the Government. While we believe that technical point ratings are useful as guides for intelligent decision-making in the procurement process, there is no basis in law or regulation for concluding that evaluation scores prepared at the initial level of the evaluation process are binding on the agency evaluators at the higher level. Rather, the process should permit the reviewing board evaluators to use the point scores together with their own judgments as to the relative merits of the proposals.

With regard to the significance of cost in the evaluation, it should be emphasized that the Army did not simply rely on the estimated costs of performance as submitted by the offerors. We can understand your objections to a cost evaluation based solely on each offeror's

estimation of costs under a cost-reimbursement type contract. The procurement regulations make it clear that undue emphasis may not be placed on such cost estimates. ASPE 3-805.2 and 4-106.5(a). However, we think it is appropriate and perhaps even an obligation of the contracting agency to independently evaluate the proposed costs and consider such independent evaluation in the award selection.

In negotiated procurements of this kind it is incumbent upon the contracting activity to select the successful contractor on some reasonable basis consistent with the evaluation factors set out in the solicitation. We think that standard has been met in this case.

During our consideration of this matter we reviewed those portions of the Army records which contain the Source Selection Review Board findings. As indicated above, we received from the Army a memorandum for record prepared on October 18, 1972, by a member of the Board in response to the protest. Neither of these documents has been released to Sanders because Army states that they "consist of internal Government communications containing staff advice and evaluations of contractors' proposals by Government personnel and, thus, these documents are not subject to release in accordance with the exemptions set forth in paragraph 10e of AR 345-20." In accordance with our long-standing policy in this regard, we have honored the Army's request that this information not be released to the parties, unless it has otherwise been made public. B-175004, October 12, 1972 (52 Comp. Gen. 198).

From our review of the record in the instant case, we are unable to conclude that the Department of the Army has arbitrarily exercised the discretion committed to it in evaluating the offers or in making an award to AEL.

Accordingly, your protest is denied.

Sincerely yours,

PAUL G. DEMBLING
For the Comptroller General
of the United States