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Tyler Przybylek Proc. II

**DECISION**

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

**FILE: 3-187239**

**DATE: December 15, 1976**

**MATTER OF: North American Telephone Association**

**DIGEST:**

1. While all evaluation criteria and their relative importance must be stated in solicitation to insure that all offerors compete on equal basis, point values for subcriteria need not be listed if subcriteria merely define major evaluation factors or are of approximately equal importance.
2. Subcriteria terms "technical superiority" and "technical acceptability" are either redundant or too vague to convey what is intended to be measured. Furthermore, where 1-year contract is to be awarded and evaluation criterion for cost refers only to total price projected over 10-year period, further clarification as to how price will be evaluated is needed.
3. Government's reservation of right to make award on basis of initial proposals does not constitute refusal to conduct discussions with offerors. However, once discussions are initiated, they must be concluded with request for best and final offers and establishment of common cut-off date for submission of such offers.
4. Provisions of Office of Management and Budget (OMB) Circulars A-94 and A-76 and Federal Management Circular (FMC) 74-5 do not establish legal rights and responsibilities and are not within decision function of General Accounting Office.
5. Requirement for "tone signaling" equipment is not unduly restrictive of competition since record shows many firms provide such equipment.
6. Although offerors, in order to quote firm fixed price, must know if telephone company will sell cable already in place and if so at what price, it is responsibility of offerors to obtain quote from telephone company or determine cost of rewiring if cable cannot be purchased.

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7. Late proposal clause included in Standard Form 33A (March 1969) has been superseded by clause appearing at FPR 1-3.802-1; accordingly, RFP should be modified to incorporate correct provision.

North American Telephone Association (NATA) protests a number of alleged improprieties in connection with request for proposals (RFP) No. 1076 issued by the Federal Bureau of Investigation (FBI) on July 30, 1976.

The RFP solicited offers to provide and maintain new telecommunications facilities (primarily a Private Automatic Branch Exchange (PABX)), on a firm fixed price basis, for the New Rochelle office of the FBI. NATA alleges that (1) the evaluation factors stated in the RFP are indefinite and incomplete; (2) the FBI will not establish a competitive range of offerors after the initial evaluation of proposals and will not negotiate with all offerors; and (3) the FBI has failed to comply with Office of Management and Budget (OMB) Circulars A-94 and A-76 and Federal Management Circular (FMC) 74-5. NATA also raises several other points concerning various RFP provisions.

The evaluation criteria were set forth in the RFP as follows:

- "1. Maintenance and Service Support (400 Points)
  - (a) Demonstrated capability to install and maintain similar PABX systems.
  - (b) Number of factory-trained technicians assigned to the New Rochelle area, who will be available to maintain the system.
  - (c) Extent of training and experience of assigned maintenance personnel.
  - (d) Ease of localizing breakdowns.
  - (e) Ease of repair of same.
  - (f) Demonstrated reliability of PABX system being proposed.

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"2. Technical Proposal (300 Points)

- (a) Awareness of problems of limited space and power.
- (b) Capability of standard system to interface with modern day word processing equipment.
- (c) Prior product experience.
- (d) Technical acceptability of product.
- (e) Technical superiority of product.

"3. Total Price Projected Over a 120-Month Period (300 Points)"

NATA claims that this listing does not reveal the FBI's actual evaluation criteria because no point values are given for each of the subcriteria in the evaluation scheme. NATA also questions the meaning of the term "technical superiority."

It has been the consistent position of this Office that offerors should be informed in the solicitation of all evaluation factors and the relative importance to be attached to each such factor so that offerors may submit accurate and realistic proposals and compete on an equal basis. 51 Comp. Gen. 272, 279 (1971); BDM Services Company, B-180245, May 9, 1974, 74-1 CPD 237. However, the absence from an RFP of point values for stated evaluation subcriteria is not necessarily improper. We have held that the relative weights of subcriteria which simply define the major evaluation factors which form the judgmental bases for award need not be disclosed. Digital Equipment Corporation, B-183614, January 14, 1976, 76-1 CPD 21; AEL Service Corporation et al., 53 Comp. Gen. 800 (1974), 74-1 CPD 217. We have also held that in other cases weights need not be explicitly assigned to subcriteria which are to be considered of approximately equal importance. Tracor, Inc., B-186315, November 8, 1976, 76-2 CPD 217; 51 Comp. Gen. 272, supra. Here, the subfactors listed appear to be more than merely definitive of the main criteria, but the RFP does not indicate any relative weights for the subfactors under each major criterion. Therefore, "offerors are entitled to assume that all subcriteria will be considered of equal, or approximately equal, importance." 51 Comp. Gen. at 281.

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We do have some concern with respect to certain other aspects of the criteria and subcriteria. First, it is not clear what is meant by the subcriteria terms "Technical acceptability" and "Technical superiority". If the terms are intended to refer to the degree with which proposed equipment would be acceptable or superior in meeting the specifications within the space and power supply parameters and with an ability to interface with modern word processing equipment, they appear to be redundant and could result in duplicate scoring, with the possible effect of crediting or penalizing an offeror twice for the same thing. If they are intended to mean something further, we think they are too vague to reflect what is actually intended to be measured.

Secondly, we think the manner in which price will be evaluated needs clarification. There is generally no requirement for an agency to list subcriteria when they are reasonably related to or encompassed by the main evaluation criterion. Tracor, Inc., supra; Digital Equipment Corporation, supra. Here, however, the FBI has stated that it intends to award a 1-year contract, but the third evaluation criterion is "Total Price Projected Over a 120-Month Period". The RFP gives no hint as to how the FBI properly will consider cost for a 10-year period. (For example, if the FBI intends to use options and to evaluate option year prices the RFP should so indicate.) Neither does the RFP specify how low cost will be evaluated, e.g., whether the FBI considers it more desirable to have non-recurring costs reflected in the price for the initial contract years or whether offerors are encouraged to spread these costs over the subsequent (option) years. Under these circumstances, we think offerors should be given a clearer idea as to how the FBI intends to evaluate price, which is worth some 20 percent of the evaluation.

With regard to the establishment of a competitive range and the holding of discussions with offerors within that range, the RFP provided that:

**"THE GOVERNMENT RESERVES THE RIGHT TO MAKE AWARD ON THE BASIS OF INITIAL PROPOSALS AND WITHOUT DISCUSSION OR NEGOTIATION WITH ANY OR ALL OFFERORS."**

NATA points to that statement as an indication that the FBI will arbitrarily refuse to negotiate with all offerors. However, that clause is consistent with Federal Procurement Regulations (FPR) § 1-3.805-1(a) (1964 ed.), which provides that in certain enumerated

situations an agency may make award on the basis of initial proposals without holding discussions with offerors. In this regard, however, the FBI states that while it informed offerors at the preproposal conference that, consistent with our decisions, see, e.g., 50 Comp. Gen. 59 (1970), it would not establish a competitive range on the basis on a predetermined point score, its position "is to negotiate with all offerors within the competitive range." Thus, it appears that the FBI does intend to establish a competitive range and to hold discussions with offerors within that range in accordance with FPR § 1-3.805-1(a). We point out only that the FBI's answer to question No. 24 of the preproposal conference, to the effect that best and final offers would not be requested because "it is expected that all offerors will submit their best offer in their initial response," is inconsistent with its intention to negotiate since the regulations require that discussions be concluded with a request for best and final offers and the establishment of a common cut-off date for that submission.

With regard to the alleged violations of OMB Circulars A-94 and A-76 and FMC 74-5, the FBI states the following:

"NATA repeatedly states that the FBI has violated, in some manner, Office of Management and Budget (OMB) Circular A-76 and A-94, and Federal Management Circular (FMC) 74-5. NATA contends further that these documents require evaluation of residual value and cost of money. The FBI sees no such requirement in these circulars. FMC 74-5, issued by the General Services Administration, is titled 'Management, Acquisition and Utilization of Automatic Data Processing Equipment' (ADPE). The policy intent expressed in it is to update and consolidate ADPE policy. It is inapplicable to the acquisition of telecommunications equipment as defined by the Federal Property Management Regulations. OMB Circulars A-76 and A-94 are statements of Executive policy and, additionally, are inapplicable to the issues presented here. OMB Circular A-76 contains policies for acquiring commercial or industrial products and services for Government use. It expresses the Government's general policy of relying on the private enterprise system to supply its needs. Formulas are then provided to

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determine if it would be in the best interest of the Government to accomplish certain functions in-house or whether to procure the services from private industry. OMB Circular A-94 has as its subject discount rates to be used in evaluating time-distributed costs and benefits. This circular states in Section 3c(2) that it does not apply to the evaluation of decisions concerning the acquisition of commercial-type services by the Government."

Furthermore, the FBI states that it believes it would not be logical, reasonable, or cost justifiable to apply the policies of the Circulars to this procurement. It also believes that there will be no residual value for the telephone equipment in view of "rapidly changing technology."

We have always regarded the provisions of these Circulars as matters of Executive policy which do not establish legal rights and responsibilities and which are not within the decision function of this Office. See M.B.I. Security Services, Inc., B-187681, November 8, 1976, 76-2 CPD \_\_\_; PRC Computer Center, Inc. et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35; 53 Comp. Gen. 86, 88 (1973). Accordingly, we cannot object to the FBI's position with respect to the Circulars. However, in accordance with the previous discussion herein with respect to evaluation of cost, we think the FBI's position regarding residual value should be explicitly indicated in the RFP.

NATA's final allegations concern the restrictiveness, indefiniteness, impossibility of compliance with, and improper use of various RFP provisions. First, NATA claims that the solicitation is restrictive because at the preproposal conference the FBI answered "Yes" to the question "Is there a requirement for touch tone service?" Although "touch tone" is a Bell System trademark, the RFP calls only for "tone signaling" equipment, which is available from a number of vendors and the FBI reports that it did not intend its answer to restrict the tone signal equipment to that available only from Bell.

Second, NATA maintains that a vendor cannot quote a firm fixed price without knowing if the New York Telephone Company (NYTELCO) will sell the cable which it already has in place at the FBI New Rochelle office or what it will charge for that cable. However, we agree with the FBI that it is the responsibility

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of offerors to solicit a quote from NYTELECO for the existing cable and to structure their prices based either on that quote or on the cost of rewiring if NYTELECO removes the existing cable.

Third, NATA claims that the RFP requirement for expansion capability is not definitive. The requirement is stated as follows:

"3. The system shall have the capability for expansion to no less than:

120 lines (stations)

25 Central Office trunks

2 dial dictation access terminals"

We see nothing vague or indefinite with this language and see no merit to the NATA allegation.

Fourth, NATA states that the solicitation incorporates an incorrect version of the late proposal clause. NATA is correct. The RFP includes the "LATE OFFERS AND MODIFICATIONS OR WITHDRAWALS" clause found on Standard Form 33A (March 1969). However, that clause has been superseded by the clause now found at FPR § 1-3.802-1. Accordingly, the RFP should be modified to incorporate the correct provision.

In view of the foregoing, the protest is sustained in part. By separate letter, the matters about which we expressed concern herein are being brought to the attention of the Attorney General with the recommendation that the solicitation be revised in accordance with this decision.

Deputy

  
Comptroller General  
of the United States