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2. August
1977

DECISION



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

FILE: B-188735

DATE: November 28, 1977

MATTER OF: ABA Electromechanical Systems, Inc.

DIGEST:

1. No legal basis exists to support contention that protester's proprietary data may have been disseminated to other offerors prior to award where only evidence presented is protester's speculation.
2. Possibility that low offeror may be "buying in" is not proper basis upon which award may be precluded.
3. Although protester argues that its proposal should have been rated higher in certain areas, procuring agency has responsibility of determining relative merits of proposal and such determination will be accepted by our Office unless it is unreasonable, arbitrary, or in violation of procurement statutes and regulations. Record provides no basis to conclude that award was not in accord with RFP and based on reasoned judgment of evaluators.
4. Contracting officer's action which permitted low offeror to increase target price by \$6,777 after receipt of "best and finals" without reopening negotiations is improper; however, since amount involved is de minimus, relative standing of offerors appears unaffected, and contractor has incurred majority of its costs and completed approximately 40 percent of contract, reopening of negotiations is not recommended.
5. Agency's refusal to consider protester's submission of late best and final offer reducing its price was proper where proposal was not the "otherwise successful proposal."

ABA Electromechanical Systems, Inc. (ABA), protests the award of a contract to Sperry Rand Corporation, Sperry Support Services (Sperry) under request for proposals (RFP) N61339-76-R-0066, issued on June 22, 1976, by the Naval Training Equipment Center (NTEC), Orlando, Florida. The subject RFP was issued for the development of a permanently installed Defense Test Range Device A3F78 and two portable combat ranges, Device A3F80, to meet the requirements for Infantry Remoted Target System (IRETS).

The RFP required the submission of technical proposals in two parts, addressed to "technical approach" and "integrated logistics support (ILS) plan," weighted in that order of relative importance. Proposals were received from four firms and negotiations were conducted between January 24-31, 1977, with the following three firms considered to be within the competitive range: ABA, Detroit Bullet Trap Corp. (DBTC), and Sperry. Following negotiations, the three offerors submitted "best and final" offers on February 18, 1977.

In accordance with the evaluation criteria contained in paragraph 2.4 of the performance evaluation plan set forth in the RFP, the following composite scores and final proposal evaluation scores were assigned:

a. <u>Technical Proposal Requirements:</u>	<u>Sperry</u>	<u>ABA</u>	<u>DBTC</u>
(1) <u>Technical Approach</u>			
Proposal score x 90% =	85.7	83.3	73.4
(2) <u>ILS Plan</u>			
Proposal score x 10% =	8.0	8.1	8.4
Composite score = Total	93.7	91.4	81.8
b. <u>Final Composite Score</u>			
(1) Technical proposal score x 75% =	70.3	68.6	61.4
(2) Cost proposal score x 25%	19.2	17.7	15.0
Final proposal score = Total	89.5	86.3	76.4

Based upon the results of the final proposal evaluation, contract No. N61339-77-C-0333 was awarded to Sperry on March 28, 1977, based on its superior technical proposal and the lowest price proposed. The contract awarded to Sperry is a fixed-price incentive type as follows: Target Cost \$2,986,623; Target Profit \$403,19 ; and Target Price \$3,389,815.

ABA filed a telegraphic protest with our Office on March 31, 1977, and submitted additional information by letters dated April 14 and May 14, 1977, after receipt of additional information requested from the Navy pursuant to the Freedom of Information Act. Following receipt of the Navy's report on this protest and a conference held at our Office, ABA submitted comments by letter dated August 18, 1977. ABA's protest is, in essence, based upon its contention that (1) ABA's proprietary data may have been disseminated to other offerors prior to award with resulting prejudice to ABA and (2) the evaluation of its proposal was unreasonable, arbitrary and capricious. ABA requests our Office to reverse the award to Sperry and make award to ABA.

In regard to the issue of possible dissemination of its proprietary data, ABA's letter of May 14, 1977, states that it was " * * * given the results of the evaluation prior to award by a third party" and that "If this information was available to a third party, we feel certain that it was also available to Sperry, because Sperry maintains close liaison with the Naval Training Equipment Center." ABA also states: "b. Both real and circumstantial evidence indicates that Sperry was privy to ABA's proprietary data." By letter of June 27, 1977, to NTEC, Sperry denies having been given or ever having access to information either in writing or orally regarding ABA's proprietary technical or pricing data during any phase of the IRETS evaluation. Sperry states that it was completely unaware of its position in the evaluation, either technically or as to price, until the contracting officer notified Sperry of its selection for award on March 28, 1977.

ABA states in its August 18, 1977, letter in pertinent part:

" * * * ABA is willing to testify that we did indeed receive data on 7 March 1977 from a third party which revealed proprietary pricing information on both Sperry and ABA's proposals. The Government states that this information was carefully controlled by the Procurement Services Department yet the fact is the information was available after 'best and final' and prior to public knowledge of the pricing. Therefore, one may conclude that if proprietary data was available after the 'best and final' offer it was also available prior to the 'best and final' offer. This is supported by the fact that Sperry did reduce their pricing substantially at the 'best and final' offer without any technical basis for cost reduction."

Under these circumstances, ABA contends that our Office should question the validity of this procurement.

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ABA's contention regarding possible disclosure of proprietary information before award would, if substantiated, cause our Office to seriously question the award. However, the record contains no relevant probative evidence and only ABA's speculation that proprietary data was in fact disclosed prior to award. In the absence of such evidence submitted in support of ABA's contention, we are unable to agree with ABA's contention. See Watkins-Johnson Company, B-187990, April 18, 1977, 77-1 CPD 268.

ABA contends that the award to Sperry may result in a "buy-in," a practice which ABA states is discouraged by the Government. ABA states that the contracting officer did not use prudent contracting procedures in attempting to determine realistic production pricing from all vendors to prevent a buy-in. Armed Services Procurement Regulation (ASPR) § 1-311 (1976 ed.) does not prohibit an award to a firm attempting a buy-in, although the regulation states that where there is reason to believe that "buying in" has occurred, contracting officers shall assure that amounts thereby excluded in the development of the original contract price are not recovered in the pricing of change orders or of follow-on procurements subject to cost analysis. The contracting officer states that he had no reason to believe that "buying in" occurred since Sperry's "best and final" target price was in excess of the Government's own final estimate/negotiation objective. Our Office has consistently held that the possibility of a buy-in is not a proper basis upon which the validity of an award may be challenged. The fact that a low offeror may incur a loss at its offer price does not justify rejecting an otherwise acceptable offer. See Space Vector Corporation, B-187680, February 18, 1977, 77-1 CPD 122, and cases cited therein.

Initially, ABA raised as a basis for its protest the Navy's alleged change in the evaluation criteria after issuance of the RFP and prior to the request for submission of best and final offers. The Navy replied to this contention by stating that this aspect of ABA's protest is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1976). In its August 18, 1977, letter ABA withdrew this ground of its protest and therefore we will not consider the question of the timeliness of this ground of ABA's protest.

ABA sets forth several factors in support of its view that the evaluation was arbitrary and capricious and that the award to Sperry should be reversed in favor of ABA.

The RFP listed the following evaluation and award factors:

"1. Proposal Evaluation - Award Factors

"a. An offeror's total proposal consists of submissions pursuant to the Technical Proposal Requirements (TPR) 2234-131, Attachment (3); Administrative Proposal Requirements (APR), Attachment (5); and the Cost Proposal Requirements (CPR), Attachment (4). The information provided in the offeror's administrative proposal shall be used as an aid to determine whether the offeror is a 'responsible' contractor, pursuant to ASFR 1-900, et seq.

"b. Technical proposals shall be evaluated in accordance with the TPR, Attachment (3). Each proposal will then be ranked in order of merit using the criteria set forth in the TPR.

"c. Cost proposals will be evaluated in accordance with the CPR, Attachment (4). The costs proposed by the offeror will be assessed as to their reasonableness and realism, taking into account the design proposed in the technical proposal. The cost proposal of an offeror submitting an unacceptable technical design will not be considered.

"d. For purposes of award, the Government desires the best design, with due consideration given to the cost proposed. Therefore, award may be made to other than the lowest priced acceptable proposal. Technical design is considered approximately three times as important as realistic R&D cost (items 1 through 19). The Government intends to select the system(s) with the best balance between technical performance and realistic estimated production unit cost at a reasonable and realistic R&D cost. Unit production cost is considered of such importance that the Government may be favorably disposed to a higher development contract cost where such an award will result in a more economical production unit cost."

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The Technical Proposal Requirements (TPR) of the RFP stated that a complete technical proposal shall consist of (1) Volume I - Technical Approach which is of primary importance and (2) Volume II - Integrated Logistic Support Plan which is of secondary importance.

The items contained in Volume I and Volume II are listed below:

<u>"Volume</u>	<u>Primary</u>	<u>Secondary</u>	<u>Tertiary</u>
I			
A. Technical Approach	1. System design 2. Reliability 3. Performance 4. Details of components	5. Safety 6. Maintainability 7. Installation 8. Quality Assurance & Testing	9. Standardization (materials, parts, processes) 10. EMI suppression 11. Human Factors 12. Transportability 13. Dimensions, weights
II			
B. Integrated Logistic Support	1. ILS planning 2. Technical Publications 3. Training	4. Provisioning 5. Contract field service "	

The RFP further provided:

"The technical proposals will be evaluated as set forth below. The order of listing indicates the relative weight that will be applied to each area in descending order of importance. The weights are essentially as follows:

"A has 9 times the weight of B. Within A (Technical Approach) Items 1 and 2 are equal, Item 3 has 4 times the weights of Items 1 or 2, Item 4 has 1-1/2 times the weight of Items 1 or 2, the combined weight of Items 5, 6, 7 and 8 is 1-1/2 times the weight of Item 4, the combined weight of Items 9, 10, 11, 12 and 13 is 1/2 the weight of Items 1 or 2.

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"The weight of B (Integrated Logistic Support), Items 1, 2, 3, 4 and 5 has 1/10th the weight of A and is equal in weight to Items 1 or 2.

"NOTE: The primary emphasis of the above factors is on Volume 1; A, Technical Approach, with major emphasis on the primary Items 1 thru 4 with Item 3 - Performance being the most critical."

The final evaluation of proposals based on 100-point scoring system resulted in ABA receiving 86.3 points and Sperry receiving 89.5 points. ABA, in its letters of May 14 and August 18, sets forth several areas where it believes its proposal should have received a higher point score and Sperry a lower score. ABA contends that since the proposal evaluation was so close, a change in 2 or 3 points in the evaluation system could have provided a difference in the source selection on this procurement.

Our review of the evaluation procedure is limited to deciding whether the record reasonably supports a conclusion that the selection of Sperry over ABA was rationally founded. Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 CPD 253, reconsidered, 55 Comp. Gen. 499 (1975), 75-2 CPD 344. We have frequently held that it is not our function to make independent evaluations of proposals to determine which offer should have been selected for award, that the determination of the relative merit of technical proposals is the responsibility of the procuring activity concerned which must bear the major burden of any difficulties encountered because of defective analysis, and that the procuring activity's determination will ordinarily be accepted by our Office unless it is clearly shown to be unreasonable. See Gloria G. Harris, B-188201, April 12, 1977, 77-1 CPD 255.

Not only was Sperry's best and final offer considered to be technically superior to ABA, it also submitted a lower total price of \$3,389,815 as compared with ABA's price of \$3,462,943. Based on our review of the Navy's technical evaluation report, we believe that the selection of Sperry's proposal as technically superior had a reasonable basis, and we therefore have no reason to question that determination. Even if we were to agree with ABA that its proposal should have been rated equally with B, the fact

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remains that Sperry's price was lower and award to Sperry would also be justified under that circumstance.

The record discloses that the contracting officer contacted Sperry on February 23, 1977, 5 days after receipt of "best and final" offers, and permitted the firm to increase its target price to \$3,389,815 which includes \$6,777 for the supply of Sperry-manufactured transmitters. The contracting officer contends that Sperry was contacted for the limited purpose of clarifying his understanding that Sperry intended to furnish its own transmitters. However, ABA contends that this action is in violation of ASPR § 3-805 (1976 ed.), and that negotiations should have been reopened. While ordinarily such action by the contracting officer would require a reopening of negotiations pursuant to ASPR § 3-805, we do not recommend the reopening of negotiations in this case because the increase in Sperry's target price was de minimus, it does not appear that the change would have affected the relative standing of the offerors, and we have been informally advised by a representative of the Navy that costs of approximately \$3 million have been incurred by Sperry and the contract is about 40 percent completed. However, by letter to the Secretary of the Navy, we are recommending that appropriate action be taken to avoid the recurrence of such a situation in the future.

ABA contends that it was not given an opportunity to discuss the Government's requirements for unlimited rights to the engineering data during its negotiations conducted on January 28, 1977. The record does not support ABA's contention in this regard. By letters of February 8, 1977, ABA was advised that "The closing date for receipt of 'best and final' offers is hereby extended to Friday, 18 February 1977, 3:00 p.m. EST." ABA could have reduced its price for rights in technical data prior to that date but did not choose to do so. In a letter to the contracting officer dated March 21, 1977, ABA stated that it was withdrawing its claim for rights in technical data by reducing its best and final price by \$468,000. However, this attempted reduction was a late modification to its proposal and was therefore properly rejected in accordance with the "Late Proposals Modification of Proposals and Withdrawals of Proposals" clause in the RFP. This clause does not permit Government consideration of a proposal received after the established closing date unless it is "an otherwise successful proposal which makes its terms more favorable to the Government." ABA's best and final proposal was not the "otherwise successful proposal" and therefore its attempted modification submitted after the February 18 common cutoff date could not be considered. See Union Center Veneer, B-188666, April 6, 1977, 77-1 CPD 241.

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ABA questions the Navy's determination that Sperry submitted the "best balance of technical performance and production costs" in view of what ABA refers to as Sperry's lack of prior experience. In this regard, we note that the RFP did not require offerors to have previously developed equipment similar to IRETS equipment. Therefore, the Navy properly made its determination as to technical superiority based upon only the evaluation factors stated in the RFP.

Our review of the record provides no basis to conclude that the award to Sperry was not in accord with the RFP and based on the reasoned judgment of the evaluators.

Accordingly, ABA's protest is denied.

R. G. Kellin
Deputy Comptroller General
of the United States