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DECISION

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

FILE: B-187716 DATE: December 29, 1977

MATTER OF: U.S. Nuclear, Inc.

DIGEST:

1. Where solicitation allows both fixed-price and cost-type proposals to be submitted, protester should have known prior to submitting its proposal that comparison between both types of proposals might be made as part of evaluation process. However, since protester was not aware, until after award, of how evaluation was made, its contentions as to propriety of evaluation are timely raised after award.

2. Cost estimate in cost-type proposal may be properly compared, for evaluation purposes, to fixed-price proposal so long as cost estimate is determined to be reasonable and realistic. Protester's contention that evaluators disregarded advantages of fixed-price proposal in making the comparison is not supported by record.

3. Protester's contention that agency violated regulations by not requiring prospective cost-type contractor to furnish certified cost or pricing data and by not performing cost analysis of such data is without merit since adequate price competition existed for procurement, and therefore requirements for submission of cost and pricing data and cost analysis of such data were not applicable.

4. Agency reliance on offeror's historical costs and experience under one contract in evaluating realism of offeror's cost estimate for another contract is reasonable where record establishes similarity between fabrication and assembly processes of items required by both contracts.

5. Where both fixed-price and cost-type proposals were solicited, agency's determination to award cost-type contract was properly made after proposals were evaluated and not before proposals were solicited, as urged by protester.

U.S. Nuclear, Inc. (USN) protests the award of a contract by Brookhaven National Laboratory (Brookhaven) to Texas Instruments (TI) under invitation for proposals (IFP) No. 374463 to furnish 420 fuel elements for a high flux beam reactor (HFBR) located at Brookhaven. Brookhaven is a federally-owned facility operated for the Energy Research and Development Administration (ERDA), now the Department of Energy, by Associated Universities, Inc., under a cost-type management contract. This procurement was effected under Brookhaven's management contract and the selection of the awardee was subject to ERDA's approval. Accordingly, this matter is properly for our consideration as a protest of an award of a contract "for an agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office." 4 C.F.R. § 20.1(a) (1976); see B-179462, November 12, 1973; B-169492, July 27, 1970.

The IFP, issued on January 19, 1976, permitted proposals to be submitted on either a fixed-price or cost basis. Of the five firms solicited, three submitted proposals by the February 23, 1976 closing date. TI submitted a cost-plus-fixed-fee proposal, while USN and Atomics International (AI) submitted fixed-price proposals.

Following discussions with the three offerors, Brookhaven's proposal evaluation committee determined that there were "no appreciable differences between the three proposals on the basis of the technical criteria listed in the solicitation." By Amendment 1 to the IFP dated May 10, 1976, which called for best and final offers, Brookhaven advised the offerors that award would "be made to that responsible bidder whose proposal is responsive and will result in the lowest projected annual fuel cycle cost for the reactor." By June 1, 1976, in response to the request for best and final offers, TI submitted a cost-plus-fixed-fee proposal, USN submitted a fixed-price proposal, and AI submitted a fixed-price proposal and a cost-plus-fixed-fee proposal. On September 1, 1976,

Brookhaven awarded the contract to TI on a cost-plus-fixed-fee basis after determining that TI's proposal offered the lowest annual projected fuel cycle cost. The protest was filed when USN was notified of this award.

USN contends that TI's cost-type proposal was not properly evaluated and compared with its fixed-price proposal. It maintains that Brookhaven and ERDA improperly determined that TI's proposal would result in the lowest cost. USN also contends that in evaluating TI's cost proposal, Brookhaven/ERDA did not comply with applicable regulations requiring submission of cost or pricing data by the offeror and a cost or price analysis by the contracting agency. Moreover, USN questions whether a determination was made that a cost-type contract could be used in this case.

Initially, ERDA argues that USN's protest boils down to the single contention that it was not appropriate to solicit cost-type proposals along with fixed-price proposals. According to ERDA, the protester should have known long before the filing of its protest that a cost-type contract might be awarded under this solicitation and that cost comparisons might have to be made as part of the evaluation process. Citing 4 C.F.R.§ 20.2(b) of our Bid Protest Procedures, ERDA argues that the protest should have been filed before the closing date for receipt of proposals, and that since the protest was filed long after that date it should be dismissed as untimely.

However, the crux of the USN protest, as outlined above, concerns the evaluation of proposals. While the protester should have been aware from the solicitation that a comparison between fixed-price and cost-type proposals might be made as a part of the evaluation process, it was not aware, until after the award, of how the evaluation was made. Therefore we believe the protester's contentions concerning the propriety of the evaluation are timely raised, and they will be considered on the merits. International Finance and Economics, B-186939, January 27, 1977, 77-1 CPD 66, at p. 11.

In fact, USN cites International Finance and Economics, supra, as a case where our Office recognized the "inherent advantage" of fixed-price proposals over cost-type proposals and concluded that the agency disregarded these advantages in its evaluation. In USN's view, Brookhaven/ERDA likewise overlooked the inherent

advantages of the fixed-price over the cost-type contract in evaluating the proposals. It lists a number of these advantages, most of which pertain to the inherent differences between the fixed-price and cost-type contract. An an example, USN notes that it would be responsible to repair or replace nonconforming items while TI is reimbursed for the cost of repair or replacement. Yet, USN states, in evaluating the proposals "the only advantage assessed to USN's fixed-price bid was the cost of added inspection under a cost-type arrangement."

ERDA, for its part, concedes that a comparison between the two types of proposals is "difficult and must be performed with great care." ERDA also points to International Finance and Economics, supra, as recognizing that comparisons between the two types of proposals are possible and proper (77-1 CPD 66, at p. 9). That a proper comparison was made in this case is, in ERDA's view, amply demonstrated by the record. ERDA cites the evaluation file to show that both AI's and TI's cost proposals were assessed costs of Brookhaven inspection which are not assessed to USN's proposal. This, in the evaluator's view, adequately compensated for the warranty which was included in USN's fixed-price proposal but not in the cost proposals.

Essentially, however, ERDA contends that the sole evaluation criterion identified in the solicitation, as amended, was "lowest projected annual fuel cycle cost to the reactor" and that Brookhaven's cost comparison was appropriate for making that determination. It states that International Finance and Economics dealt with a situation where the agency failed to evaluate proposals in accordance with the evaluation criteria expressed in the solicitation, and thus is not applicable to the instant situation.

We agree. In the prior case we found in part that, although fixed-price proposals were not excluded under the solicitation, the agency had downgraded a proposal because it offered a fixed-price and made it "impossible to guarantee how much effort will be delivered." We felt that the agency had "missed the point" since the fixed-price offer guaranteed an acceptable product at a stated price.

In this case, Brookhaven/ERDA [illegible] downgrade USN because it offered a fixed-price [illegible]al. Instead the record indicates that the evaluato[illegible]re aware of the advantages of a fixed-price proposal. Thus, the evaluators noted that the prices set forth by TI were estimates while those by USN were binding commitments. Nevertheless, the evaluators concluded that TI's cost estimates were reasonable. They also recognized that escalation falls solely on the fixed-price contractor but found that TI's projected escalation rate was realistic. Other factors were considered as well, including changes in requirements and possible termination, and prior manufacturing experience. Therefore, based on the record, we cannot sustain USN's contention that the evaluators disregarded the "inherent advantages" of USN's fixed-price proposal in making their cost comparison.

USN next contends that the evaluation of TI's cost proposal was contrary to regulations because TI did not furnish cost or pricing data and did not certify any cost information. USN cites the Federal Procurement Regulations (FPR) and the ERDA regulations applicable to cost-type procurements which require the submission of certified cost or pricing data from a prospective contractor for a cost-type contract. Moreover, USN points out that the FPR also provides that "price or cost analysis should be made in connection with every negotiated contract," citing FPR § 1-3.807-2(a), and it contends that Brookhaven/ERDA failed to comply with this requirement in evaluating TI's cost proposal.

In reply, ERDA states that while USN submitted a "Proposal Pricing Sheet" which was included in the solicitation as a convenient form for setting forth quotations, TI included in its proposal all of the data which would have been included in the Proposal Pricing Sheet. ERDA cites its regulation (ERDA 9-59.003) and the FPR as providing that "the method and degree of [price or cost] analysis" to be made for a negotiated procurement "is dependent on the facts surrounding the particular procurement and pricing situation." FPR § 1-3.807-2.

ERDA insists that "intensive cost and price analyses" were performed in this case. It states that data submitted or made available by TI were examined, including costs incurred by TI on similar work. It states that the TI cost estimates were

compared with the price quotations offered by the other offerors, and that audit services were utilized. Also, ERDA states that since "adequate price competition" existed for this procurement, the requirement for certification of cost or pricing data was not applicable.

We find no basis to conclude that Brookhaven/ERDA's evaluation of TI's cost proposal was contrary to regulations. FPR § 1-3.807-3(b) and (f) provide that where there is adequate price competition cost or pricing data need not be requested. "Adequate price competition" may be said to exist where at least two responsible offerors who can satisfy the Government's requirements independently contend for the contract award. FPR § 1-3.807-1. Here there were three responsible offerors independently contending for the contracting award. Thus, a requirement for cost or pricing data was not applicable for this procurement. Rather, as provided by FPR § 1-3.807-2, the extent of cost or pricing analysis to be conducted was a matter left to the discretion of the procuring activity. 52 Comp. Gen. 346, 351 (1972). Hence, USN's contentions concerning the need to require submission of cost or pricing data and to perform a cost analysis of such data are not sustained.

As to the cost evaluation which was performed of TI's offer, the record shows that Brookhaven relied in part on an audit made in connection with a contract TI is currently performing for Oak Ridge National Laboratory for high flux isotope reactor (HFIR) fuel elements. The record shows that Brookhaven and ERDA "placed considerable reliance on the audited historical costs and estimating experience of TI in fabricating HFIR fuel elements," which TI has been doing on a cost-type basis for over 10 years, because of similarities between the HFIR fuel element and the HFBR fuel element.

It is USN's contention that these fuel elements are substantially different and cannot provide a basis for cost comparison. USN cites differences in the fabrication of the initial core, in the fuel plate fabrication, and in the fuel element assembly. (Both the HFBR and HFIR fuel elements consist of a number of aluminum plates containing enriched uranium, called fuel plates, which are joined to make an assembly called a fuel element.)

USN's contention concerning the core fabrication arises from an exception TI took in its initial proposal regarding tolerance on the thickness of the core. The protester suggests that this indicates that TI might have problems in complying with the core thickness tolerance.

ERDA points out, however, that each of the offerors took exception to this aspect of the specification because they misunderstood the requirement. ERDA states that in the case of TI the exception was withdrawn in its final proposal and that, in fact, as a result of discussions with TI, Brookhaven clarified the specification on core thickness when it issued Amendment 1 on May 10, 1976.

As for fuel plate fabrication, USN points out a difference between the HFIR and the HFBR. The HFIR fuel plate is fabricated by annealing the plates after substantial cold work and leaving them in a fully annealed condition. The HFBR fuel plate, however, is required to have 20 percent cold work so that the final anneal utilized in the HFIR plate fabrication cannot be done. This difference, according to USN, is significant and makes more difficult manufacture of the HFBR fuel plate.

ERDA, on the other hand, believes the similarity between HFIR and HFBR plate fabrication is obvious since both plates are fabricated using the same equipment and procedures. With regard to the 20 percent residual cold work in the HFBR fuel plates, ERDA believes this difference "is off-set by the fact that the HFBR fuel plate is bent to an easily controlled simple radius curvature while the HFIR plate is bent into a complicated involute curvature."

Finally, on the element assembly, USN notes that the HFBR fuel elements are assembled by mechanically swaging the fuel into grooved aluminum side plates, while the HFIR elements are assembled by a welding procedure. In the case of the HFIR, the fuel plates are inserted in a groove and a few circular welds are placed around the element, thereby tacking the fuel plates to the side plates of the circular aluminum channels. The roll swaging assembly procedure involved in the HFBR, in contrast, places stress on the fuel plates making it difficult to

hold the tight water gap tolerances required for proper cooling of the fuel plates in the reactor. USN concludes from this that the difficulty in holding the HFIR water channels should be much less than in the assembly of the HFBR element. Also, because each HFIR element has 540 plates and each HFBR element only 18 plates, more than 30 HFBR elements must be assembled for each HFIR element to utilize the same number of plates.

In this connection USN questions whether TI's current performance on the HFIR of more than 10 years experience manufacturing that type of fuel plate is relevant to a new start on the HFBR fuel plate. Thus, USN doubts that the 6 percent rejection rate which was used in estimating TI's cost is realistic.

In reply, ERDA explains that due to its concern over past assembly problems experienced by the incumbent HFBR contractor (not TI), Brookhaven had developed its own roll swaging machinery specifically for the HFBR plate; it thoroughly evaluated the assembly of HFBR elements, and, with the aid of its auditors made assembly cost analyses. ERDA states that since these Brookhaven-developed machinery procedures and cost analysis were used by TI in its proposal, there was no need for a separate analysis on this portion of the work. (It notes, also, that USN was offered use of this same machinery but declined a significant portion of it.) In addition, ERDA believes that the projected rejection rate of 5-6 percent for TI was conservative in view of TI's actually lower rejection rate over the past seven years.

In view of the foregoing, we cannot say that ERDA/Brookhaven's reliance on TI's cost experience in fabricating the HFIR fuel element was misplaced. In this connection, ERDA reports that in the time which has intervened since TI commenced HFBR work, TI's progress has served to confirm the validity of the evaluation in some notable areas. ERDA states that the TI qualifying plates have already been fabricated and tested in all important details and that the parameters which USN raised as possible points of difficulty, such as thickness control and cold work, "were all found to be comfortably within specifications."

Finally, USN has questioned whether a determination was made here that a cost-type contract could be used. It cites 41 U.S.C.§ 254(b) and FPR § 1-3.405-1(c) as requiring such a determination. A copy of such a determination dated August 31, 1976 has been furnished to our Office by ERDA. Nevertheless, USN suggests that the Determination, in order to be valid, must be made prior to issuance of the solicitation. We do not agree. Where both fixed-price and cost-type proposals are solicited, a determination to award a cost-type contract should be made after proposals are evaluated and not before proposals are solicited.

Accordingly, the protest is denied.

Acting Comptroller General
of the United States