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Proc II

DECISION



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

FILE: B-190045

DATE: February 1, 1978

MATTER OF: Wapora, Inc.

DIGEST:

Agency's rejection of protester's entire proposal is upheld where protester failed to provide timely response to RFP amendment issued after initial and revised proposals were received and evaluated. Protester's contention that amendment did not make any substantial changes to RFP is not sustained.

Wapora, Inc. (Wapora) protests the rejection of its proposal under request for proposal (RFP) C1-76-0300, issued by the Environmental Protection Agency (EPA), Cincinnati, Ohio, inviting proposals on a cost-plus-fixed-fee basis for the compilation and assessment of data dealing with the environmental impact of certain specified industrial activities. A number of industries were identified in the RFP and prospective offerors were invited to submit separate technical proposals for each industry in which they could claim expertise. Wapora submitted proposals for "Pulp Paper and Paperboard Mills", "Builders Paper and Board Mills" and "Machinery and Mechanical Products Manufacturing", as well as for "Paint and Ink Formulation and Publishing".

The RFP was amended seven times. Wapora's protest arises from the contracting officer's determination that Wapora's failure to timely respond to amendment #7, issued after the submission of best and final offers, precluded consideration of its proposal. Wapora submitted a "best and final offer" on June 23, 1977. On August 5, 1977, EPA issued amendment #7 which revised the contemplated period of performance, provided offerors additional instructions for the preparation of cost proposals, and called for a response by August 15. No response was received from Wapora. On August 19, 1977, the contracting officer contacted Wapora by telephone. Wapora stated that it had not received the

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amendment. but upon being informed of its provisions, advised the contracting officer that the amendment would have occasioned no change in its cost estimate or technical proposal. By letter dated August 22, 1977, Wapora formally confirmed that advice.

EPA responded by letter dated September 1, 1977, stating that a "late proposal situation" existed. The contracting officer reasoned as follows:

* * * * we note that your letter dated August 22, 1977 which reaffirmed your last cost estimate in light of the changes made in Amendment number 7 must be considered a late proposal. As such, no consideration can be given to your proposal since your response to Amendment number 7 made a significant change in the period of performance by altering it from a 12-month term with an option for an additional 12 months to a firm 24-month term. Your last cost estimate submitted on June 23, 1977, was based on the prior period of performance * * * rather than the amended 24-month period of performance with no additional time option.

* * * * *

"I have in accordance with the foregoing determined your failure to respond by the specified time and in conjunction with your letter dated August 22, 1977 to be a late proposal, thus precluding consideration of your company for award resulting from Request for Proposal CI 76-0300."

However, because Wapora submitted the sole proposal in the "Paint and Ink Formulation and Publishing Industry" category, EPA entered into negotiations with Wapora for this category.

Although Wapora, in its initial protest letter, cites several grounds for the protest, in its response to the

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agency report it states that the controversy has been narrowed to whether the provisions of amendment #7 worked any substantial change in the terms of the RFP. Wapora contends that since the amendment held no practical significance, it was unnecessary and its existing proposal should not have been denied consideration because of a failure to respond to the amendment by the specified date.

In LaBarge, Incorporated, B-190011, January 5, 1978, 78-1 CPD _____, a line item was added by amendment to the RFP after initial proposals had been received and evaluated. Offerors within the competitive range were instructed to respond to the amendment by a certain date and time. One of the offerors responded late, and we held that, even though the amendment response was the only part of the proposal that was late, it had the effect of rendering the total proposal as late "since no timely proposal had ever been submitted for the totality of the line items for which a single contract would be awarded."

On the other hand, where an amendment issued after initial proposals had been received and evaluated merely modified the RFP evaluation criteria and not the terms and conditions of the contract, we held that the failure of the offeror to submit a timely response to that amendment did not require rejection of the entire proposal as late. Techniarts, B-189246, August 31, 1977, 77-2 CPD 167. We also held in that case, however, that the offeror's late response to the amendment could not be considered in determining whether the offeror remained within the competitive range under the revised evaluation criteria.

Thus, it is evident from these cases that Wapora is correct in asserting that the crucial issue here is whether amendment #7 made any substantial change in the terms and conditions of the RFP. If, as EPA contends, the amendment introduced significant changes, then Wapora's failure to respond to the amendment required rejection of its entire proposal.

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The RFP as issued specified the period of performance as 24 months. Cost proposals were requested based on the 1,000 manhour level of effort, distributed to the labor categories set forth in the RFP. In addition, the RFP included an option to increase the "level of effort" to a maximum of 13,000 manhours in increments of 1000 manhours. By amendment #4, issued before proposals were received, the period of performance for completion of the work was changed to 12 months with an option for an additional 12 months. Offerors were still instructed to base their cost proposals on 1000 manhours, although the labor category distribution was somewhat altered.

Initial proposals were submitted by January 12, 1977, as specified in amendment #4. Thereafter, on February 28 and March 8, 1977, amendments #5 and #6, respectively, were issued. These amendments modified the RFP technical evaluation criteria, and the due date for proposals was changed to March 18, 1977. Wapora responded in a timely fashion stating that it had no changes to propose.

On May 17, 1977, the competitive range was determined and thereafter negotiations were conducted with offerors within the competitive range, including Wapora. By letter of June 21, 1977, EPA requested best and final offers by July 1, to which Wapora timely responded by letter of June 23, together with its best and final offer.

On August 5, 1977, EPA issued amendment #7. As stated, the amendment revised the period of performance and provided offerors additional instructions for the preparation of cost proposals. The EPA contracting officer believes the changes reflected by amendment #7 were significant and necessary for award evaluation because:

- (1) The period of performance was changed from 12 to 24 months;

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- (2) For cost pricing comparison, offerors were instructed to submit cost pricing data applying consolidated indirect cost rates for 24 months;
- (3) Offerors were advised as to the ratio of secretarial/clerical and other direct charges to technical direct labor estimates. (Amendment #7 provided that one hour of secretarial/clerical time shall be provided for each 3 hours of technical labor time, and that other direct charges shall not exceed 15 percent of technical labor dollars);
- (4) The total estimated level of effort (for all contracts) was established at 150,000 manhours in lieu of 75,000 manhours over a one-year period;
- (5) A new requirement was set forth for 15,000 manhours per industrial category to be included in each contract as an option; and
- (6) Offerors were provided samples in amendment #7 of the following 3 contract articles: Period of Performance, Level-of-Effort, and Option to Increase the Level-of-Effort, which are substantially different from those previously set forth in the RFP.

In response, Wapora argues that the change from a 12-month contract term plus 12 months option to a 24-month term is meaningless. It states that any contractor who would submit a program before this change was made would realize that it was committing itself for 24 months and not simply for 12 months. Likewise, Wapora states that the corresponding change in estimate from 75,000 manhours to 150,000 manhours is also a meaningless change. Moreover, Wapora states that the secretarial and clerical support included in amendment #7 is that which was included in the original RFP, and while the 15 percent limit for other direct charges is new, Wapora's cost proposal included that limitation anyway.

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As for the new requirement for 15,000 manhours per industrial category, Wapora states that the evidence of this "new" requirement "is what the contracting officer calls a new sample contract article entitled 'Option to Increase the Level of Effort'. The identical proposed article was included in the original RFP." In Wapora's opinion, all amendment #7 accomplished was to take "everyone back to the original request for proposal."

Although we agree with some of Wapora's analysis as to the effect of amendment #7, we do find that the "Option to Increase the Level of Effort" clause was significantly changed. As Wapora states, the basic RFP included such a clause. That clause provided the Government with the option to increase the level of effort "in this contract" to a maximum of 15,000 manhours. Paragraph c of the "Additional Instructions to Offerors" stated that "the Government anticipated that ten (10) contracts will be awarded" under the RFP. Thus the option to increase the level of effort by 15,000 manhours applied for each contract regardless of the number of industrial areas covered by the contract. While amendment #4 deleted the reference in paragraph c to ten awards and substituted instead the statement that "the Government reserves the right to make as many awards as necessary to provide contractual support coverage for each of the industries," the option provision remained the same. In amendment #7, however, language was added to the option clause to the effect that the level of effort under the contract could be increased "to 15,000 manhours per each industrial category awarded to contractor." As the text of amendment #7 makes clear, if a contractor were to be "awarded a contract covering four (4) of the industrial categories," the level of effort "could be increased to a maximum of 60,000 manhours."

In addition, we note that amendment #7 required a certain level of secretarial and clerical support as well as specifying a maximum charge based on technical labor dollars for other direct charges. As stated by Wapora, the original RFP did include the same requirement for secretarial/clerical support as that required by amendment #7. However, amendment #4 eliminated the requirement until it was reinstated by amendment #7. While the record shows that

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Napora's best and final cost proposal of June 23 was based on secretarial/clerical and other direct charges in accordance with the ratio specified in amendment #7, the offeror was not strictly committed to these ratios under the terms of the existing proposal, which did not include amendment #7.

Finally, as the EPA contracting officer states, a number of the contract articles were revised somewhat. Both the Level of Effort and Option to Increase the Level of Effort clauses were revised to provide that no adjustment in fixed fee for work reports would be made unless the direct labor hours varied by more or less than 10 percent of the estimated level of effort specified in the contract. Originally, these RFP clauses did not specify a fixed range for fee adjustment but, rather, presumably left the matter open for negotiation.

In conclusion, we find that amendment #7 did make significant changes in the RFP. Moreover the amendment stated that the due date for response was August 15, 1977, and, in this connection, attention was "directed to the Late Proposals provisions of FPR 1-3.802-1(a)." Therefore the contracting officer's determination to exclude Napora from the competition because of its failure to submit a timely response to that amendment is legally justifiable. LaBarge, Incorporated, supra.

Accordingly, the protest is denied.

R. J. ...
Deputy Comptroller General
of the United States