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

FILE: B-194030 DATE: August 21, 1979

MATTER OF: Caedmon Division, The Raytheon Company
[Protest Against Contract Award]

DIGEST:

1. Offeror's contract with union requiring certain wages and fringe benefits does not bind Government or require procuring agency to insure that contract is not breached.

2. Award to low offeror is not precluded simply because price appears too low and, as a result, offeror may suffer loss.

3. Offeror for fixed price contract must allow for expected cost increases and, where there is no escalation clause, assumes risk of such increases.

4. GAO will not review affirmative determinations of responsibility unless there is showing of fraud on part of Government officials or allegation of failure to meet definitive responsibility criterion.

5. Regulations permit waiver of preaward audit when information already available is adequate for proposed procurement.

6. Whether point spread between two competing technical proposals indicates significant superiority of one over another is matter within discretion of contracting officer.

7. Selecting official is not bound by findings, scoring, and recommendations of technical evaluators, so long as his choice has reasonable basis and is consistent with evaluation criteria.

8. Alleged procedural deficiencies, such as failure to synopsize or to provide formal notice of award, do not affect validity of award.

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DLG02618

Caedmon, a division of the Raytheon Company, has protested the award of a fixed price contract for production of public service radio programs in English and Spanish by the Social Security Administration (SSA), Department of Health, Education, and Welfare, under request for proposals No. SSA-79-0030.

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Caedmon, whose price was $183,781, believes that the $157,081 contract awarded to Herbert M. Moss, Inc. (Moss), is not based on paying union rates, as required by the American Federation of Television and Radio Artists (AFTRA). Caedmon alleges that SSA made incorrect assumptions regarding these rates, failed to check with AFTRA about discrepancies in the rates proposed by Caedmon and Moss, and did not consider anticipated rate increases. Caedmon also objects to SSA's waiver of a preaward audit of Moss.

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In addition, Caedmon alleges that its proposal was technically superior to Moss's; that it was misinformed as to the dollar amount of a 1978 contract for similar services, held by Moss; that the procurement was not synopsized in the Commerce Business Daily; and that it did not receive written notice of the award to Moss.

For the following reasons, we find that none of these allegations provides a basis for disturbing the award.

First, although Caedmon alleges that it was implicit in the request for "programs along the lines of existing shows," the solicitation neither required AFTRA talent to be used nor AFTRA rates to be paid. Caedmon's allegations therefore raise the issue of whether the agency had a duty to insure that offered prices reflected AFTRA rates. We do not believe that it did. As SSA points out:

> "Compliance with contractually stipulated rates is a matter of concern to those who are parties to that contract--in this instance the offerors, AFTRA, and its membership. The fact that these

> parties have entered into a contract would in no way bind third parties such as the Government to insure that the contract is not breached.
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> "What the contractor pays for services rendered is of concern to the contractor, to AFTRA, and to AFTRA's membership. In a fixed price situation, the Government's concern is limited to what the contractor charges it for those services. The contractor is in no way obligated to charge the Government an amount sufficient for it to recover its costs."

We agree. We have no evidence that in this case Moss will not recover its costs; however, we consistently have held that an award is not precluded simply because the offered price appears too low and, as a result, the offeror may suffer a loss. The Brunton Company, B-192243, August 29, 1978, 78-2 CPD 151.

Regarding the protester's contention that Moss did not consider AFTRA rate increases, we note that Moss increased its initial price in its best and final offer. The record indicates that this was because the firm was aware of, and attempting to project, the rate increase expected to result from ongoing AFTRA negotiations. In a fixed price contract, a bidder or offeror is expected to include in its basic price a factor to cover any cost increases; where, as here, there is no escalation clause, the risk of such increases is assumed by the contractor, not the Government. See generally Ronald Campbell Company, B-190837, April 24, 1978, 78-1 CPD 313; Suburban Industrial Maintenance Co., B-190588, March 6, 1978, 78-1 CPD 173.

SSA continues:

> "The Government's concern here would be limited to whether a failure to comply with the terms of another contract would be a sufficient basis for concluding that an offeror was not responsible within the meaning of Federal Procurement

> Regulations (FPR) Subpart 1-1.12. In this regard the record indicates that Moss has routinely made and AFTRA has routinely accepted such payments as Moss perceived as being in compliance with its contract."

SSA therefore made an affirmative determination of Moss's responsibility. Our Office no longer reviews affirmative determinations of responsibility unless there is a showing of fraud on the part of Government officials or an allegation of failure to meet a definitive responsibility criterion. The Brunton Company, supra. Neither is present here.

SSA further indicates that it waived a preaward audit because most of Moss's proposed indirect costs had been substantiated in a February 1978 audit, and most of Moss's proposed direct costs were substantiated in a published price list. We note that the regulations permit waiver of an audit when information already available is adequate for the proposed procurement. FPR § 1-3.809(b)(1)(i); (1964 ed. amendment 190, March 1978).

With regard to technical superiority, the record indicates that Caedmon's final evaluation score was 10 points more than Moss's; Caedmon argues that this advantage required award to it.

While technical ratings are useful as guides, whether a given point spread between two competing proposals indicates a significant superiority of one over another is a matter within the discretion of the contracting officer. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. A selecting official is not bound by the findings, scoring, and recommendations of technical evaluators, so long as his choice has a reasonable basis and is consistent with evaluation criteria. The Ohio State University Research Foundation, B-190530, January 11, 1979, 79-1 CPD 15.

In this case, Moss and Caedmon received virtually equal scores on each evaluation criterion except understanding of the project and creativitiy. Two evaluators

also found them equal on this criterion; the third favored Caedmon. The contracting officer states that he assumed both offerors understood the project, since both previously had performed similar SSA contracts "in an exceptional manner." Analyzing tasks in which creativity could be demonstrated, the contracting officer found that for the radio shows, Moss proposed using existing format and talent, while Caedmon offered an option of using new talent. For English and Spanish production spots, to the existing format Moss proposed adding comments by financial or economic experts on the Social Security program, while Caedmon proposed using comedy skits to draw attention to the message. The record reveals that the evaluator who downgraded Moss did so because the use of expert panelists is not uncommon or unique to the advertising industry. The contracting officer, however, noted that use of comedy skits in spot announcements is not uncommon or unique either. He therefore determined that the proposals were essentially equal, and that award should be made on the basis of price.

We find this determination reasonable, and note that the solicitation clearly stated that if, based on technical merit, two or more proposals were essentially equal, cost would be determinative.

SSA acknowledges an error in advising Caedmon that the prior year's contract price was $200,000. There is no evidence, however, that the information was given in bad faith, and we believe that Caedmon assumed the risk of relying on the $200,000 figure in preparing its offer for this procurement.

Finally, we find that the alleged failure to synopsize and to provide formal notice of award concern procedural deficiencies which do not affect the validity of the award. See Leon Whitney, Certified Public Accountant, B-190792, December 19, 1978, 78-2 CPD 420.

The protest is denied.

R.F. Keller

Deputy Comptroller General
of the United States