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DECISION

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

FILE: B-194168 DATE: November 28, 1979

MATTER OF: Burroughs Corporation C451

[Protest of Bid Rejection as Unacceptable]

DIGEST:

1. In absence of applicable North Dakota law, conduct of procurement under Department of Labor grant which included Attachment O to OMB Circular A-102 is measured against fundamental norms of Federal negotiated procurement.

2. Grantee's decision to exclude complainant's initial proposal from competitive range is not shown to be contrary to fundamental norms of Federal procurement. In such circumstances, fact that no negotiations were conducted with complainant while negotiations were conducted with successful offeror does not constitute unequal treatment of offerors.

Burroughs Corporation has requested that we review the award of a contract to Honeywell Corporation under a request for proposals (RFP) issued by the North Dakota Employment Security Bureau (NDESB). The procurement was conducted under a grant from the U.S. Department of Labor (DOL). Our review is made pursuant to 40 Fed. Reg. 42406 (1975), where we stated that we would consider complaints concerning contracts awarded under Federal grants.

Background

The RFP, issued by NDESB in July 1978, called for "detailed proposals" for certain data processing hardware, software and services. A previous RFP for the same requirement, issued in June 1977, had been canceled by NDESB prior to any award being made. In August 1978, proposals were received from Burroughs, Honeywell, and Sperry Univac, with prices reportedly as follows:

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	Lease	Lease-Purchase	Purchase
Burroughs	$2,747,851	$2,006,010	$1,906,224
Honeywell	2,816,378	2,810,379	2,503,806
Sperry Univac	2,794,809	3,212,240	2,671,982

NDESB evaluated the proposals, and rejected Burroughs' for failure to meet several mandatory requirements. The proposals of Honeywell and Sperry Univac were evaluated as acceptable, and both vendors passed benchmark tests. Ultimately NDESB selected Honeywell to receive the award.

Applicable Law

DOL indicates that the grant was made under title III of the Social Security Act, 42 U.S.C. §§ 501-504 (1976), and the Wagner-Peyser Act, 29 U.S.C. § 49, et seq. Under these laws the Secretary of Labor grants funds for the administration of State unemployment compensation laws and public employment offices. DOL also indicates that the grant terms included Attachment O to Federal Management Circular 74-7, September 13, 1974 (later, Attachment O to Office of Management and Budget Circular A-102). Attachment 0 provides, among other things, that grantees may use their own procurement regulations which reflect applicable State and local law, rules and regulations, provided that procurements made with Federal grant funds adhere to certain described standards.

It is not clear from the record to what extent NDESB was following State law in conducting the procurement. In this connection, Burroughs has cited chapter 54-44.2, North Dakota Century Code, which appears to exempt NDESB from the established State procedures for purchasing ADPE. We are unaware of any North Dakota law dealing with the subject of how NDESB is required to conduct a negotiated procurement. Accordingly, we will review the procurement from the standpoint of whether the grantee's actions were inconsistent with the fundamental principles or norms of Federal procurement. See Complete Irrigation, Inc., B-187423, November 21, 1977, 77-2 CPD 387.

Discussion

Primarily, Burroughs maintains that NDESB acted improperly in rejecting its initial proposal without conducting any discussions with it. The record shows that NDESB rejected the proposal for what it judged to be substantial shortcomings in three areas. First, the grantee found Burroughs' proposal did not satisfy RFP section 3.3.11.A.1(c), (d) because it did not provide required computer security features through one of the four mechanisms designated in the RFP. Second, NDESB found the proposal to be noncompliant with RFP section 8.2.1.B, which called for maintenance on a 17-hour-per-day basis. Section 8.2.1.B of the Burroughs proposal was silent on this point, and elsewhere the proposal contained several references to a 16-hour day. Third, the grantee found the proposal did not respond individually to the five software support requirements in RFP section 8.2.2.A through E. Specifically, NDESB found that Burroughs' proposal totally failed to address the 8.2.2C requirement for software support on an 8-hour-per-day, 5-day-per-week basis with a 1-hour response time on 90 percent of trouble calls.

Burroughs maintains its proposal contained sufficient information and that any deficiencies were inconsequential and could have been resolved in discussions. Burroughs contends that the above-referenced RFP sections are not questions which call for answers, but merely statements. The complainant believes that, accordingly, a "yes" answer, a repetition of the RFP requirement, or simply submitting a proposal without taking exception to the requirements should have been regarded as an acceptable response.

As to security requirements, Burroughs maintains that a reference to hardware in section 3.3.11.A.1 of its proposal should have been considered a sufficient indication of how security facilities would be provided. Further, the complainant states that while its proposal may have been deficient in this respect, the system it offered is not. As to maintenance requirements, Burroughs does not deny the references in its proposal to a 16-hour day, but points to other references to a

17-hour day and contends the latter reflected its actual intent. In regard to software requirements, Burroughs admits its proposal did not discuss RFP section 8.2.2.A,B,C and D in detail. However, the complainant maintains that by submitting a proposal it agreed to these requirements, and that its proposal did discuss in detail the software support plan required by RFP section 8.2.2.E.

Under Federal procurement principles, the determination whether an initial proposal is within the "competitive range" is a function of the contracting agency, involves a considerable range of discretion, and will not be disturbed by our Office unless it is clearly shown to have no reasonable basis. See Electrospace Systems, Inc., 58 Comp. Gen. 415 (1979), 79-1 CPD 264. A contracting agency may exclude an initial proposal from the competitive range for "informational" deficiencies when the deficiencies are so material that major revisions would be required in order to upgrade the proposal to an acceptable level. See PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35. In reviewing such agency determinations, we have considered a variety of factors, including how definitely the RFP called for the omitted information, the nature, scope and range of the informational deficiencies, whether only one proposal was found to be in the competitive range, and whether a deficient but reasonably correctable proposal represented a significant cost savings. PRC Computer Center,Inc., et al., 55 Comp. Gen., supra, at 69.

In the present case, Burroughs' initial proposal offered the lowest prices. However, the rejection of the proposal did not leave only one offeror in the competitive range. Also, it is significant that the RFP repeatedly and explicitly warned (sections 3 and 6.2) that proposals would be disqualified if they failed to show satisfaction of the requrements. In the same vein, section 9 of the RFP stated, among other things, that each proposal must be "complete" and "respond to all mandatory requirements." We believe these RFP provisions were sufficient to put prospective offerors on notice that a proposal with informational deficiencies in the form of incomplete

or inconsistent responses--such as the Burroughs proposal responses in the three areas described supra--would run the risk of immediate rejection. Considering all the circumstances, we cannot say that NDESB's rejection of Burroughs' proposal was in conflict with fundamental Federal principles of negotiated procurement.

Burroughs also complains of unequal treatment by NDESB in that it was not given an opportunity to correct deficiencies in its initial proposal, whereas Honeywell was. Burroughs points out that the RFP required local support of all software and that Honeywell's initial proposal stated that all software except "PLANIT" would be supported by local personnel. The complainant notes that after a request for clarification from NDESB, Honeywell stated that all proposed software would be locally supported. A related clarification involved the Honeywell proposal's omission of information regarding one of seven areas to be included in training courses. Honeywell responded to NDESB's query with a two-paragraph description of a "PLANIT" training seminar. There is a dispute between Burroughs and DOL over whether these exchanges were mere clarifications or actual changes to the Honeywell proposal.

Under Federal procurement principles, any opportunity to revise or modify a proposal is regarded as constituting negotiations (51 Comp. Gen. 479 (1972)) and if negotiations are conducted with one offeror negotiations must be conducted with all other offerors in the competitive range (50 Comp. Gen. 202 (1970)). However, if an initial proposal has been properly excluded from the competitive range, there is no obligation to negotiate with that offeror. Thus, the fact that Honeywell was given an opportunity to revise its proposal, while Burroughs was not, does not in itself establish any impropriety in the procurement. Neither, can we say, given the respective shortcomings in the Burroughs and Honeywell proposals, that NDESB was acting in a wholly unreasonable fashion when it in effect included Honeywell within the competitive range and excluded Burroughs. See generally Servrite International, Ltd., B-187197, October 8, 1976, 76-2 CPD 325.

Burroughs has also cited section 2809 of DOL's Employment Security Manual, which states in part that "each vendor shall be allotted adequate time to present and explain each proposal to state agency staff." Initially, it is not clear from the record whether the Manual was incorporated into the terms of the grant. In any event, we do not believe this language, taken in context, must be read as unequivocally precluding a grantee from rejecting without discussions an initial proposal with major informational deficiencies.

Finally, Burroughs contends that the 1977 RFP should not have been canceled. In this regard, we stated in 40 Fed. Reg. 42406 that "It is important that complaints be received as promptly as possible." We believe this objection would be more appropriately for consideration if it had been presented to our Office when the first RFP was canceled, rather than after the rejection of Burroughs' proposal under the second RFP.

In any event, the record indicates NDESB canceled the 1977 RFP because it believed the offerors misunderstood the grantee's requirements and that clearer, more detailed specifications were needed. Burroughs disputes this. The record further indicates that the second RFP did incorporate changes in technical specifications, as well as revised evaluation criteria and provisions calling for the rejection of proposals which did not satisfy all requirements. It is well established under Federal procurement law that contracting agencies enjoy a broad range of discretion in deciding whether or not to cancel an RFP. See generally United States District Court for the District of Columbia, 58 Comp. Gen. 451 (1979), 79-1 CPD 301. We are not prepared to say on the present record that the complainant has shown NDESB's determination to be contrary to fundamental Federal norms of negotiated procurement.

While we do not find NDESB's rejection of Burroughs' proposal to be objectionable, DOL's report to our Office reflects a misconception which should be

corrected for the record. DOL, citing part 1-2 of the Federal Procurement Regulations (FPR's), states that "any attempt to allow Burroughs to clarify or respond further [after submission of initial proposals] would have resulted in a change in their proposal, a violation of Federal regulations." In this regard, part 1-2 of the FPR's deals with procurement by formal advertising. In a formally advertised procurement, a nonresponsive bid cannot be changed after bid opening in order to make it responsive. The rigid rules of bid responsiveness in formally advertised procurements do not, however, apply to negotiated procurements. In a negotiated procurement, as here, any initial proposal which is determined to be within the competitive range properly may be changed during discussions. See generally DPF Incorporated, B-180292, June 5, 1974, 74-1 CPD 303, and decisions cited therein. By letter of today to the Secretary of Labor we are suggesting that this point be brought to the attention of responsible departmental personnel for whatever relevance it may have in future procurements of this type.

Conclusion

The complaint is denied.

Milton J. Socolar

For the Comptroller General
of the United States