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DECISION



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

[Protest of Cost Reimbursement Contract Award]

FILE: B-196365

DATE: May 27, 1980

MATTER OF: ABT Associates, Inc.

DIGEST:

1. Where protester is aware of basis for protest at time negotiations are reopened, protest generally concerned with reopening of negotiations filed more than 10 days after that time is untimely.
2. Where RFP sets forth estimate of level of effort for informational purposes and indicates it is "not considered restrictive for proposal purposes" offeror properly could revise its level of effort in second best and final offer. Agency, therefore, in accepting proposal with reduced level of effort was not required to amend RFP.
3. Information requested and obtained from one offeror after second round of best and final offers--regarding functions of staff employee and explanation of offeror's reduction in professional staff hours--constituted discussions with offeror requiring reopening of negotiations with other offeror.
4. Where competing technical proposals are essentially equal, cost may become determinative factor, even though in overall evaluation scheme cost was of less importance than technical considerations. However, in face of serious objections to award by project officer and lack of any basis in the record for contracting officer's decision that proposals were technically equal, GAO cannot conclude award has rational basis.

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ABT Associates, Inc. (ABT) protests the award of a cost reimbursement contract to SRI International (SRI) under request for proposals (RFP) 79-93 issued by the Department of Education (DE) (formerly the Office of Education, Department of Health, Education and Welfare (HEW)). The RFP solicited proposals for an 18 month study of student flow between special and regular education. This project is part of a larger effort by the Bureau of Education for the Handicapped (BEH) to insure that special education and related services are available for handicapped children. We sustain the protest.

As a preliminary matter, we believe ABT has raised several grounds of protest which are untimely. In this respect, ABT essentially contends that the contracting officer's oral request for a second best and final cost proposal was in violation of procurement regulations because all technical and price issues previously had been resolved after offerors submitted their first best and final offers and because the request was intended to implement an unauthorized agency fee ceiling of seven percent on cost reimbursement contracts. The protester also states that this request should have been confirmed in writing in accordance with the Federal Procurement Regulations (FPR).

After receipt of best and final offers from ABT, SRI and one other offeror (ultimately found to be technically unacceptable), the contracting officer decided that SRI's and ABT's proposals were technically equal and was prepared to make an award to ABT because of its lower estimated cost. However, since ABT's and SRI's fee or profit of nine and eight percent, respectively, exceeded the fee limitations prescribed by HEW Procurement Regulations, and because agency reviewing officials considered these fees excessive, negotiations were reopened. The regulation, 41 C.F.R. 3-3.405-5 (1979), limits fees on cost-plus-a-fixed-fee contracts to 10 percent of the estimated cost for experimental, developmental or research contracts and seven percent of the estimated cost for all other such contracts unless the excess fees are approved "by the principal official

responsible for the procurement." See also FPR 1-3.405-5 (1964 ed.); 41 U.S.C. 254(b) (1976) (which provides for maximum fee limitations of 15 percent for experimental, developmental or research contracts of this type and 10 percent for other cost-plus-a-fixed-fee contracts). Thus, ABT and SRI were orally requested to submit a second best and final cost proposal with a maximum seven percent fee. While ABT objected to limiting its fee to seven percent and tried to persuade the agency to change its position, it nevertheless submitted a second best and final cost proposal by the September 25 due date. In its second cost proposal, SRI not only limited its fee to seven percent but also reduced its estimated labor hours in the professional, clerical, and report preparation categories. Because of its lower cost, the contracting officer made an award to SRI.

Our Bid Protest Procedures state that a protest must be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 20.2(b)(2) (1980). Here, ABT was aware or should have been aware of the seven percent fee limitation and the lack of a written confirmation of the second request for best and final offers on or near September 22 when the contracting officer orally requested the second best and final offer. ABT complied with the request and did not raise these issues in its initial protest to our Office filed in October. Instead ABT chose to present these protest grounds in its March 24 comments on the agency report. Its protest on these issues is therefore untimely and will not be considered on the merits.

- ABT's other grounds of protest relate to SRI's reduction in various labor and work categories which were contained in its second best and final cost proposal. ABT contends that 1) the level of effort proposed by SRI was less than permitted in the RFP, 2) the department's acceptance of this level indicated a substantial change in the Government's requirements requiring an amendment to the RFP in accordance with FPR 1-3.805-1(d), thereby providing ABT with an opportunity to similarly revise its proposed level of

effort, 3) the contracting officer improperly conducted discussions with SRI after the closing date for receipt of the second best and final offers, and 4) the selection officials deviated from the RFP's evaluation criteria.

With respect to the reduced level of effort proposed by SRI in its second best and final offer, we point out that the RFP notified offerors that the Government estimate for the level of effort required for performance was four person years. Moreover, the RFP clearly advised offerors that the estimate was furnished for informational purposes and was "not considered restrictive for proposal purposes." Thus, contrary to ABT's contention, offerors were not required to propose four person years but were free to offer any level of effort they deemed appropriate.

Therefore, in our view, SRI properly could revise its proposed level of effort under the terms of the RFP in its second best and final offer, and no RFP amendment was required. We therefore find no impropriety per se in the agency's acceptance of SRI's proposal for a reduced level of effort without amending the RFP.

Nonetheless, by reducing its proposed professional staff hours by 128, its report preparation hours by 260 and its clerical hours by half, SRI in effect revised its technical proposal. See Arthur Young & Company, B-196220, March 17, 1980, 80-1 CPD 205. Further, by proposing the reduction without explanation, SRI also ran the risk of proposal rejection. See Electronic Communications, Inc., 55 Comp. Gen. 636 (1976), 76-1 CPD 15; Analysis & Computer Systems, Inc., 57 Comp. Gen. 239 (1978), 78-1 CPD 75. This is so because contracting agencies may consider an offeror's price or cost proposal in evaluating an offeror's understanding of the technical requirements. Electronic Communications, Inc., supra. Thus, in light of SRI's unexplained cost and staff year reductions, the agency justifiably could have revised SRI's technical evaluation score. Science Management Corporation, B-193256, April 5, 1979, 79-1 CPD 237. Instead, the contracting officer chose

to contact SRI by telephone on two occasions to seek "clarification" of SRI's proposed reductions. It is ABT's position that these requests for "clarification" after the receipt of best and final offers amounted to discussions from which it was improperly excluded. We agree.

Inquiries to an offeror for the sole purpose of eliminating minor uncertainties or irregularities in a proposal constitute "clarifications," not "discussions." John Fluke Manufacturing Company, Inc., B-195091, November 20, 1979, 79-2 CPD 367. On the other hand, it is our view that discussions occur if an offeror is afforded an opportunity to revise or modify its proposal, 51 Comp. Gen. 479 (1972), or when the information requested and provided is essential for determining the acceptability of proposals. Human Resources Company, B-187153, November 30, 1976, 76-2 CPD 459. It is also the actions of the parties that determine whether discussions have been held, and not merely the characterization thereof by the contracting officer. New Hampshire-Vermont Health Service, 57 Comp. Gen. 347 (1978), 78-1 CPD 202. If discussions are reopened with one offeror after receipt of best and final offers, they must be reopened with all offerors in the competitive range to give these offerors an opportunity to submit revised proposals. University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD 201.

The record indicates that the project officer, a member of the evaluation panel, believed that the reduction in staff hours could significantly affect SRI's ability to perform the work. As a result of this concern, the contract specialist and the project officer made a conference call to SRI to find out whose professional hours had been reduced. These officials learned that the staff time of one individual, who in SRI's initial proposal appeared to be a key staff member, had been significantly reduced. Because the project officer was still concerned about the staff hour reductions, SRI was again called and read written "clarification" questions.

Basically, four of the five questions asked how the work for the project's data collection and analysis

phases would be performed in light of the significant reduction in the staff time of these employees. For example:

"Explain specifically, how the work on this task which Mr. [X] was to accomplish in five days can now be accomplished in one day?

"Is Mr. [X] the sole SRI person doing field data collection? If so, who is training whom?"

In response to these questions, SRI essentially stated that it had overestimated the time this employee would spend on these phases and that in redoing the budget, SRI decided that other professional staff could perform some of this work. SRI also indicated that it had cut back on "brainstorming" sessions and that this individual's value and expertise were confined to the data collection activity.

Thus, while the contracting officer believes that SRI was not given an opportunity to change its proposal, the record shows that SRI's proposed staff hour reductions were a matter of considerable concern to the department and that the acceptability of SRI's proposal was dependent upon a satisfactory explanation of reductions. See New Hampshire-Vermont Health Service, supra. Accordingly, we find that the "clarification" information required of SRI constituted discussions; the agency should have reopened negotiations with ABT to provide it with a like opportunity to revise its proposal. PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11.

Finally, the protester contends that agency selection officials deviated from the RFP's evaluation criteria. In this connection, the RFP provided that technical factors were of "paramount importance." Thus, the RFP placed more emphasis on technical factors than cost and the contracting officer could not make an award on a proposal inferior in quality simply because it offered

a better price. Telecommunications Management Corporation, 57 Comp. Gen. 251 (1978), 78-1 CPD 80. But, we have recognized that even if the RFP assigns greater weight to technical factors, cost nevertheless may become determinative if the proposals are found to be essentially equal technically. Applied Financial Analysis, Ltd., B-194388.2, August 10, 1979, 79-2 CPD 113. Even in this situation, however, although we will give great weight to an agency's technical evaluation of proposals, the record must reasonably support a conclusion that there was a rational basis for award. Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 CPD 253.

Here, it appears that the contracting officer decided that ABT's and SRI's proposals were essentially equal technically and made an award to SRI because of its lower cost. The record shows, however, that the project officer and Deputy Commissioner of BEH opposed an award to SRI largely because of SRI's proposed staff reductions. The project officer carefully documented her rationale for this conclusion. In this connection, the project officer's memorandum to the Deputy Commissioner states:

"Today's conversation with SRI raises concerns for the entire ethnographic/qualitative work to be accomplished. We find these [budget] cuts decrease the technical quality of the proposal. SRI responses to the clarification questions raise additional concern, rather than resolve concern."

The record, however, provides no factual explanation as to why the contracting officer concluded that the ABT and SRI proposals were essentially equal in technical merit. After the submission of the first best and final offer, ABT's technical score was 93 and SRI's technical score was 92; ABT's price was approximately \$2,000 less than SRI's. After the submission of the second best and final offers, however, SRI's price was approximately \$14,000 less than ABT's price. In the face of SRI's reduction in staff hours, the proposals were not rescored or reevaluated and the record only indicates "the contracting officer decided that since both proposals were

still acceptable, price and other factors considered, award to SRI was in the best interests of the Government." The question is not, however, whether both proposals were technically acceptable; rather under the RFP evaluation criteria the issue is whether after receipt of best and final offers, the competing proposals were essentially equal or, conversely, whether the contracting officer departed from the evaluation criteria.

Contracting officers and other selection officials are not bound by the conclusions of the technical evaluators. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. The ultimate selection decision, however, must be rationally supported on the record. All that appears on this record is the mere statement that the proposals were "still acceptable"; such a statement, without more, is insufficient to support a conclusion that the proposals were essentially equal technically. See Moshman Associates, Inc., B-192008, January 16, 1979, 79-1 CPD 23. Thus, because of the project officer's serious concerns regarding an award to SRI and her rationale therefor and the lack of any basis in the record for the contracting officer's determination that the ABT and SRI technical proposals were essentially equal, we cannot conclude that the award to SRI was rationally founded. Tracor Jitco, Inc., supra.

While we believe the protest has merit, we do not believe there is any meaningful relief we can recommend in this case. Among the factors involved in our consideration of corrective action which might entail termination of an improperly awarded contract is the extent of contract performance. Cohu, Inc., 57 Comp. Gen. 759 (1978), 78-2 CPD 175. In this respect, about half the 18 month contract term has already been completed, and we therefore do not believe it would be in the best interest of the Government to recommend termination action.

We are, however, bringing this matter to the attention of the Secretary of Education.

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The protest is sustained.

Milton J. Arosen

For the Comptroller General
of the United States