

14012 PL-1 Mr. Boyl

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

[Protest of Army Contract Award]

FILE: B-197752

DATE: June 11, 1980

MATTER OF: RCA Service Company

DIGEST:

1. Proposal--based on ceiling price which is \$2,249,107 below offeror's estimate of actual cost to Government and which is \$4,300,986 below agency's realistic cost estimate over evaluation period--is not acceptable, as submitted, because (1) RFP did not contain complete specifications necessary for fixed-price type contract, making enforcement difficult, (2) offeror's proposal created incentive to control costs at expense of acceptable performance, and (3) ceiling cost proposal cast grave doubt on quality of offeror's previously acceptable technical proposal.
2. Where offeror submits cost-ceiling proposal in best and final offer, which offers ambiguous potential savings, agency is not required to reopen discussions with all offerors in competitive range merely to explore such possible savings since (1) offeror had fair opportunity to submit complete and unambiguous offer, (2) agency had adequate competition and reasonable estimated costs, and (3) procurement has been in process for over 1 year.

RCA Service Company (RCA) protests the proposed award of a contract to Pan American World Airways, Inc. (Pan Am), under request for proposals (RFP) No. DABT11-79-R-0009 issued by the Department of the Army for staffing, operation and performance of base operations support services at Fort Gordon, Georgia.

RCA essentially contends that the Army improperly rejected the ceiling price aspect of its cost proposal resulting in an erroneous determination that Pan Am's

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proposal was the "best overall value to the Government." The Army and Pan Am argue that (1) RCA's proposed ceiling price was not presented in a form that was acceptable without substantially more negotiation than was envisioned and (2) even after the additional negotiation was completed it did not offer the Government the potential "best overall value" from the standpoint of contractual control of performance and estimated realistic cost. We do not consider the protest to have merit.

I. Background

The RFP requirements are currently being accomplished with a combination of military and civilian employees and individual contracts. The RFP was issued for the purpose of selecting an offer and conducting a cost comparison analysis of "contracting-out" versus "in-house" operation. At the time of issuance, the RFP called for phase-in commencing on October 1, 1979, and performance commencing on December 1, 1979, and continuing for a 10-month performance period through September 30, 1980, with four option periods. This project is a test case for the Army and the Department of Defense. The March 29, 1979, revision of the Office of Management and Budget Circular No. A-76 had a major impact on the performance period under the RFP since the in-house cost estimate, audited by the Army Audit Agency, had to be received by the contracting officer prior to the closing date for receipt of proposals; therefore, the phase-in and contract performance periods set forth in the RFP were changed to April 1, 1980, and June 1 through September 30, 1980, respectively.

Offerors had substantially completed the 10-month cost proposals at the time of the first RFP closing date postponement and preparation of the in-house cost estimate had also begun on the 10-month basis; therefore, the contracting officer decided that no change should be made to reflect the anticipated shortened performance period but offerors were advised that "[a]djustments for the actual phase-in and contract performance periods will be negotiated with the successful contractor if award is made." None of the offerors objected.

The RFP provided that the proposal which had the "best overall value to the Government consisting of technical and realistic cost will be selected for cost comparison evaluation."

The RFP also provided that the cost realism determination would be based on DD Form 633 and the offeror's cost proposal, which must include in detail all information related to the estimated costs and each element of cost, must be completely documented to show the basis and rationale used in arriving at the amount proposed and the proposal should be properly cross-referenced; in summary, "all cost elements must be supported by number and words." The RFP also provided that proposals would be evaluated to assess the degree to which proposed costs accurately reflect proposed performance and costs which are found to be either too high or too low in relation to proposed work would be judged unrealistic.

The RFP also advised offerors to indicate, as part of their proposals, those areas of costs such as overhead and general and administrative (G&A) for which the offerors are willing to negotiate ceiling figures. The RFP further stated that to be in consonance with the award fee contracting philosophy, the proposed base fee should be commensurate with minimum acceptable contract performance and the proposed maximum award fee should be sufficient to provide a meaningful positive incentive; both base fee and maximum award fee proposed shall recognize the limited investment and absence of cost risk under a cost-plus-award-fee (CPAF) service contract.

In its best and final offer, RCA submitted detailed cost data for estimating the cost of performance for the 10-month evaluation period at \$14,052,469 with a base fee of 1 percent (\$140,526) and an award fee estimated at 5 percent (\$702,632) plus phase-in costs estimated at \$303,300; the consolidated DD Form 633, included in the cost proposal, reflected these amounts totaling \$15,199,107; however, an additional entry, labeled "CEILING PRICE, \$12,950,000, See Introduction/Foreword p. 1," was made. The foreword stated that RCA proposed to perform the basic 10-month contract and the preceding 2-month phase-in as defined in the RFP at a total CPAF ceiling amount of \$12,950,000; "[t]his means

that from contract award through 30 September 1980 * * * [RCA] will bill no costs nor earned fee in excess of the ceiling amount." The statement explained that Fort Gordon was a "cornerstone for potential base support service business with the Department of Defense" and RCA desired to capture a large share of that potential by making initial investments to gain a foothold. The statement continued that RCA's "potential investment" would be reduced because of the actual 4-month contract to be negotiated, but "proportionate and substantial savings will accrue to the Government."

RCA also stated that it was "willing to negotiate CPAF ceilings in the option years with the understanding that appropriate contract language will be included to allow ceiling adjustment for cost increases in areas over which the contractor has no control."

In evaluating RCA's cost proposal, the Army did not consider the ceiling price provision. After technical and cost evaluation of all proposals was complete, the Army Source Selection Authority determined Pan Am's proposal to be the best value to the Government at a relative DD Form 633 total price of \$14,921,613. Later, the in-house estimate was compared to Pan Am's proposal and it was determined that award should be made to Pan Am, but, as yet,, award has not been made.

II. RCA's Position

First, RCA argues that the evaluation of cost realism is twofold: (1) the cost proposal must show whether the offeror clearly understands the RFP's technical requirements--if the proposed costs are unrealistically high or low, the offeror may not fully comprehend the technical requirements; and (2) the cost proposal must be the basis for determining what the actual cost to the Government will be. From the standpoint of technical understanding, RCA believes that its detailed DD Form 633 cost estimate supporting a cost of \$15,199,107 demonstrates that it understood the RFP technical requirements. From the standpoint of ultimate cost to the Government, RCA believes that it submitted the most realistic cost estimate possible, a ceiling, specifically identified as the maximum amount for both cost and fee, which

assures that the ultimate cost to the Government will not be more.

Second, RCA argues that the cost advantage of its ceiling price proposal remains when compared to the actual performance period since RCA specifically agreed to prorate its ceiling; thus, based on the ratio of the actual performance period to the evaluation period as applied to RCA's ceiling price proposal and Pan Am's estimated cost and fee proposal, the result is a cost under RCA's ceiling proposal of \$5,180,000, as compared with \$6,112,000 under Pan Am's, resulting in a \$932,000 cost savings under RCA's ceiling proposal. Further, RCA believes that its cost advantage remains over the entire contract period; RCA calculates that, assuming option year costs at the annualized amount of \$15,199,107, less the one-time phase-in cost, the total cost to the Government would be (at least) \$387,000 less with RCA than it would be with Pan Am. Moreover, RCA stated that it is willing to negotiate ceiling prices for the option years so that the actual savings with RCA could be significantly more than \$387,000.

Third, RCA argues that it has a greater incentive under its proposal to provide quality services than Pan Am since, in the base period subject to the ceiling, RCA is willing to "invest" in order to obtain the contract as a cornerstone for potential base support services business. In RCA's view, therefore, it must perform the Fort Gordon contract in a high quality manner, absorbing costs over the ceiling, if necessary, to ensure that performance is not degraded; moreover, RCA stated that it would staff the program according to the plan detailed in the technical proposal. Thus, RCA concludes that the quality of its performance would not be impaired by virtue of the ceiling and its proposal is consistent with the CPAF contracting philosophy, whereas the Army's proposed contract award is not. In this regard, RCA has proposed a 1-percent base fee and an award fee of 5 percent, which is an important incentive to RCA to provide quality performance and to control costs. On the other hand, RCA notes that Pan Am proposed no base fee and an award fee of 2.44 percent, which would not provide the type of incentive contemplated in a CPAF contract.

Fourth, RCA argues that in reliance on the RFP's provision requesting cost ceiling, RCA submitted a ceiling price for its proposal; therefore, it was improper and unfair to disregard RCA's ceiling proposal in the determination as to the successful offeror. Alternatively, RCA contends that if the Army did not desire a ceiling proposal for this contract, the RFP was ambiguous and resulted in a situation where the offerors were not competing on an equal basis. RCA states that if it knew that a ceiling price would not be considered, it could have concentrated on a reduction of fee instead of a cost ceiling.

III. The Army's Response

First, the Army explains that its contracting officials evaluated only RCA's estimated cost, including maximum fee, of \$15,199,107 because that was the amount which was supported by cost data as required by the RFP and, therefore, it was considered the only amount which could be evaluated for cost realism. Further, the Army argues that although the contracting officials did not consider RCA's ceiling price proposal, they were not in error since a CPAF contract was to be awarded and the selected proposal's cost compared with the in-house Government cost estimate. The Army notes that the RFP suggested that uniformity of proposals was essential to assure fair and accurate assessment and that proposals which did not conform to all requirements expressed in the RFP may be rejected without further discussion or evaluation and the RFP required offerors to submit a detailed DD Form 633 to support their cost pricing proposal. In addition, the Army reports that its contracting officials projected that RCA's most probable cost would exceed its best and final offer by 13.5 percent.

Second, the Army explains that the RFP requested ceiling prices for areas like overhead and G&A because those areas of costs are more controllable by the contractor and do not have as direct an impact on job performance; accordingly, it was feasible to negotiate ceilings on these types of costs because the level of performance contracted for would not suffer. In this connection, the Army observes that when the Government

enters into a CPAF contract, the Government purchases the knowledge, judgment, skill and capabilities of the contractor to perform the contract but the contractor and his employees exercise discretion in carrying out all the factors involved in the performance of the contract. The Army contends that it cannot be assured of efficient job performance or that the offeror selected to perform can do so in the manner most advantageous to the Government at a below-cost ceiling price. Thus, the Army concludes that RCA's ceiling price offer can scarcely be characterized as realistic when offerors are competing against an in-house Government cost estimate which is based on the staffing "required to accomplish all missions of this solicitation as managerially efficient and cost effective as possible."

In addition to the Army's obligation to protect its in-house work force from a displacement occasioned by an unduly optimistic offer which will not be performed or will be performed at increased cost, an award fee contract was utilized to foster performance, not through the presence of firm and definitive requirements, but through the flexibility permitted by subjective standards.

Third, the Army argues that an overall ceiling proposal offered for the first time in connection with a "best and final" offer may be considered unrealistic when all discussions with offerors have ended, and the Government has not been able to negotiate with the offeror to assure itself that the ceiling offer will result in efficient job performance. In this regard, the Army notes that in order to assure that the Government's interests are adequately protected under a cost-reimbursement contract with an overall ceiling, a contracting officer must have the opportunity to negotiate the inclusion of a fixed-price default clause so that if the contractor fails to perform in accordance with the contract terms or refuses to continue performance past the cost ceiling, the Government may terminate and repurchase the services elsewhere, charging the contractor for the excess costs; the termination clause in a cost-reimbursement contract does not offer this protection. The Army concludes that without the overall cost ceiling negotiated on the foregoing basis, there would be no firm commitment from RCA to perform effectively and efficiently.

Fourth, the Army argues that the RFP was not ambiguous regarding cost-ceiling proposals and that no offeror except RCA has claimed prejudice or misunderstanding; RCA could have requested clarification prior to closing date for receipt of proposals and, in any event, the time for exploring uncertainties by offerors within the competitive range was during the course of discussions and not after receipt of best and final offers, the completion of cost realism studies, and a proposed awardee selected. The Army concludes that the failure to clarify a proposed total cost ceiling in a timely fashion--when there was ample opportunity to discuss it--rested solely with RCA and RCA must suffer the consequences.

Finally, the Army reports that since Pan Am's technical proposal was considered superior to RCA's, and Pan Am's cost proposal displayed more cost realism, the selection of Pan Am as the proposed awardee was reasonable and consistent with the evaluation criteria.

IV. Analysis

At the outset, we note that while the RFP expressly invited ceiling figures, the Army did not intend to invite the type of total cost ceiling proposal submitted by RCA. Arguably, RCA could have interpreted that RFP provision as not foreclosing submission of a total cost ceiling proposal. However, we believe that RCA's significantly different cost proposal first submitted in its best and final offer should have been submitted with the knowledge that the Army would have needed to investigate fully all aspects of RCA's proposal before it could have been accepted.

We must examine the full context in which RCA's ceiling price proposal was submitted. First, RCA's cost data showed that it estimated that the full cost to the Government over the evaluation period would be \$15,199,107; however, the Army's cost realism analysis indicated that the total cost to the Government of the RCA proposal would be 13.5 percent higher than RCA's estimate. Second, we note that the RFP's

specifications or statement of work was not the complete type necessary for a fixed-price type contract. Instead, they were the less definite type requiring the use of a cost-type contract. Third, the Army was primarily acquiring the skill, knowledge, and abilities of the contractor for assignments requiring the exercise of discretion in their performance. To assure undiminished performance, the Army contemplated a subjective award fee. Fourth, RCA's ceiling price proposal was an undisguised buy-in, which was not per se illegal.

From this examination, we have little difficulty recognizing the grave doubts that the Army had concerning RCA's proposal. We can see that RCA's proposed ceiling of \$12,950,000 may give rise to a reverse incentive to control costs because (1) the Army's estimate of RCA's costs to the Government was \$17,250,986 over the evaluation period, (2) cost over the ceiling would be RCA's responsibility, and (3) the specifications were not definitive. We cannot fail to recognize that RCA would have some incentive to control or reduce costs. Such an incentive usually is good. However, in this case RCA's effort might be directed toward minimizing its potential loss on the contract, resulting possibly in unacceptable performance. Consequently, we believe that RCA's cost ceiling proposal cast doubt on RCA's previously approved technical proposal because of the newly introduced reverse performance incentives, thus undermining the total quality of the RCA proposal.

We conclude, therefore, that the Army was justified in not considering RCA's ceiling cost proposal without reopening discussions going to the heart of RCA's technical and cost proposal.

In reviewing whether the Army acted properly in not reopening discussions with offerors, we cannot ignore the length of time that this procurement was in process--more than 1 year from the issuance of the RFP to receipt of best and final offers. Clearly, the time for innovative suggestions and approaches was over when RCA presented its price ceiling proposal. In this

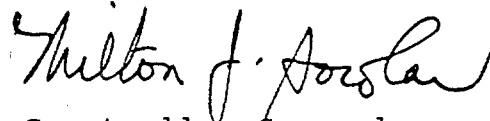
regard, our decision in Electronic Communications, Inc., 55 Comp. Gen. 636 (1976), 76-1 CPD 15, cited by the Army, presented a similar situation. There, an offeror's best and final offer appeared to be inconsistent with the RFP and its initial acceptable offer. We held that the contracting officer's determination not to reopen discussions with all offerors in the competitive range was proper as not being in the best interests of the Government. We also noted that when an offeror submits in its best and final offer unexplained or incomplete revisions to its otherwise acceptable proposal, it has the burden of affirmatively demonstrating the acceptability of its proposal. Here, RCA did not meet its burden.

Moreover, the Army had adequate competition (five offerors in the competitive range) and realistic, reasonable estimated costs (particularly in view of the relative closeness of RCA's and Pan Am's CPAF proposals and the fact that both were lower than the in-house estimate).

For these reasons, we have no basis to object to the Army's determination that it was not required to reopen discussions with offerors.

In view of the above conclusions, we need not decide whether it would have been proper for the Army in final negotiation with RCA if RCA was selected to (1) add a fixed-price default clause, (2) to clarify whether RCA took any exceptions to the RFP's requirements in its technical proposal, and (3) to translate the ceiling price over the actual performance period.

Protest denied.



For The Comptroller General
of the United States