Moorhouse
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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Space Communications Company

File: B-223326.2; B-223326.3

Date: October 2, 1986

DIGEST

1. Protest is denied where, despite numerous allegations of agency misconduct, the record establishes that the agency acted properly in no longer considering for award a proposal which had not been made technically acceptable through the course of discussions and which was more than $40 million higher in price than that of sole remaining competitive range offeror.

2. Meaningful discussions have occurred where an offeror is reasonably informed of the perceived deficiencies in its proposal and has been given the opportunity to correct those deficiencies in a best and final offer.

3. A best and final offer was properly found to be technically unacceptable where the protester continued to propose elements of high risk despite agency concern and where its alternative approaches in those areas were not sufficiently detailed to establish their acceptability, since an offeror should not expect any further discussions once it has submitted its best and final offer.

4. The fact that a proposal was initially included within the competitive range does not preclude the agency from later excluding it from further consideration if it no longer has a reasonable chance of being selected for award.

5. Reopened discussions with only one offeror following receipt of best and final offers were not improper where, as the result of the agency's evaluation of best and final offers, only that offeror justifiably remained within the competitive range.

DECISION

Space Communications Company (Spacecom) protests the award of a contract to Communications Satellite Corporation (Comsat) under request for proposals (RFP) No. RFP 1-23-5-LM, issued

by the United States Information Agency (USIA). The procurement is for a Satellite Interconnect System to enhance USIA's Voice of America international broadcasting mission. Spacecom asserts that the award was improper because of numerous violations of applicable procurement regulations by the agency. We deny the protest.

BACKGROUND

The RFP contemplated the award of a firm, fixed-price contract for a Satellite Interconnect System (SIS) that initially would link three domestic Voice of America facilities and would provide access from one domestic site for satellite communications with overseas sites in the Caribbean, Europe, and Africa. The proposed contract also contemplated the exercise of various priced options, including the implementation of satellite communication facilities at additional overseas sites and access for services to Pacific region sites. The SIS requirements involve the furnishing of earth stations, switching equipment, satellite channels, and maintenance services.

The RFP was issued on March 27, 1985, and was subsequently amended several times. Of the six proposals received in response to the solicitation, those of Comsat, Spacecom, and ITT World Communications were initially determined to be within the competitive range.1/ Discussions were then held with the three competitive range offerors, and best and final offers (BAFOs) were requested and evaluated. ITT did not submit a BAFO and, accordingly, the firm was eliminated from further award consideration. In terms of relative technical scoring, Spacecom's initial proposal received a score of 64 out of a possible 100 points, which increased to 72 upon submission and evaluation of its BAFO. The score for Comsat's initial proposal was 80, subsequently raised to 88 for its BAFO.

1/ The competitive range in a negotiated procurement consists of all proposals that have a reasonable chance of being selected for award, including deficient proposals which are reasonably susceptible of being made acceptable through discussions. See the Federal Acquisition Regulation, 48 C.F.R. § 15.609(a) (1985); Fairchild Weston Systems, Inc., B-218470, July 11, 1985, 85-2 CPD ¶ 39. Here, only Comsat's proposal was deemed to be technically acceptable as submitted; the initial proposals of both Spacecom and ITT were found to contain unacceptable aspects which potentially could be corrected during the discussion process.

At this point in the procurement, USIA determined that Comsat's offer was technically acceptable for purposes of award, "subject to minor clarifications in [the] BAFO . . . ." However, the agency determined that Spacecom's offer was not acceptable "because of technical deficiencies that were not corrected through negotiations." In this regard, the agency found that Spacecom's proposal remained materially deficient in two areas.

Spacecom continued to propose the use of an international satellite (INTELSAT) instead of a domestic satellite (DOMSAT) for domestic communications, an approach which USIA determined would violate current Federal Communications Commission (FCC) policy. Although Spacecom had repeatedly urged that the national security-related functions of the Voice of America would result in a policy change by FCC which could be effected rapidly, the FCC had indicated to USIA that although such a change might ultimately be justified in the circumstances, it would entail an involved administrative process before any final ruling in the matter could be implemented. Because this policy change would be needed immediately to enable Spacecom's performance of the agency's SIS requirements, the agency concluded that the INTELSAT approach posed an unacceptable risk.

Furthermore, Spacecom had not altered its original intention to place the earth station serving the Voice of America's Worldwide Operations Control Center on the roof of the Health & Human Services - North (HHS-N) building in Washington, D.C. This involved the installation of a 25-foot diameter dish antenna on a corner of the building. Although the HHS-N building, in fact, had been specified in the RFP as a possible site for the earth station, offering certain technical advantages, USIA was concerned that the designation of HHS-N as an historical building would preclude the agency from obtaining the necessary local zoning authorization for placement of the antenna in the face of public opposition. The agency noted that it had been unsuccessful in recent attempts to add any additional structures to the roof. Although Spacecom again urged that the national security considerations would overcome such opposition, USIA concluded that this approach, as in the case with Spacecom's proposed INTELSAT concept, created an unacceptable risk that the SIS requirements would not be met.

Thus, upon the evaluation of BAFOs, USIA determined that only Comsat's proposal remained within the competitive range, and the agency continued discussions with Comsat which resulted

in certain technical and price modifications to the firm's offer. Comsat's total evaluated price for the effort was $40,017,145, whereas Spacecom's offer was much higher at $84,554,794.

These discussions continued into April 1986, and Comsat was not awarded the contract until May 30. During this time, Spacecom was not notified that its BAFO had been found to be unacceptable. Upon learning of the award to Comsat, Spacecom filed an action in the United States Claims Court seeking injunctive relief. Because the Claims Court's jurisdiction over this post-award controversy was doubtful, Spacecom agreed to a stipulated dismissal of the action, and the firm then protested to this Office.[2]/

PROTEST POSITION

Spacecom asserts that the award to Comsat was improper on several grounds. Spacecom's principal bases of protest may be summarized for purposes of analysis as follows:

(1) the agency improperly failed to notify Spacecom after BAFO evaluations that its offer was no longer in the competitive range;

(2) the agency failed to conduct meaningful discussions;

(3) Spacecom's BAFO was unreasonably found to be technically unacceptable resulting in the firm's exclusion from further award consideration;

(4) improper post-BAFO discussions with only Comsat converted a competitive procurement into a sole-source acquisition;

(5) the agency failed to evaluate the proposals for purposes of determining price realism;

(6) the agency created an auction situation and engaged in impermissible technical leveling and/or technical transfusion; and

(7) the agency was biased in favor of Comsat's selection throughout the procurement process.

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[2]/ See 4 C.F.R. §§ 21.3(f)(11); 21.9(a) (1986).

ANALYSIS

Failure of Notice

Spacecom urges that it was improper for USIA to wait nearly 6 months after determining that its offer was technically unacceptable before completing the procurement process. Spacecom asserts that, by regulation, it was entitled to prompt notice that it was not the successful offeror, and, because it incurred substantial personnel and materials costs in keeping its offer open during that period, that it should be allowed monetary relief in the form of its protest and proposal preparation costs.

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.1001(a) (1985), generally provides, with respect to negotiated procurements, that the contracting officer shall promptly notify each offeror whose proposal is determined to be unacceptable or whose offer is not selected for award, unless disclosure might prejudice the government's interest. See also FAR, 48 C.F.R. § 15.1001(b)(1). We agree with Spacecom to the extent the agency's action in not notifying the firm that its BAFO was unacceptable until nearly 6 months later (through its award to Comsat) was inconsistent with this provision. USIA argues that it did not provide Spacecom with notice because it was concerned that Comsat would learn through industry "gossip" that it was the only firm remaining in the competitive range, and, hence, that the government would be at a disadvantage in seeking any further price or technical revisions in Comsat's proposal through continued discussions. However, since it is presumed that contracting agencies, in advising offerors that they are no longer in consideration for award, will take care at the same time not to reveal to offerors who do remain in the competition of the elimination of their competitors, USIA's action, in our view, was not justified by its concern that notification to Spacecom would prejudice the government's interest.

Nevertheless, any impropriety on the agency's part in this matter does not provide a basis to sustain the protest and to allow Spacecom the recovery of its costs. The failure to notify a firm promptly that it is no longer in consideration for award is directly akin to situations where the agency has failed to provide the protester with prompt notice of award to another firm. In those cases, we have consistently held that such failure is only procedural in nature and does not affect the validity of an otherwise properly awarded contract. See L.L. Rowe Co., B-220973, Feb. 27, 1986, 86-1 CPD ¶ 204. Concomitantly, since our authority to allow the

recovery of protest and bid or proposal preparation costs is conditioned by our determination that a solicitation, proposed award, or award does not comply with statute or regulation, see 4 C.F.R. §§ 21.6(d) and (e) (1986), Spacecom is not entitled to monetary relief for what constitutes only a procedural deficiency.

Absence of Meaningful Discussions

We find no merit in Spacecom's assertion that the agency failed to conduct meaningful discussions. It is true that discussions, whether written on oral, are a fundamental requirement of negotiated procurement and must be held with all responsible offerors whose proposals are within the competitive range. Price waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54. This requirement includes advising offerors of deficiencies in their proposals and affording them the opportunity to satisfy the government's requirements through the submission of a revised proposal. Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. Thus, it is well settled that competitive range discussions must be "meaningful" in nature--that is, agencies must point out weaknesses, deficiencies, or excesses in proposals unless doing so would result in technical leveling or technical transfusion. Price Waterhouse, 65 Comp. Gen. 205, supra; Ford Aerospace & Communications Corp., B-200672, Dec. 19, 1980, 80-2 CPD ¶ 439. Although agencies are not obligated to afford all-encompassing discussions, in other words, to address in express detail all inferior or inadequate aspects of a proposal, agencies still generally must lead offerors into the areas of their proposals which require amplification. Furuno U.S.A., Inc., B-221814, supra.

The record in this case, significantly with respect to the two areas of its proposal which ultimately were deemed to be unacceptable, belies Spacecom's assertion that the agency failed to point out those deficiencies through discussions. USIA states in its administrative report that Spacecom was informed throughout the course of discussions that its INTELSAT approach for domestic communications and its proposed HHS-N antenna location were areas of significant agency concern. This is borne out by Spacecom's own BAFO which, in detail, recognizes the potential problems associated with the proposed implementation of these approaches. Thus, the extent to which Spacecom addressed the agency's concerns in its BAFO refutes the contention that the agency did not meet the general requirement of leading the firm "into the areas of its proposal which required amplifications." Price Waterhouse, B-222562, supra. Where perceived

proposal deficiencies have been communicated to an offeror, and the offeror has been given the opportunity to submit a revised proposal, this Office generally considers that meaningful discussions have taken place. The Aerial Image Corp., Comcorps, B-219174, Sept. 23, 1985, 85-2 CPD ¶ 319.

Determination of Technical Unacceptability

In our view, then, the determinative issue for resolution is whether the agency acted properly in rejecting Spacecom's BAFO as technically unacceptable on the ground that the firm continued to propose what the agency regarded as high-risk approaches to satisfying the SIS requirements. It is well settled that contracting agencies enjoy a reasonable degree of discretion in determining the acceptability of submitted technical proposals, and this Office, accordingly, will not substitute its judgment for that of the agency by making an independent determination unless the agency's action is shown to be unreasonable or in violation of procurement statutes or regulations. APEC Technology Ltd., 65 Comp. Gen. 230 (1986), 86-1 CPD ¶ 81. The protester clearly bears the burden to show that the agency's technical evaluation was unreasonable. Id.; Magnavox Advanced Products and Systems Co., B-215426, Feb. 6, 1985, 85-1 CPD ¶ 146. We do not believe that Spacecom has met that burden here.

It is clear from the record that USIA regarded the INTELSAT and HHS-N earth station location approaches as elements of the proposal which posed significant risks to successful implementation of the SIS requirements because both concepts were dependent upon approval by outside authorities. We have consistently viewed an agency's reasonable concerns as to the levels of risk created by a particular proposal approach as proper factors to be considered in the selection process. See Consolidated Group, B-220050, Jan. 9, 1986, 86-1 CPD ¶ 21. Therefore, an agency's judgment that a proposed approach presents high risk generally will not be questioned unless the offeror has clearly established the feasibility of the approach within the confines of the proposal. See Laser Photonics, Inc., B-214356, Oct. 29, 1984, 84-2 CPD ¶ 470; Ionics Inc., B-211180, Mar. 13, 1984, 84-1 CPD ¶ 290.

Here, although Spacecom repeatedly urged in its BAFO that the national security-related aspects of the Voice of America mission would eventually result in FCC approval of its INTELSAT concept for domestic communications and would overcome any public opposition to placement of the earth station

antenna atop the HHS-N building, the statements in the proposal were, in essence, nothing more than the firm's own belief and cannot be read as providing the agency with firm assurances that its proposal would allow for successful implementation of the SIS requirements. Hence, we find no basis to question the agency's determination that Spacecom's proposed approaches created unacceptable risks. Consolidated Group, B-220050, supra.

Spacecom further complains that the agency acted improperly in rejecting its BAFO without further discussions where the firm, in fact, had provided alternative approaches in these areas. In this regard, Spacecom stated in its BAFO that it would relinquish the INTELSAT approach in favor of DOMSAT use for domestic communications--the current FCC policy--if a policy change allowing for the former was not forthcoming from the FCC. Moreover, Spacecom stated that it had identified alternative candidate sites in Washington, D.C., for placement of the earth station antenna if local authorization should not be obtained for placement on the HHS-N building roof.

Spacecom asserts that the agency was obligated to conduct further discussions with regard to these alternative approaches before finding the BAFO to be technically unacceptable. We emphasize, however, that a BAFO is simply that--"a best and final offer"--and an offeror is responsible for assuring that it submits just such an offer and should not expect any further discussions once it has made a submission. Mount Pleasant Hospital, B-222364, June 13, 1986, 86-1 CPD ¶ 549. It is USIA's position that the firm failed to provide sufficient information in the BAFO to establish the acceptability of these alternative approaches.

It is true, as Spacecom points out, that the elimination of a proposal from the competitive range, thereby leaving a competitive range of one, is improper where the record shows that the informational deficiencies in the excluded proposal were not so material that a major revision would have been required to make the proposal acceptable. Falcon Systems, Inc., B-213661, June 22, 1984, 84-1 CPD ¶ 658. However, we find no such impropriety here because it is clear from the BAFO itself that Spacecom's alternative approaches were lacking in specifics to the extent that the agency could not reasonably determine their acceptability (the alternative approaches constituted only one page of the firm's multi-volume BAFO), and we agree with USIA that a material restructuring of the proposal would have been necessary to meet the SIS requirements without high degrees of risk. It is well settled that an agency should not permit an offeror

to remedy major proposal defects where the only manner of cure is by means of such an extensive revision. Angstrom, Inc., 59 Comp. Gen. 588 (1980), 80-2 CPD ¶ 20; Midcoast Aviation, Inc., B-223103, June 23, 1986, 86-1 CPD ¶ 577.

Post-BAFO Discussions

USIA's subsequent post-BAFO discussions with COMSAT cannot be viewed as converting a competitive procurement into a sole-source acquisition. Although this Office will closely scrutinize any determination that results in a competitive range of one, Falcon Systems, Inc., B-213661, supra, our analysis here has revealed no violation of the applicable procurement regulations. There is nothing improper per se in an agency's making more than one competitive range determination, and the fact that a firm's proposal was initially included in the competitive range does not preclude the agency, upon sufficient justification, from later excluding it from further award consideration. Information Systems & Networks Corp., B-220661, Jan. 13, 1986, 86-1 CPD ¶ 30. As we have already concluded, there is no basis to question the reasonableness of the agency's determination that Spacecom's BAFO contained uncorrected deficient aspects that, in consequence, rendered it technically unacceptable. Since the firm's proposal no longer had a reasonable chance of being selected for award, (noting as well that Spacecom's proposed price was more than twice that of Comsat's) Spacecom, therefore, did not remain a competitive range offeror after the evaluation of BAFOs. Id.

The FAR, 48 C.F.R. § 15.611(c), provides that discussions should not be reopened after receipt of BAFOs unless it is clearly in the government's best interest to do so, and, if reopened, additional BAFOs shall be requested from "all offerors still within the competitive range."(Emphasis supplied.) USIA states that it conducted post-BAFO discussions with Comsat to obtain certain technical and price[3]/ revisions in the best interests of the government, and further states that the factors discussed would, in any event, have had no material effect upon Comsat's selection for award over Spacecom. Regardless of the nature and extent of these discussions, they were not legally objectionable in the circumstances because only Comsat remained within the competitive range. FAR, 48 C.F.R. § 15.611(c), supra.

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[3]/ The only downward revision in Comsat's price was a $750,000 reduction unilaterally proposed by the firm representing less than 2 percent of its offer. Moreover, we have held that negotiations after source selection with the successful offeror to obtain a small reduction in price are not improper. Environmental Enterprises, Inc., B-193090, Mar. 9, 1979, 79-1 CPD ¶ 168.

PRICE ANALYSIS

Spacecom asserts that the agency failed to conduct an analysis of the proposals for purposes of determining price realism.[4/] Here, we point out that the contemplated contract was a firm, fixed-price, rather than a cost-reimbursement type, and although contracting agencies must perform a cost realism analysis before awarding the latter, see Norfolk Ship Systems, Inc., B-219404, Sept. 19, 1985, 85-2 CPD ¶ 309, there is no similar requirement with regard to a firm, fixed-price contract. See Corporate Health Examiners, Inc., B-220399.2, June 16, 1986, 86-1 CPD ¶ 552. Nevertheless, it is within the agency's discretion in a solicitation for a firm, fixed-price contract to provide for a cost realism analysis for such purposes as measuring an offeror's understanding of the requirements of a solicitation. Id.; Los Angeles Community College District, B-207096.2, Aug. 8, 1983, 83-2 CPD ¶ 175.

Spacecom is correct in noting that the RFP provided at section M.3, as amended, that "[p]rice proposal, including supporting cost information, will be evaluated to determine realism of the proposal, probable cost to the government, and understanding of the government requirements," and section L.3.1 clearly required the submission of cost or pricing data. We cannot find from the record that the agency performed a full analysis of the proposals to determine price realism, although the agency, as also provided in section M.3, did evaluate the proposals with respect to total aggregate price for comparison purposes. However, since a price or cost analysis based on cost or pricing data generally is concerned with whether an offeror's prices are higher than warranted considering its costs, rather than whether they are too low, Corporate Health Examiners, Inc., B-220399.2, supra, a full analysis here likely would not have served to support Spacecom's underlying contention that Comsat cannot implement the SIS requirements at its offered price of $40.0 million.

An assertion that an offeror cannot perform at its offered price is a challenge to the agency's determination that the

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[4/] Strictly speaking, since Spacecom's proposal was found to be technically unacceptable, there was no requirement that the agency conduct any evaluation of its price proposal, as the firm was no longer being considered for award. Progressive Learning Systems, B-218483, July 23, 1985, 85-2 CPD ¶ 72.

offeror is a responsible contractor[5/], and this Office does not consider challenges to affirmative determinations of responsibility except in limited circumstances which are not present here. See Bobnreen Consultants, Inc., B-218214.4, Sept. 27, 1985, 85-2 CPD ¶ 558. The submission of a below-cost or a low-profit offer, if that, in fact, is what Comsat has done here, is not illegal and provides no basis for challenging the award of a firm, fixed-price contract to a responsible contractor, since it is the offeror's loss and not the government's if the cost of performance exceeds the contract price. Advanced Technology Systems, Inc., 64 Comp. Gen. 344 (1985), 85-1 CPD ¶ 315. We find no basis to question USIA's view that Spacecom's $84.5 million offered price was greatly overstated, rather than that Comsat's price was in any way understated for the work.

AUCTION, TECHNICAL LEVELING, AND TECHNICAL TRANSFUSION

We find Spacecom's allegations that the agency created an auction situation and engaged in impermissible technical leveling and/or technical transfusion to be devoid of merit. An auction situation arises when the agency, during the course of discussions, (i) indicates to an offeror a cost or price that must be met for further consideration; (ii) advises an offeror of its price standing relative to another offeror; or (iii) otherwise furnishes information about other offerors' prices. FAR, 48 C.F.R. § 15.610(d)(3). We find no evidence in the record that the agency was involved in such improper practices, and, more to the point, it is obvious that any knowledge by Comsat of Spacecom's price relative to its own would have been of no consequence where that price was more than $40 million higher. Such information, even if revealed, would hardly have given the firm any incentive to lower its price in order to enhance its competitive standing. The allegation of improper auctioning is fundamentally unreasonable in the circumstances.

We reach a similar result with respect to Spacecom's contention that the agency engaged in impermissible technical leveling and/or technical transfusion. "Technical leveling" involves helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussions, while "technical transfusion" is the government disclosure of technical information pertaining to a proposal

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5/ USIA's award to Comsat, by regulation, is a determination that the firm is responsible with respect to that contract. Federal Acquisition Regulation, 48 C.F.R. § 9.105-2(a)(1) (1985); Ameriko Maintenance Co., B-216247, Sept. 12, 1984, 84-2 CPD ¶ 287.

that results in the improvement of a competitive proposal. FAR, 48 C.F.R. §§ 15.610(d)(1) and (d)(2); see also Price Waterhouse, B-222562, supra.

Spacecom's assertion that Comsat's proposal was somehow technically "leveled" is not credible where Comsat's proposal always enjoyed a significant scoring advantage in terms of its relative technical merit from the beginning of the evaluation process. Technical leveling involves a reverse of that situation, that is, an inferior proposal is improved through repeated discussions whereby the agency improperly "coaches" the offeror as to inherent weaknesses in the proposal stemming from the offeror's own lack of diligence, competence, or inventiveness. See C&W Equipment Co., B-220459, Mar. 17, 1986, 86-1 CPD ¶ 258. Since Comsat's proposal was consistently judged to be superior, it could not have been technically "leveled" with Spacecom's in the sense of the term.

With regard to Spacecom's allegation that technical transfusion occurred, the firm, for example, points out that it had proposed the use of commercially available, off-the-shelf equipment, and that this approach only appeared for the first time in Comsat's BAFO. However, our review reasonably establishes that this change in Comsat's proposal, which affected only two limited areas (the firm, for the most part, had also proposed the use of commercially available, off-the-shelf equipment in its initial proposal) resulted from Comsat's particular decision not to continue to propose the development of technically innovative equipment in these two areas in the face of what it regarded as agency concern, rather than from anything improperly conveyed by the agency during discussions. C&W Equipment Co., B-220459, supra. On this point, as well as others raised by Spacecom, we find no support for the firm's allegation that technical transfusion occurred, especially given the fact that the firm's proposal was ultimately rejected as technically unacceptable.

Finally, we reject Spacecom's contention that the agency was biased in favor of Comsat's selection. Where a protester alleges that procurement officials acted intentionally to preclude the protester from receiving the contract award, the protester must submit virtually irrefutable proof that the officials had a specific and malicious intent to harm the protester, since procurement officials otherwise are presumed to act in good faith, and prejudicial motives will not be attributed to such officials on the basis of inference or

supposition. Rodgers-Cauthen Barton-Cureton, Inc., B-220722.2, Jan. 8, 1986, 86-1 CPD ¶ 19; Lear Siegler, Inc.--Reconsideration, B-217231.2, May 30, 1985, 85-1 CPD ¶ 613. Spacecom clearly has not met that burden here.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel